

FEDERAL TRADE COMMISSION DECISIONS

FINDING, OPINIONS, AND ORDERS

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Robert F. Swenson, Editor
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**MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JANUARY 1, 2010 TO JUNE 30, 2010**

JON LEIBOWITZ, *Chairman*

Took oath of office September 3, 2004.

PAMELA JONES HARBOUR, *Commissioner*

Took oath of office August 4, 2003.

WILLIAM E. KOVACIC, *Commissioner*

Took oath of office January 4, 2006.

J. THOMAS ROSCH, *Commissioner*

Took oath of office January 5, 2006.

EDITH RAMIREZ, *Commissioner*

Took oath of office April 5, 2010.

JULIE BRILL, *Commissioner*

Took oath of office April 6, 2010.

DONALD S. CLARK, *Secretary*

Appointed August 28, 1988.

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2010, TO JUNE 30, 2010

IN THE MATTER OF

PANASONIC CORPORATION
AND
SANYO ELECTRIC CO., LTD.

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

Docket No. C-4274; File No. 091 0050
Filed, November 23, 2009 — Decision, January 6, 2010

This consent order addresses the \$9 billion acquisition by Panasonic Corporation of the voting securities of Sanyo Electric Co., Ltd. As the only suppliers of high quality portable NiMH batteries, Panasonic and Sanyo control the vast majority of the market, and as each other's most significant competitors for portable NiMH batteries, they respond directly to competition from each other with lower prices, better services and improved products, to the benefit of consumers. By eliminating this direct and substantial competition, the proposed acquisition would allow Panasonic to exercise market power unilaterally, thereby increasing the likelihood that purchasers of portable NiMH batteries would be forced to pay higher prices and restraining the direct competition that promoted innovation and high quality service. The Commission's complaint alleges that the acquisition would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by lessening competition in the market for portable NiMH batteries. The consent order eliminates the competitive concerns raised by Panasonic's proposed acquisition of Sanyo by requiring the divestiture of Sanyo's assets relating to the manufacture and sale of portable NiMH batteries to FDK Corporation ("FDK"), a subsidiary of Fujitsu, Ltd. Pursuant to the order, FDK would receive all the assets necessary to operate Sanyo's current portable NiMH battery business, including the NiMH battery manufacturing facility in Takasaki, Japan.

Complaint

Participants

For the *Commission*: *David Garcia, Brendan J. McNamara, and Mark Seidman.*

For the *Respondents*: *Michael Naughton, Arman Oruc, and Jennifer Rie, Simpson Thacher & Bartlett; and Adam Hemlock, Ann Malester, and Debra Pearlstein, Weil, Gotshal & Manges LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Panasonic Corporation (“Panasonic”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Sanyo Electric Co., Ltd. (“Sanyo”) (collectively “Respondents”), 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 the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Panasonic Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of Japan, with its head office located at 1006, Oaza Kadoma, Kadoma-shi, Osaka 571-8501, Japan. Panasonic Corporation of North America is a wholly-owned subsidiary of Panasonic Corporation with offices at 1 Panasonic Way, Secaucus, NJ 07094.

2. Respondent Sanyo Electric Co., Ltd. is a corporation organized, existing and doing business under and by virtue of the

Complaint

laws of Japan, with its head office at 5-5 Keihan-Hondori 2-Chome, Moriguchi City, Osaka 570-8677, Japan. Sanyo North America Corporation is a wholly-owned subsidiary of Sanyo Electric Co., Ltd., with its principal place of business at 2055 Sanyo Ave., San Diego, CA 92145.

3. Respondents are engaged in, among other things, the production and sale of rechargeable batteries, including, but not limited to, portable nickel metal hydride batteries.

4. 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.

II. THE PROPOSED ACQUISITION

5. Pursuant to a Capital and Business Alliance Agreement (the “Agreement”) concluded on December 19, 2008, Panasonic announced its intention to commence a cash tender offer to acquire 100 percent of the voting securities of Sanyo for an aggregate purchase price of approximately \$9 billion (the “Acquisition”).

III. THE RELEVANT MARKET

6. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the acquisition is portable nickel metal hydride batteries (“portable NiMH”).

7. For the purposes of this Complaint, the relevant geographic area in which to analyze the effects of the acquisition on the portable NiMH battery market is worldwide.

Complaint

IV. THE STRUCTURE OF THE MARKET

8. The worldwide market for portable NiMH batteries is highly concentrated as measured by the Herfindahl-Hirschman Index (“HHI”) with significant differentiation among suppliers based on quality and reputation. The combination of Respondents’ portable NiMH battery businesses would consolidate the only two portable NiMH battery suppliers that produce high-quality, reliable products. Post acquisition, a combined Panasonic and Sanyo will have a market share in excess of 65 percent. The post-merger HHI would be 4,675 and the acquisition will increase the HHI level by 2,028. This market concentration level far exceed the thresholds set out in the *Horizontal Merger Guidelines* and thus creates a presumption that the proposed acquisition will create or enhance market power.

V. ENTRY CONDITIONS

9. Neither new entry nor repositioning and fringe expansion sufficient to deter or counteract the anticompetitive effects of the proposed acquisition in the portable NiMH market is likely to occur within two years. The market for portable NiMH batteries offers very limited prospects for growth, making it unlikely that a potential competitor would have the incentive to make the substantial investments necessary to enter the market *de novo*. Existing fringe competitors would have to significantly improve their portable NiMH production facilities, improve the quality of their portable NiMH batteries, and overcome customers’ unwillingness to rely on a portable NiMH battery supplier that lacks the track record for producing reliable, high-quality products. The limited growth prospects for the portable NiMH battery market make it unlikely that the fringe competitors would undertake the significant investments necessary to reposition and expand.

Complaint

VI. EFFECTS OF THE ACQUISITION

10. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the portable NiMH battery 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:

Decision and Order

- a. By eliminating actual, direct, and substantial competition between Respondents in the worldwide portable NiMH battery market;
- b. By increasing the likelihood that Respondents would unilaterally exercise market power in the worldwide portable NiMH battery market; and
- c. By increasing the likelihood that U.S. consumers would be forced to pay higher prices for portable NiMH batteries.

VII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-third day of November, 2009, issues its Complaint against said Respondents.

By the Commission.

Decision and Order

DECISION AND ORDER
[Public Record Version]

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

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

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

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following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Panasonic Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its head office located at 1006, Oaza Kadoma, Kadoma-shi, Osaka 571-8501, Japan. Panasonic Corporation of North America is a wholly-owned subsidiary of Panasonic Corporation with offices at 1 Panasonic Way, Secaucus, NJ 07094.
2. Respondent Sanyo Electric Co., Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its head office at 5-5, Keihan-Hondori 2-Chome, Moriguchi City, Osaka 570-8677, Japan. Sanyo North America Corporation is a wholly-owned subsidiary of Sanyo Electric Co., Ltd., with its principal place of business at 2055 Sanyo Ave., San Diego, CA 92145.
3. The Commission has jurisdiction over 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 the Order, the following definitions shall apply:

- A. “Panasonic” means Panasonic Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Panasonic, and the respective directors, officers, employees, agents, representatives,

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successors, and assigns of each. After the Acquisition, Panasonic shall include Sanyo.

- B. “Sanyo” means Sanyo Electric Co., Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Sanyo, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “FDK” means FDK Corporation, a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its head office located at Hamagomu Bldg., 5-36-11 Shimbashi, Minato-ku, Tokyo 105-8677. FDK America, Inc., is a wholly owned subsidiary of FDK Corporation, with its principle offices at 250 E. Caribbean Drive, MS200, Sunnyvale, CA 94089.
- D. “Respondents” mean Panasonic and Sanyo, individually and collectively.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer” means FDK or any other Person approved by the Commission to acquire the Portable NiMH Battery Business Assets and the Portable NiMH Battery Business License(s) pursuant to this Order.
- G. “Acquisition” means the proposed cash tender offer by Respondent Panasonic to acquire Respondent Sanyo pursuant to the Capital and Business Alliance Agreement, dated December 19, 2008, and all amendments, attachments and exhibits thereto.

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- H. “Acquisition Date” means the date the Acquisition is consummated.
- I. “Confidential Business Information” means all information not in the public domain related to the Portable NiMH Battery Business, the Portable NiMH Battery Business Assets, or the Portable NiMH Battery Business License(s) including without limitation, Portable NiMH Battery Business Intellectual Property, Portable NiMH Battery Business Know-How, and Portable NiMH Battery Business Records.
- J. “Divestiture Agreement(s)” means the FDK Acquisition Agreements, the Sintered Cathode Supply Agreement (if any), the Transition Services Agreement, or any other agreement(s) that effectuate the divestiture of the Portable NiMH Battery Business Assets and the conveyance of the Portable NiMH Battery Business License(s).
- K. “Divestiture Date” means the last closing date of a Divestiture Agreement, including without limitation, any FDK Acquisition Agreement.
- L. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service.
- M. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- N. “FDK Acquisition Agreements” means the following agreements, including all amendments, exhibits, attachments, agreements, and schedules thereto:

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1. Master Agreement between SANYO Electric Co, Ltd. (the “Seller”) and FDK Corporation (the “Buyer”) relating to Buyer's purchase of the stock of SANYO Energy Twicell Co., Ltd. held by the Seller;
 2. Stock Purchase Agreement between SANYO Electric Co., Ltd. (the “Seller”) and FDK Corporation (the “Buyer”), related to the Buyer's purchase of the stock of SANYO Energy Twicell Co., Ltd. (“Sanyo-FDK Stock Purchase Agreement”);
 3. Agreement for the Assignment of Trademark Rights between SANYO Electric, Co., Ltd. (the “Assignor”) and FDK Corporation (the “Assignee”) related to the assignment of Trademark Rights by the Assignor; and
 4. Master Transaction Agreement between FDK Corporation (the “Company”) and SANYO Electric Co., Ltd. (the “Supplier”) dated Oct. 1, 2001, attached hereto as Confidential Appendix A.
- O. “Intellectual Property” means any type of intellectual property, including without limitation, patents, copyrights, trademarks, trade dress, trade secrets, techniques, data, inventions, practices, methods and other confidential or proprietary technical, business, research, or development information.
- P. “Interim Monitor” means any monitor appointed pursuant to this Order or the related Order to Maintain Assets.
- Q. “Interim Purchase Agreement” means the Master Purchase Agreement (NiMH Batteries) attached to the

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Sanyo-FDK Stock Purchase Agreement as Exhibit 9.7, or any other agreement that receives prior approval of the Commission through which Sanyo purchases from the Acquirer Sanyo-Branded Retail Batteries for a period determined by the Acquirer, but in no event longer than two (2) years.

- R. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- S. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Consent Agreement.
- T. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or government entity, and any subsidiaries, divisions, groups or affiliates thereof.
- U. “Portable NiMH Battery Business” means the research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage and transport of Portable NiMH Battery Products by Respondent Sanyo before the Acquisition Date, including any contracts, agreements or other arrangements by Sanyo with any Person to provide any such research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport.

provided, however, that Portable NiMH Battery Business shall not include the distribution, marketing, promotion and retail sale of Sanyo-Branded Retail Batteries.

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V. “Portable NiMH Battery Business Assets” means the following assets related to the Portable NiMH Battery Business:

1. SANYO Twicell (Takasaki);
2. All real and personal property comprising Respondent Sanyo's business office and factory located at 307-2 Koyagi-machi, Takasaki-shi, Gunma, Japan, and 952 Koyagi-machi, Takasaki-shi, Gunma, Japan, including without limitation, real estate; buildings; warehouses; storage tanks; structures; manufacturing equipment; other equipment; machinery; tools; spare parts; personal property; furniture; fixtures; supplies and other tangible property, owned, leased, or operated on or behalf of Respondent Sanyo;
3. Suzhou Sub-C and D NiMH Battery Production;
4. all Portable NiMH Battery Business Intellectual Property used predominantly in the Portable NiMH Battery Business, including, without limitation, all rights to obtain and file for patents, trademarks, copyrights and registrations of such Intellectual Property and to bring suit against a Third Party for the past, present or future infringement, misappropriation, dilution, misuse or other violations of such Intellectual Property; and
5. all Portable NiMH Battery Business Records used exclusively in the Portable NiMH Battery Business;

provided, however, that the Portable NiMH Battery Business Assets need not include assets needed by

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Respondents to fulfill their obligations under the Suzhou Sub-C and D NiMH Battery Agreement or the Sintered Cathode Supply Agreement.

- W. “Portable NiMH Battery Business Employee(s)” means any employee of Respondent Sanyo whose duties, in whole or part, relate to the Portable NiMH Battery Business.
- X. “Portable NiMH Battery Business Key Employees” means employees of Respondent Sanyo identified on Confidential Appendix B.
- Y. “Portable NiMH Battery Business Know-How” means all knowledge, information and know-how in the possession of Respondent Sanyo or within the knowledge of any employee or consultant of Respondent Sanyo on or before the Acquisition Date that relates to the Portable NiMH Battery Business.
- Z. “Portable NiMH Battery Business Intellectual Property” means all Intellectual Property related to the Portable NiMH Battery Business, *provided, however*, Portable NiMH Battery Business Intellectual Property need not include i) the corporate names or corporate trade dress of “Sanyo”, or “Eneloop,” or ii) Intellectual Property licensed from a Third Party to the extent the Acquirer has licensed such Intellectual Property directly from its owner.
- AA. “Portable NiMH Battery Business License(s)” means a fully paid-up, perpetual, non-revocable and royalty-free license(s) to all documents, intellectual property and know-how related to the Portable NiMH Battery Business to the extent not included in the Portable NiMH Battery Business Assets, including, without limitation,

Decision and Order

1. Portable NiMH Battery Business Intellectual Property;
 2. Portable NiMH Battery Business Records; and
 3. Portable NiMH Battery Business Know-How.
- BB. “Portable NiMH Battery Business Records” means all documents and records, including all electronic records and files wherever stored, that are related to or used in the Portable NiMH Battery Business, including without limitation,
1. all documents and information related to employees, contractors, and others employed or contracted by Respondent Sanyo whose duties relate, in whole or part, to the Portable NiMH Battery Business;
 2. all customer contracts and other documents, contracts, agreements and information relating to any Person to whom Respondent Sanyo, on or after January 1, 2008, has supplied or made efforts to supply Portable NiMH Battery Products;
 3. all supply agreements and other documents, contracts, agreements and information relating to any Person who, on or after January 1, 2008, has supplied Respondent Sanyo with any raw materials, products, services or other items used by Respondent Sanyo in the Portable NiMH Battery Business;
 4. all documents relating to the manufacturing and production of Portable NiMH Battery Products;

Decision and Order

5. all documents related to the research, development and design of Portable NiMH Battery Products; and
 6. all documents relating to the sales, marketing, distribution and promotion of any Portable NiMH Battery Products.
- CC. “Portable NiMH Battery Products” means rechargeable nickel metal hydride batteries for non-automotive use.
- DD. “Sanyo-Branded Retail Batteries” means Portable NiMH Business Battery Products for retail sale that are produced using Portable NiMH Battery Intellectual Property and sold under the brand names “Sanyo” or “eneloop.”
- EE. “SANYO Twicell (Takasaki)” means SANYO Energy Twicell Co., Ltd. as constituted after execution of the Takasaki Formation Agreements.
- FF. “Suzhou Sub-C and D NiMH Battery Production” means the supply of Portable NiMH Battery Products in size Sub-C and size D produced or capable of being produced (utilizing 100% of current production capacity) at Respondent Sanyo's production facility in Suzhou, China. Included in “Suzhou Sub-C and D NiMH Battery Production” is the right to determine, upon reasonable notice, up to current capacity limits, the volume and specifications for the production of Portable NiMH Battery Products in size Sub-C and size D at the Suzhou facility, and to acquire, pursuant to the terms of a Suzhou Sub-C and D NiMH Battery Agreement, all such products produced at the facility.
- GG. “Suzhou Sub-C and D NiMH Battery Agreement”

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means the Sub-C and D Supply Agreement attached to the Sanyo-FDK Stock Purchase Agreement as Exhibit 9.5, or any other Agreement that receives the prior approval of the Commission and through which the Acquirer obtains the Suzhou Sub-C and D NiMH Battery Production.

- HH. “Sintered Cathode Supply Agreement” means the Memorandum between SANYO Energy Twicell Co., Ltd (the “Buyer”) and SANYO Electric Co., Ltd (the “Seller”) under the Master Purchase Agreement dated October 1, 2001, related to the Buyer's purchase of sintered cathode plates for industrial NiMH batteries from the Seller; or any other Agreement that receives the prior approval of the Commission and through which Respondents supply the Acquirer with sintered cathodes needed by the Acquirer for use in Portable NiMH Battery Products.
- II. “Takasaki Formation Agreements” means the Absorption-Type Split between SANYO Electric Co., Ltd. and SANYO Energy Twicell Co., Ltd., attached hereto as Appendix C, and the Plan for Incorporation-Type Split for transferring to SANYO Energy Kaizuka Co., Ltd. some of the rights and duties of SANYO Energy Twicell Co., Ltd. relating to the business of developing and manufacturing lithium-ion batteries, attached hereto as Appendix D.
- JJ. “Third Party(ies)” means any Person other than the Respondents or the Acquirer.
- KK. “Transition Services Agreement” means the Transitional Services Agreement attached to the Sanyo-FDK Stock Purchase Agreement at Exhibit 10.5, or any other agreement approved by the Commission between Respondents and an Acquirer

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through which Respondents provide assistance and advice to enable the Acquirer to operate the Portable NiMH Battery Business in a manner at least consistent with the past practice and expertise of Respondent Sanyo as of the Acquisition Date.

II.

IT IS FURTHER ORDERED that:

- A. Not later than fifteen (15) days after the Acquisition Date, Respondents shall
1. execute the Takasaki Formation Agreements pursuant to and in accordance with the laws of Japan; and
 2. divest the Portable NiMH Battery Business Assets and grant the Portable NiMH Battery Business License(s), absolutely and in good faith, to FDK in accordance with the FDK Acquisition Agreements,

provided that this period may be extended by up to thirty (30) days if necessary to permit Respondents to obtain prior approval of the FDK Acquisition Agreements from the European Commission, so long as Respondents divest the Portable NiMH Battery Business Assets and grant the Portable NiMH Battery Business License(s) as required by this Order within five (5) days of obtaining such approval.

provided further that, if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that FDK is not an acceptable acquirer of the Portable NiMH Battery Business Assets and/or the Portable NiMH Battery Business License(s), or the manner in which either was divested or granted was not acceptable, Respondents shall immediately

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notify FDK and shall as soon as practicable rescind the FDK Acquisition Agreements, and within six (6) months from the date this Order becomes final, absolutely and in good faith, at no minimum price, divest the Portable NiMH Battery Business Assets and grant the Portable NiMH Battery Business License(s) to an Acquirer and in a manner that receives the prior approval of the Commission.

- B. Each Divestiture Agreement, including without limitation, each FDK Acquisition Agreement, shall be incorporated by reference into this Order and made a part hereof. Further, nothing in any such Divestiture Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of the Acquirer or to reduce any obligations of Respondents under such Agreements. Respondents shall comply with the terms of any Divestiture Agreement; a breach by Respondents of any term of a Divestiture Agreement shall constitute a violation of this Order. To the extent that any term of a Divestiture Agreement conflicts with a term of this Order such that Respondents cannot fully comply with both, Respondents shall comply with the term of this Order. It shall be a violation of this Order to, without the prior approval of the Commission, i) make any modification to a Divestiture Agreement prior to the Divestiture Date or ii) fail to meet any material condition precedent to closing (whether waived or not). Further, notwithstanding any paragraph, section, or other provision of a Divestiture Agreement, for a period of five (5) years after the Divestiture Date, it shall be a violation of this Order to make any material modification of a Divestiture Agreement, without the approval of the Commission.

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- C. Prior to divesting the Portable NiMH Battery Business Assets and granting the Portable NiMH Battery Business License(s), Respondents shall,
1. secure all consents and waivers from all Third Parties that are necessary to permit Respondents to fully divest the Portable NiMH Battery Business Assets and grant the Portable NiMH Battery Business License(s) and to permit the Acquirer to continue to operate the Portable NiMH Battery Business in a manner consistent with the past practice of Respondent Sanyo, *provided, however*, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties; and
 2. secure the consent of all Persons whose consent is necessary for the execution, under Japanese law, of the Takasaki Formation Agreements.
- D. Within fifteen (15) days of the Divestiture Date, Respondents shall transfer to the Acquirer a duplicate original or copy of all Portable NiMH Battery Business Records licensed to the Acquirer pursuant to this Order or the Divestiture Agreement. Such copies shall be produced to the location(s) specified by the Acquirer and in the style and format of the original document unless otherwise specified by the Acquirer.
- E. Until the Divestiture Date, Respondents shall provide all Portable NiMH Battery Business Employees with reasonable financial incentives to continue in their positions and continue the research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage and transport of the Portable NiMH Battery Products consistent with past practices

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and/or as may be necessary to preserve the marketability, viability and competitiveness of such products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent Sanyo until the Acquisition Date, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by Law), and additional incentives as may be necessary to prevent any diminution of the competitiveness of the Portable NiMH Battery Business.

- F. Until Respondents fully and finally deliver to the Acquirer all of the Portable NiMH Battery Business Assets, all Portable NiMH Battery Business Records licensed to the Acquirer, and all other tangible assets to be transferred to Acquirer pursuant to the Divestiture Agreement(s), Respondents shall maintain the full economic viability, marketability and competitiveness of all portions of such assets and records in their possession or control; shall prevent the destruction, removal, wasting, deterioration, or impairment of such assets and records; and shall maintain such assets and records in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance).
- G. On or before the Divestiture Date, Respondents shall enter into a Suzhou Sub-C and D NiMH Battery Agreement, and, at the Acquirer's option, a Sintered Cathode Supply Agreement.
- H. For a period lasting one (1) year after Respondents have fully and finally transferred and delivered to the Acquirer all of the Portable NiMH Battery Business Assets and all the Portable NiMH Battery Business Records licensed to the Acquirer, Respondents shall,

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pursuant to the Transition Services Agreement, provide in a timely manner, at no greater than Direct Cost, assistance and advice to enable the Acquirer to operate the Portable NiMH Battery Business in a manner at least consistent with the past practice and expertise of Respondent Sanyo, *provided that*, the Interim Monitor may authorize up to two (2) extensions of the one (1) year time period, if the Interim Monitor, in consultation with the staff of the Commission, finds that such extension is reasonably necessary and consistent with the terms of this Decision and Order and the Order to Maintain Assets.

- I. At the Acquirer's option, Respondents shall, on or before the Divestiture Date, enter into an Interim Purchase Agreement through which Respondents shall purchase Sanyo-Branded Retail Batteries for a period not longer than two (2) years in duration.
- J. Respondents shall provide financial incentives to Portable NiMH Battery Business Key Employees as needed to facilitate the employment of such employees by the Acquirer, provided that such incentives need not exceed twenty (20) percent of each such Employee's annual salary.
- K. For a period lasting until one (1) year from the Acquisition Date, Respondents shall:
 1. within 10 days of a request by the Acquirer, provide the following information to the Acquirer (to the extent permitted by applicable law) regarding each Portable NiMH Battery Business Employee not employed by SANYO Twicell (Takasaki) on the Divestiture Date:
 - a) the date of hire and effective service date;

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- b) job title or position held;
 - c) a specific description of the employee's responsibilities related to the Portable NiMH Battery Products; however, in lieu of this description, Respondents may provide the employee's most recent performance appraisal;
 - d) the base salary or current wages;
 - e) the most recent bonus paid, aggregate annual compensation for Respondent Sanyo's last fiscal year and current target or guaranteed bonus, if any;
 - f) employment status (i.e., active or on leave or disability; full-time or part-time);
 - g) any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees;
 - h) copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees;
2. not interfere with the hiring or employing by the Acquirer of any Portable NiMH Battery Business Employee and remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Acquirer, including without limitation, any non-compete or non-disclosure provisions of any employment agreements with respect to Portable NiMH Battery Products or other contracts with Respondents that would affect the ability or

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incentive of those individuals to be employed by the Acquirer. In addition, Respondents shall not make any counteroffer to a Portable NiMH Battery Business Employee who has received a written offer of employment from the Acquirer; and

- L. For a period lasting until two (2) years from the Divestiture Date, Respondents shall not hire any Portable NiMH Battery Business Employee of the Acquirer or solicit or otherwise attempt to induce such employee to terminate his or her employment relationship with the Acquirer,

provided, however, Respondents may i) hire any Portable NiMH Battery Business Employee whose employment has been terminated by the Acquirer or who independently applies for employment with Respondents, as long as such employee was not solicited in violation of the non-solicitation requirements contained herein; ii) advertise for employees in newspapers, trade publications or other media not targeted specifically at Portable NiMH Battery Business Employees; or iii) hire a Portable NiMH Battery Business Employee who contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from Respondents.

- M. Respondents shall not use any Confidential Business Information that is related to the Portable NiMH Battery Business to research, develop, manufacture, market, or sell Portable NiMH Battery Products, except that the Respondents may retain (or be licensed) rights to use Confidential Business Information i) to fulfill the requirements of any Suzhou Sub-C and D NiMH Battery Agreement, ii) to manufacture or have manufactured sintered cathodes,

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or iii) to manufacture or have manufactured Sanyo-Branded Retail Batteries,

provided that nothing in this paragraph shall affect the rights of Respondents to use any Confidential Business Information, including without limitation, any Portable NiMH Battery Business Intellectual Property, lawfully in the possession of Respondent Panasonic prior to the Acquisition Date.

- N. Respondents shall not disclose or convey any Confidential Business Information that is exclusively related to the Portable NiMH Battery Business, directly or indirectly, to any Person or Persons except as follows:
1. Respondents may disclose Confidential Business Information to the Acquirer or Persons specifically authorized by the Acquirer to receive such information; and
 2. Respondents may disclose Confidential Business Information as necessary to manufacture or have manufactured sintered cathodes, fulfill the terms of the Suzhou Sub-C and D NiMH Battery Agreement or produce or have produced Sanyo-Branded Retail Batteries pursuant to rights retained or licensed under any Divestiture Agreement so long as in doing so, Respondents do not disclose or convey any Confidential Information to any Person involved in the research, development, manufacture, sale, marketing or distribution of any of Respondents' Portable NiMH Battery Products (other than Sanyo-Branded Retail Batteries and products produced pursuant to the Suzhou Sub-C and D NiMH Battery Production

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Agreement and the Sintered Cathode Supply Agreement).

provided however, that the restrictions contained in this paragraph shall not apply to information that i) subsequently falls within the public domain by means other than a violation of this Order or Respondents' breach of a confidentiality or non-disclosure agreement; ii) is required by Law to be publicly disclosed; or iii) is lawfully possessed by Respondent Panasonic as of the Acquisition Date.

- O. Respondents shall prevent the disclosure or use of Confidential Business Information except as permitted or authorized by this Order or the Order to Maintain Assets and shall,
1. require that each Portable NiMH Battery Business Employee retained by Respondents after the Divestiture Date, his or her direct supervisor, and any other employee designated by the Interim Monitor (if one has been appointed) sign a confidentiality agreement that requires such employee to maintain Confidential Business Information as strictly confidential and not use such information or disclose it to any other Person except as authorized by Respondents in accordance with this Order; and
 2. provide, within thirty (30) days of the Divestiture Date, written notice of the restrictions on the disclosure and use of Confidential Business Information contained in this Order to all employees not required to sign a confidentiality agreement who were involved in the Portable NiMH Battery Business at any time during the twelve (12) months prior to the Divestiture Date, or

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who otherwise may possess Confidential Business Information. Respondents shall provide such written notice by electronic mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Divestiture Date.

- P. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer or a licensee of such for the research, development, manufacture, distribution, finishing, packaging, marketing, sale, storage and transport of any Portable NiMH Battery Product that was manufactured by Respondent Sanyo on or prior to the Acquisition Date under any Intellectual Property (i) owned or licensed by Respondents as of the day after the Acquisition Date, or (ii) owned or licensed by Respondents that claims any aspect of the Portable NiMH Battery Business divested or licensed to the Acquirer.
- Q. Respondents shall not enforce any agreement against a Third Party or the Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Acquirer to acquire or use the Portable NiMH Battery Business Assets and shall, not later than ten (10) days after the Divestiture Date, grant a release to each Third Party that is subject to such agreement. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to the Acquirer for the relevant assets.
- R. Upon reasonable written notice and request from the Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist the Acquirer to prosecute, defend against, respond to, or otherwise participate in

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any litigation related to the Portable NiMH Battery Business Intellectual Property, if such litigation would have the potential to interfere with the Acquirer's freedom to research, develop, or manufacture Portable NiMH Battery Products; to use, supply, distribute, market, sell such products in the United States, or to export such products from or import them into the United States.

- S. For any patent infringement action either i) alleging that, prior to the Divestiture Date, Respondent Sanyo has infringed, or is infringing, a Patent of a Third Party, or ii) in which Respondent Sanyo has prepared or is preparing as of the Divestiture Date to defend against infringement claim(s); and that would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, development, or manufacture of a particular Portable NiMH Battery Product; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of the relevant Portable NiMH Battery Products, Respondents shall:
1. cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondents in connection with obtaining resolution of any pending patent litigation involving such Portable NiMH Battery Product;
 2. waive conflicts of interest, if any, to allow either Respondent's outside legal counsel to represent the Acquirer in any ongoing patent litigation involving such Portable NiMH Battery Product; and
 3. permit the transfer to the Acquirer of all of the litigation files and any related attorney work-product in the possession of Respondents'

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outside counsel relating to such Portable NiMH Battery Product.

- T. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Divestiture Agreement, or in any agreement related to any Portable NiMH Battery Products, a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.
- U. Respondents shall not, without the prior approval of the Commission, sell or grant to the Acquirer any rights or assets related to Portable NiMH Battery Products in sizes sub-C and D (other than those contained in the Suzhou Sub-C and D NiMH Battery Agreement).
- V. The English-language versions of the Divestiture Agreements, the Suzhou Sub-C and D NiMH Battery Agreement, the Sintered Cathode Supply Agreement (if applicable), the Interim Purchase Agreement and the Transition Services Agreement, as submitted to and approved by the Commission, shall be the versions of such agreements used in interpreting and enforcing this Order.
- W. The purpose of the divestiture of the Portable NiMH Battery Business Assets is:
 - 1. to ensure the continued use of the Portable NiMH Battery Business Assets in the research, development, manufacture, use, import, export, distribution, and sale of Portable NiMH Battery Products;

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2. to provide for the future use of the Portable NiMH Battery Business Assets for the research, development, manufacture, use, import, export, distribution, and sale of Portable NiMH Battery Products;
3. to create a viable and effective competitor, who is independent of the Respondents in the research, development, manufacture, use, import, export, distribution, or sale of Portable NiMH Battery Products; and
4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

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

- A. The Commission may appoint a Monitor (“Interim Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order and/or the Order to Maintain Assets.
- B. The Commission appoints ING Financial Markets LLC (“ING”), as Interim Monitor and approves the agreement between ING and Respondents, attached hereto as Confidential Appendix E, which agreement, inter alia, names Philip Comerford, Jr. as ING designated Project Manager.
- C. Respondents shall facilitate the ability of the Interim Monitor to comply with the duties and obligations set forth in this Order, and shall take no action that

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interferes with or hinders the Interim Monitor's authority, rights or responsibilities as set forth in this Order or any agreement between the Interim Monitor and Respondents.

- D. The Interim Monitor's duties and responsibilities shall include the following:
1. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 2. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out his or her duties and responsibilities in a manner consistent with the purposes of the Order and in consultation with the Commission;
 3. the Interim Monitor shall, in his or her sole discretion, consult with Third Parties in the exercise of his or her duties under this Order or any agreement between the Interim Monitor and Respondents; and
 4. the Interim Monitor shall evaluate the reports submitted by Respondents pursuant to this Order, and within thirty (30) days from the date the Interim Monitor receives these reports, report in writing to the Commission concerning performance by Respondents of their obligations under the Order.
- E. Respondents shall grant and transfer to the Interim Monitor, and such Monitor shall have, all rights, powers, and authority necessary to carry out the

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Monitor's duties and responsibilities, including but not limited to the following:

1. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order and the Order to Maintain Assets;
2. subject to any demonstrated legally recognized privilege, Respondents shall provide the Interim Monitor full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Order, including, but not limited to, its obligations related to the relevant assets;
3. the Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions to which the Monitor and Respondents agree and that the Commission approves;
4. the Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities;
5. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses

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

6. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; provided, however, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission or require the Interim Monitor to report to Respondents the substance of communications to or from the Commission or the Acquirer.
- F. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- G. The Interim Monitor shall serve until the later of i) one (1) year after Respondents have fully and finally transferred and delivered to the Acquirer all of the Portable NiMH Battery Business Assets and all the Portable NiMH Battery Business Records licensed to the Acquirer; or ii) the termination of all Respondents' obligations under the Transition Services Agreement,

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provided, however, that the Interim Monitor's service shall not exceed five (5) years from the date the Order becomes final;

provided, further, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of this Decision and Order and the Order to Maintain Assets.

- H. If the Commission determines that an Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided for in this Paragraph.
- I. The Commission may on its own initiative, or at the request of an Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- J. An Interim Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

IV.

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by such Agreements and this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey the assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise

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conveyed pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph. In the event that the Commission or the Attorney General brings an action pursuant to §5(l) of the Federal Trade Commission Act, 15 U.S.C. §45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other available relief, including a court appointed Divestiture Trustee, pursuant to §5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Panasonic, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent Panasonic 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 Panasonic of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all

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rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed;
 2. the Divestiture Trustee shall have one (1) year 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 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; provided, however, the Commission may extend the divestiture period only two (2) times;
 3. subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents

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shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court appointed Divestiture Trustee, by the court;

4. the Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondents from among those approved by the Commission; and, provided further, however, that Respondents 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 Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of

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

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee;
7. the Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; provided, however, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person

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appointed as Interim Monitor pursuant to the relevant provisions of this Order and/or the Order to Maintain Assets;

8. the Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

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

- A. Respondents shall assure that in any instance wherein their counsel (including in-house counsel under appropriate confidentiality arrangements) either retains

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Confidential Business Information provided to the Acquirer or accesses original documents containing Confidential Business Information (under circumstances where copies of documents are insufficient or otherwise unavailable), that Respondents' counsel does so only in order to do the following:

1. comply with this Order, a Divestiture Agreement, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or
2. defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the Portable NiMH Battery Products or assets and businesses associated with those products;

provided, that Confidential Business Information may be disclosed to Third Parties as necessary for the purposes authorized by this Paragraph V pursuant to an appropriate confidentiality order, agreement or arrangement with the Acquirer (but Respondents shall not be deemed to have violated this requirement if the Acquirer withholds such agreement unreasonably); and (2) Respondents shall use their best efforts to obtain a protective order to protect the confidentiality of such Confidential Business Information during any adjudication;

provided, further, that nothing in the Paragraph V shall permit Respondents to use or disclose any Confidential Business Information for any

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purposes not authorized by this Order (including this Paragraph V).

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

- A. Within five (5) days after the Acquisition Date, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. 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:
 - 1. Within thirty (30) days after the date this Order becomes final,
 - 2. Every sixty (60) days thereafter until Respondents have fully transferred the Portable NiMH Battery Business Assets and Portable NiMH Battery Business License(s) to an Acquirer; and
 - 3. Every six (6) months thereafter so long as Respondents have a continuing obligation under this Order and/or the Divestiture Agreements to render transitional services to the Acquirer.
- C. One (1) year after the date this Order becomes final, annually for the next nine years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

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VII.

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

- A. any proposed dissolution of Respondents; or
- B. any proposed acquisition, merger or consolidation of Respondents; or
- C. any other change in Respondents, including without limitation, assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VIII.

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

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

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

IX.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the date on which the Order becomes final.

By the Commission.

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CONFIDENTIAL APPENDIX A

FDK ACQUISITION AGREEMENTS

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

CONFIDENTIAL APPENDIX B

KEY EMPLOYEES

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

CONFIDENTIAL APPENDIX C

AGREEMENT FOR ABSORPTION-TYPE SPLIT

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

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CONFIDENTIAL APPENDIX D

PLAN FOR INCORPORATION-TYPE SPLIT

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

CONFIDENTIAL APPENDIX E

INTERIM MONITOR AGREEMENT

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

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS
[Public Record Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Panasonic Corporation (“Panasonic”) of Respondent Sanyo Electric Co., Ltd. (“Sanyo”), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Panasonic Corporation is a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its head office located at 1006, Oaza Kadoma, Kadoma-shi, Osaka 571-8501,

Order to Maintain Assets

Japan. Panasonic Corporation of North America is a wholly-owned subsidiary with offices at 1 Panasonic Way, Secaucus, NJ 07094.

2. Respondent Sanyo Electric Co., Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of Japan, with its head office at 5-5, Keihan-Hondori 2-Chome, Moriguchi City, Osaka 570-8677, Japan. Sanyo North America Corporation is a wholly-owned subsidiary of Sanyo Electric Company, Ltd., with its principal place of business at 2055 Sanyo Ave., San Diego, CA 92145.
3. The 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 to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Panasonic” means Panasonic Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Panasonic, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition, Panasonic shall include Sanyo.

Order to Maintain Assets

- B. “Sanyo” means Sanyo Electric Co., Ltd., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Sanyo, and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- C. “Respondent(s)” means Panasonic and Sanyo, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Decision and Order” means:
1. the proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
 2. the Final Decision and Order issued by the Commission in this matter.
- F. “Divestiture Assets” means the Portable NiMH Battery Business Assets and Portable NiMH Battery Business License as defined in the Decision and Order.
- G. “Divestiture Business” means the Portable NiMH Battery Business as defined in the Decision and Order.
- H. “Divestiture Business Employees” means the Portable NiMH Battery Business Employees as defined in the Decision and Order.
- I. “Divestiture Business Key Employees” means the Portable NiMH Battery Business Key Employees as defined in the Decision and Order.

Order to Maintain Assets

- J. “Divestiture Products” means Portable NiMH Battery Products produced by Respondent Sanyo prior to the Acquisition Date.
- K. “Interim Monitor” means any monitor appointed pursuant to this Order to Maintain Assets or the Decision and Order.
- L. “Orders” means the Decision and Order and this Order to Maintain Assets.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

- A. Until the Divestiture Date, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Divestiture Business, and minimize any risk of loss of competitive potential for such business; and shall prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Assets, except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Divestiture Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of such assets.
- B. Until the Divestiture Date, Respondents shall maintain the operations of the Divestiture Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of such business, and

Order to Maintain Assets

shall use their best efforts to preserve the existing relationships with suppliers; vendors and distributors; customers; employees; and others having business relations with such business. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing the Divestiture Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of such business; including without limitation,
 - a. providing sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the business,
 - b. making available for use by the Divestiture Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business, including without limitation, the Divestiture Assets, and
 - c. continuing, at least at their scheduled pace, any additional expenditures authorized for the Divestiture Business prior to the date the Consent Agreement was signed by Respondents including, without limitation, all research, development, manufacturing, distribution, marketing and sales expenditures;
2. providing such resources as may be necessary to respond to competition against any Divestiture Products and/or to prevent any diminution in sales of any such products during and after the

Order to Maintain Assets

Acquisition process and prior to the complete transfer and delivery of the Divestiture Assets to an Acquirer;

3. providing such resources as may be necessary to maintain the competitive strength and positioning of each Divestiture Product at customer accounts for such product;
 4. providing such support services to the Divestiture Business as were being provided to such business by Respondent(s) as of the date the Consent Agreement was signed by Respondents; and
 5. maintaining a work force at least equivalent in size, training, and expertise to what has been associated with the Divestiture Business for the last fiscal year.
- C. Until the Divestiture Date, Respondents shall provide all Divestiture Business Employees with reasonable financial incentives to continue in their positions and to research, develop, and manufacture the Divestiture Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of such products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent Sanyo until the Acquisition Date, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by applicable law), and additional incentives as may be necessary to prevent any diminution of the competitiveness of the Divestiture Business.
- D. Respondents shall provide financial incentives to Divestiture Business Key Employees as needed to

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facilitate the employment of such employees by the Acquirer, provided that such incentives need not exceed twenty (20) percent of each such Employee's annual salary.

- E. For a period lasting until one (1) year from the Acquisition Date, Respondents shall
1. within 10 days of a request by the Acquirer, provide the following information to the Acquirer (to the extent permitted by applicable law) regarding each Divestiture Business Employee not employed by SANYO Twicell (Takasaki) on the Divestiture Date:
 - a. the date of hire and effective service date;
 - b. job title or position held;
 - c. a specific description of the employee's responsibilities related to the Divestiture Products; however, in lieu of this description, Respondents may provide the employee's most recent performance appraisal;
 - d. the base salary or current wages;
 - e. the most recent bonus paid, aggregate annual compensation for Respondent Sanyo's last fiscal year and current target or guaranteed bonus, if any;
 - f. employment status (i.e., active or on leave or disability; full-time or part-time);
 - g. any other material terms and conditions of employment in regard to such employee that

Order to Maintain Assets

are not otherwise generally available to similarly situated employees;

- h. copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees;
2. not interfere with the hiring or employing by the Acquirer of any Divestiture Business Employee and remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Acquirer, including without limitation, any non-compete or non-disclosure provisions of any employment agreements with respect to Divestiture Products or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Acquirer. In addition, Respondents shall not make any counteroffer to a Divestiture Business Employee who has received a written offer of employment from the Acquirer; and
 3. not hire any Divestiture Business Employee of the Acquirer or solicit or otherwise attempt to induce such employee to terminate his or her employment relationship with the Acquirer.

provided, however, Respondents may i) hire any Divestiture Business Employee whose employment has been terminated by the Acquirer or who independently applies for employment with Respondents, as long as such employee was not solicited in violation of the non-solicitation requirements contained herein; ii) advertise for employees in newspapers, trade publications or other media not targeted specifically at Divestiture

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Business Employees; or iii) hire a Divestiture Business Employee who contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from Respondents.

- F. Respondents shall not disclose or convey any Confidential Business Information that is exclusively related to the Divestiture Business, directly or indirectly, to any Person or Persons except as follows:
1. Respondents may disclose Confidential Business Information to the Acquirer or Persons specifically authorized by the Acquirer to receive such information; and
 2. Respondents may disclose Confidential Business Information as necessary to comply with the Orders, to manufacture sintered cathodes, to fulfill the terms of the Suzhou Sub-C and D NiMH Battery Agreement or to produce or have produced Sanyo-Branded Retail Batteries pursuant to rights retained or licensed under any Divestiture Agreement so long as in doing so, Respondents do not disclose or convey any Confidential Information to any Person, other than Divestiture Business Employees, involved in the research, development, manufacture, sale, marketing or distribution of any of Respondents' Portable NiMH Battery Products (other than Sanyo-Branded Retail Batteries and products produced pursuant to the Suzhou Sub-C and D NiMH Battery Production Agreement and the Sintered Cathode Supply Agreement).

provided however, that the restrictions contained in this paragraph shall not apply to information that i) subsequently falls within the public domain by means

Order to Maintain Assets

other than a violation of this Order or Respondents' breach of a confidentiality or non-disclosure agreement; ii) is required by Law to be publicly disclosed; or iii) is lawfully possessed by Respondent Panasonic as of the Acquisition Date.

- G. Respondents shall prevent the disclosure or use of Confidential Business Information except as permitted or authorized by the Orders and shall,
1. require that each Divestiture Business Employee retained by Respondents after the Divestiture Date, his or her direct supervisor, and any other employee designated by the Interim Monitor (if one has been appointed) sign a confidentiality agreement that requires such employee to maintain Confidential Business Information as strictly confidential and not use such information or disclose it to any other Person except as authorized by Respondents in accordance with this Order; and
 2. provide, within thirty (30) days of the Divestiture Date, written notice of the restrictions on the disclosure and use of Confidential Business Information contained in this Order to all employees not required to sign a confidentiality agreement who were involved in the Divestiture Business at any time during the twelve (12) months prior to the Divestiture Date, or who otherwise may possess Confidential Business Information. Respondents shall provide such written notice by electronic mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Divestiture Date.
- H. Respondents shall adhere to and abide by the Divestiture Agreements (which agreements shall not

Order to Maintain Assets

contradict or limit, or be construed to contradict or limit, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondents under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof).

- I. The English-language versions of all Divestiture Agreements, as submitted to and approved by the Commission and attached to the Decision and Order, shall be the versions of such agreements used in interpreting and enforcing this Order.
- J. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Businesses through its full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Divestiture Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Assets except for ordinary wear and tear.

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

- A. The Commission may appoint a Monitor (“Interim Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Order to Maintain Assets and/or the Decision and Order.
- B. The Commission appoints ING Financial Markets LLC (“ING”), as Interim Monitor and approves the agreement between ING and Respondents, attached hereto as Confidential Appendix A, which agreement,

Order to Maintain Assets

inter alia, names Philip Comerford, Jr. as ING designated Project Manager.

- C. Respondents shall facilitate the ability of the Interim Monitor to comply with the duties and obligations set forth in this Order, and shall take no action that interferes with or hinders the Interim Monitor's authority, rights or responsibilities as set forth in this Order or any agreement between the Interim Monitor and Respondents.
- D. The Interim Monitor's duties and responsibilities shall include the following:
1. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 2. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out his or her duties and responsibilities in a manner consistent with the purposes of the Order and in consultation with the Commission;
 3. the Interim Monitor shall, in his or her sole discretion, consult with Third Parties in the exercise of his or her duties under this Order or any agreement between the Interim Monitor and Respondents; and
 4. the Interim Monitor shall evaluate the reports submitted by Respondents pursuant to this Order, and within thirty (30) days from the date the Interim Monitor receives these reports, report in writing to the Commission concerning

Order to Maintain Assets

performance by Respondents of their obligations under the Order.

- E. Respondents shall grant and transfer to the Interim Monitor, and such Monitor shall have, all rights, powers, and authority necessary to carry out the Monitor's duties and responsibilities, including but not limited to the following:
1. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders;
 2. subject to any demonstrated legally recognized privilege, Respondents shall provide the Interim Monitor full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Order, including, but not limited to, its obligations related to the relevant assets;
 3. the Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions to which the Monitor and Respondents agree and that the Commission approves;
 4. the Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry

Order to Maintain Assets

out the Interim Monitor's duties and responsibilities;

5. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor; and
 6. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; provided, however, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission or require the Interim Monitor to report to Respondents the substance of communications to or from the Commission or the Acquirer.
- F. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

Order to Maintain Assets

- G. The Interim Monitor shall serve until the termination of this Order to Maintain Assets.
- H. If the Commission determines that an Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided for in this Paragraph.
- I. The Commission may on its own initiative, or at the request of an Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- J. An Interim Monitor appointed pursuant to this Order may be the same Person appointed as the Interim Monitor or Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every sixty (60) days thereafter until Respondents have fully complied with their obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by the proposed Decision and Order in this matter, 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 to Maintain Assets and the related Decision and Order; provided, however, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as the reports required to be submitted by Respondents pursuant to the Decision and Order.

V.

Order to Maintain Assets

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

- A. any proposed dissolution of Respondents; or
- B. if the following may affect compliance obligations arising out of this Order,
 - 1. any proposed acquisition, merger or consolidation of Respondents; or
 - 2. any other change in Respondents, including without limitation, assignment and the creation or dissolution of subsidiaries.

VI.

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

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

Order to Maintain Assets

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

VII.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the later of:

- A. The day after the Divestiture Date;
- B. The day the related Decision and Order becomes final;
or
- C. The Commission otherwise directs that this Order to Maintain Assets is terminated,

provided that, if the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. §2.34, this Order to Maintain Assets shall terminate no later than three (3) days after such action by the Commission.

By the Commission.

Order to Maintain Assets

CONFIDENTIAL APPENDIX A

Interim Monitor Agreement

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

Analysis to Aid Public Comment

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission (“Commission”) has accepted from Panasonic Corporation (“Panasonic”), subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”), which is designed to remedy the anticompetitive effects resulting from Panasonic’s proposed acquisition of 100% of the voting securities of Sanyo Electric Co., Ltd. (“Sanyo”). Under the terms of the Consent Agreement, Sanyo will divest its assets relating to the manufacture and sale of portable NiMH batteries to FDK Corporation (“FDK”), a subsidiary of Fujitsu, Ltd.

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

Pursuant to an agreement concluded on December 19, 2008 (the “Agreement”), Panasonic announced its intention to commence a cash tender offer to acquire 100 percent of the voting securities of Sanyo for an aggregate purchase price of approximately \$9 billion (the “Acquisition”). The Commission’s complaint alleges the facts described below and that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the market for portable NiMH batteries.

II. The Parties

Analysis to Aid Public Comment

Panasonic, headquartered in Osaka, Japan, is a leading manufacturer of consumer electronics such as televisions, DVD players, and computers. Panasonic's Components and Devices Division produces rechargeable batteries, as well as semiconductors and mechanical components.

Headquartered in Osaka, Japan, Sanyo Electric Co., Ltd., is a leading producer of electronic devices and components, including digital cameras, televisions, car navigation systems, home appliances, and consumer electronics. Sanyo's rechargeable battery business is operated out of its Components Division, which also manufactures batteries, semiconductors, capacitors, small motors, and optical pickups.

III. Portable NiMH Batteries

There are three rechargeable battery chemistries: nickel cadmium (“NiCd”), nickel metal hydride (“NiMH”) and lithium-ion (“Li-ion”). While each battery chemistry is used in varying degrees to power batteries for portable electronic devices, the evidence shows that portable NiMH batteries are a relevant antitrust market. First of all, there are a number of products, most notably two-way radios, that have a large installed base of customers that cannot switch to another type of rechargeable battery because the products were designed specifically to accommodate portable NiMH batteries. Second, even for customers who use NiMH batteries but are not locked in to purchasing them, there is a strong preference for portable NiMH batteries for performance and cost reasons. Both sets of customers would not switch to a different battery technology in response to a five to ten percent increase in the price of portable NiMH batteries.

The relevant geographic market for portable NiMH batteries is worldwide. Manufacturing of portable NiMH batteries is

Analysis to Aid Public Comment

concentrated in Asia, and orders are shipped to customers located throughout the world.

Panasonic and Sanyo produce the highest quality portable NiMH batteries, and consequently the two firms are uniquely close competitors. The remaining suppliers of portable NiMH batteries produce lower quality batteries and are therefore more distant competitors to Panasonic and Sanyo. As the only suppliers of high quality portable NiMH batteries, Panasonic and Sanyo control the vast majority of the market. The lower quality suppliers have fringe positions and do not affect competition between Panasonic and Sanyo.

As each other's most significant competitors for portable NiMH batteries, Panasonic and Sanyo respond directly to competition from each other with lower prices, better services and improved products, to the benefit of consumers. By eliminating this direct and substantial competition, the proposed acquisition would allow Panasonic to exercise market power unilaterally, thereby increasing the likelihood that purchasers of portable NiMH batteries would be forced to pay higher prices and restraining the direct competition that promoted innovation and high quality service. The proposed acquisition eliminates a competitor to which customers otherwise could have diverted their sales – in a market where the alternative sources of supply are usually not viable options.

Neither new entry nor repositioning and expansion sufficient to deter or counteract the anticompetitive effects of the proposed acquisition in the portable NiMH market is likely to occur within two years. Existing competitors would have to significantly improve their portable NiMH production facilities, improve the quality of their portable NiMH batteries, and overcome the resistance of customers to switch to a portable NiMH battery supplier that lacks the track record of effectively meeting the needs of those customers served by Panasonic and Sanyo. Also, because NiMH is an older battery technology, it has a relatively small growth potential for the sale of portable NiMH batteries, so

Analysis to Aid Public Comment

it is unlikely that a potential competitor would be able to justify the investments necessary to enter the market for portable NiMH batteries.

IV. The Consent Agreement

The proposed Order eliminates the competitive concerns raised by Panasonic's proposed acquisition of Sanyo by requiring the divestiture of Sanyo's assets relating to the manufacture and sale of portable NiMH batteries to FDK Corporation ("FDK"), a subsidiary of Fujitsu, Ltd. This divestiture must occur with fifteen days after the Acquisition but may be extended an additional thirty days, if necessary, to allow European Commission approval of the divestiture to FDK.

FDK has the industry experience, reputation, and resources to replace Sanyo as an effective competitor in the portable NiMH battery market. Headquartered in Tokyo, Japan, FDK manufactures and sells electronic components and batteries worldwide, and is a subsidiary of Fujitsu, a multinational computing, telecommunications and electronics company. FDK does not currently compete against Panasonic and Sanyo in the sale of portable NiMH batteries, but it does manufacture and sell alkaline batteries. FDK also sources and resells a broad range of batteries, including carbon-zinc, lithium primary, and manganese batteries.

Pursuant to the Order, FDK would receive all the assets necessary to operate Sanyo's current portable NiMH battery business, including most importantly, the NiMH battery manufacturing facility in Takasaki, Japan ("Takasaki plant"). The Takasaki plant is a premier manufacturing facility for portable NiMH batteries, producing approximately 30 percent of the portable NiMH batteries worldwide. The Order also requires Sanyo to supply to FDK sizes Sub C/D portable NiMH batteries, which are the only sizes of Sanyo's portable NiMH batteries not produced at the Takasaki plant and account for a tiny fraction of

Analysis to Aid Public Comment

Sanyo's overall portable NiMH sales. In addition to the employees of the Takasaki plant, who would automatically transfer to FDK, the Order requires Sanyo to provide FDK access to certain other key Sanyo employees needed to successfully operate the business. The Order also requires Sanyo to transfer all intellectual property necessary to make and sell portable NiMH batteries, including Sanyo patents and licenses related to portable NiMH batteries. A divestiture of Sanyo's portable NiMH assets will ensure that FDK has a full line of high-quality portable NiMH batteries, enabling it to compete immediately with the merged entity.

The Commission has appointed Philip Comerford, Jr., Managing Director of ING Capital LLC and Head of the Mergers & Acquisitions Group, as the interim monitor to oversee the divestiture of the NiMH battery business. In order to ensure that

If the Commission determines that FDK is not an acceptable purchaser, or the manner of the divestiture is not acceptable, the parties must unwind the sale to FDK and divest the portable NiMH battery assets within six months of the date the Order becomes final to another Commission-approved acquirer. If the parties fail to divest within six months, the Commission may appoint a trustee to divest the portable NiMH battery assets.

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

Complaint

IN THE MATTER OF

SERVICE CORPORATION INTERNATIONAL

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

Docket No. C-4275; File No. 091 0138
Filed, November 24, 2009 — Decision, January 6, 2010

This consent order addresses the acquisition by Service Corporation International of 100 percent of the voting securities of Palm Mortuary, Inc. Post-acquisition, the combined entity will have a 76 percent share in the cemetery services market. The acquisition will eliminate significant competition between SCI and Palm in the highly concentrated cemetery services market and increase the likelihood that SCI would be able to unilaterally raise prices or exercise market power through coordinated interaction among competitors. The Consent Agreement preserves competition completely in the relevant market by requiring that SCI divest the Davis combination cemetery/funeral home facility, rights to the Davis trade name, and all the pre-need service contracts associated with the Davis combination facility and with a second Davis funeral home in the Las Vegas metropolitan area. Divestiture of the pre-need service contracts associated with a second Davis funeral home in the Las Vegas area is to help ensure the competitiveness and viability of the divested assets. The Consent Agreement also prohibits SCI from acquiring any interest or assets engaged in the provision of cemetery services in the Las Vegas metropolitan area for ten (10) years without providing prior written notice to the Commission.

Participants

For the *Commission*: *William Kristopher Treadwell* and
Goldie Veronica Walker.

For the *Respondents*: *David J. Laing, Esq., Baker &*
McKenzie LLP.

Complaint

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Service Corporation International (“SCI”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Palm Mortuary, Inc. (“Palm”), 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 (“FTC Act”), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent SCI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1929 Allen Parkway, Houston, Texas 77019. SCI, among other things, is engaged in the sale and provision of (a) funeral services and associated products and (b) cemetery services and associated products and property.

2. SCI owns and operates 1,302 funeral homes and 369 cemeteries world-wide (including 208 combination locations) and 1,122 funeral homes and 356 cemeteries in the United States. SCI, under the Davis trade name, operates one standalone funeral home facility and one funeral home and cemetery combination facility within the Las Vegas metropolitan area of Clark County, Nevada. SCI’s revenues from all operations in 2008 were approximately \$2.1 billion.

Complaint

II. JURISDICTION

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

III. THE PROPOSED ACQUISITION

4. Pursuant to an Equity Purchase Agreement dated August 5, 2009, SCI proposes to purchase all of the outstanding voting securities of Palm Mortuary, Inc. (“the Acquisition”).

5. The Acquisition would combine the first and third largest providers of cemetery services and associated merchandise and property in the relevant geographic market. Respondent SCI and Palm both own and operate cemetery service facilities in the Las Vegas metropolitan area of Clark County, Nevada, and compete and promote their businesses based on name recognition, reputation, location, price, range of available services, quality of service, associated product offerings, and the appearance of facilities.

IV. RELEVANT PRODUCT MARKET

6. The relevant line of commerce in which to analyze the Acquisition is the provision and sale of cemetery services and associated products and property, which includes all activities relating to the sale of goods and services provided for the final disposition of human remains in a cemetery, whether by burial, entombment in a mausoleum or crypt, or disposition in a niche.

V. RELEVANT GEOGRAPHIC MARKET

7. The relevant geographic market in which to assess the competitive effects of the Acquisition is the Las Vegas, Nevada, metropolitan area.

Complaint

VI. CONCENTRATION

8. The relevant market for the provision and sale of cemetery services in the Las Vegas metropolitan area is highly concentrated, and the Acquisition will substantially increase concentration as measured by the Herfindahl-Hirschman Index (“HHI”).

9. Post-acquisition, SCI would have a market share of about 76 percent in the market for cemetery services in the Las Vegas metropolitan area. The Acquisition would increase the HHI by about 1876 points, from 4385 to 6261, leaving only two meaningful competitors and eliminating one of two competitors that are the first and second choices for a substantial number of consumers.

VII. ENTRY CONDITIONS

10. Entry in the relevant market would not be timely, likely, or sufficient to prevent anticompetitive effects.

VIII. EFFECTS OF THE ACQUISITION

11. The Acquisition, if consummated, may substantially lessen competition in the cemetery services market in the Las Vegas metropolitan area, identified in Paragraphs 6 and 7 in which SCI and Palm both own and operate cemeteries, in the following ways, among others:

- a. by eliminating direct competition between SCI and Palm;
- b. by increasing the likelihood that Respondent SCI will unilaterally exercise market power; or

Decision and Order

- c. by increasing the likelihood of, or facilitating, coordinated interaction between or among participants in the relevant product market.

IX. VIOLATIONS CHARGED

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

WHEREFORE, THE PREMISES CONSIDERED, Federal Trade Commission on this twenty-fourth day of November, 2009, issues its Complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Service Corporation International (“SCI”) of Palm Mortuary Inc. (“Palm”), 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

Decision and Order

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 Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Service Corporation International (“SCI”) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its corporate head office and principal place of business located at 1929 Allen Parkway, Houston, Texas 77109.
2. The Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

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ORDER**I.**

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

- A. “SCI” means Service Corporation International, its directors, officers, employees, agents, representatives, successors and assigns; and its subsidiaries, divisions, groups, and affiliates controlled by Service Corporation International (including, after the Acquisition Date, Palm) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Palm” means Palm Mortuary, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its headquarters address at 1325 North Main Street, Las Vegas, Nevada 89101, and the subsidiaries, divisions, groups, and affiliates controlled by Palm Mortuary, Inc.
- C. “Respondent” means SCI.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer(s)” means any Person(s) that receives the prior approval of the Commission to acquire the Divestiture Business pursuant to this Order.
- F. “Acquisition” means the proposed acquisition described in and contemplated by the Equity Purchase Agreement by and among Alderwoods (Nevada), Inc., Palm Mortuary, Inc., its Stockholders, Knauss Enterprises Limited Liability Company, Knauss

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Holdings, LLC, and its Members, dated as of August 5, 2009.

- G. “Acquisition Agreement” means the Equity Purchase Agreement, dated as of August 5, 2009.
- H. “Acquisition Effective Date” means the earliest of the following dates:
1. the date the Respondent and Palm close on the Acquisition pursuant to the Acquisition Agreement; or
 2. the date on which Respondent, directly or indirectly, acquires a controlling interest in Palm.
- I. “Cemetery Services” means all activities relating to the promotion, marketing, sale and provision of property, goods and services, to provide for the final disposition of human remains in a cemetery, whether by burial, entombment in a mausoleum or crypt, or disposition in a niche.
- J. “Confidential Business Information” means information not in the public domain related to the Divestiture Business, except for any information that was or becomes generally available to the public other than as a result of a disclosure by Respondent, or was available, or becomes available, to Respondent on a non-confidential basis, but only if, to the knowledge of Respondent, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.
- K. “Davis Pre-need Contracts” means any type of contract or other agreement entered into by a person with Davis Funeral Home and Memorial Park, 6200 South Eastern

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Avenue, Las Vegas, Nevada 89119, or the Davis Funeral Home, 2127 West Charleston Boulevard, Las Vegas, Nevada 89102. for the purchase of Funeral Services or Cemetery Services at a future time, regardless of whether such agreement is revocable or how payment for such services is arranged.

- L. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. “Direct Cost” to the Acquirer for its use of any of Respondent's employees' labor shall not exceed the average hourly wage rate for such employee.
- M. “Divestiture Agreement” means an agreement or agreements divesting the Divestiture Assets to an Acquirer, and in a manner, that has been approved by the Commission.
- N. “Divestiture Assets” means all of Respondent's rights, title, and interest in all property and assets, tangible or intangible, of every kind and description, wherever located, and any improvements or additions thereto, used in the operation of the Divestiture Business, including but not limited to:
 - 1. All real property interests (including fee simple interests and real property lease-hold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
 - 2. All Tangible Personal Property used in the Divestiture Business, including without limitation, Tangible Personal Property removed (and not

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replaced) from the Divestiture Business at any time after August 5, 2009, if such Property is necessary to operate the Davis Divestiture Business as a going concern, unless such Property was removed in the ordinary course of business and has a cost of less than \$1,000;

3. The trade name “Davis Funeral Home and Memorial Park” and all commercial names, trade names, “doing business as” (d/b/a) names, registered and unregistered trademarks, service marks and applications using the term “Davis,” “Davis Funeral Home,” “Davis Memorial Park,” or “Davis Funeral Home and Memorial Park”;
4. All inventories;
5. All accounts receivable;
6. All agreements, contracts, and leases and all rights thereunder and related thereto, including without limitation, all Davis Pre-Need Contracts;
7. All consents, licenses, certificates, registrations, or permits issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefore or renewals thereof, to the extent assignable;
8. All Divestiture Business Intellectual Property used exclusively in the Divestiture Business;
9. Intangible rights and property other than Intellectual Property, including going concern value, goodwill, internet, telephone, telecopy, e-mail, telephone numbers, addresses, domain names, listings, and websites, *provided* that

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Respondent is not required to divest any portion of domain names or websites content that contain registered or unregistered trademarks, service marks and applications using the words “Alderwoods,” “Service Corporation International,” “SCI,” “Dignity” or “Dignity Memorial.”

10. All Confidential Business Records used exclusively in the Divestiture Business;
11. All insurance benefits, rights, and proceeds, including those arising from any Davis Pre-need Contracts; and
12. All rights relating to pre-need deposits (including bank, trust, or other accounts relating to or arising from any Davis Pre-need Contracts and endowment or perpetual care funds), claims for refunds, and rights to offset in respect thereof.

provided, however, that the Divestiture Assets need not include:

- i. assets located at facilities or offices not included in the Divestiture Business and whose use is not exclusively or primarily related to the operation of the Divestiture Businesses;
- ii. motor vehicles used by the relevant Divestiture Businesses if the Acquirer does not need them and the Commission approves the divestiture without such vehicles;
- iii. rights in any lease of Tangible Personal Property that pertains to generally available property

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relating to office furniture, office equipment, or computers;

- iv. rights in, and records and documents (or portions thereof) exclusively concerning, any national license, national supply or service agreement, national proprietary or licensed advertising program, or national proprietary product associated with SCI's Dignity Memorial program;
 - v. rights to records and documents (or portions thereof) exclusively concerning, commercial names, trade names, "doing business as" (d/b/a) names, registered and unregistered trademarks, service marks and applications using the words "Alderwoods," "Service Corporation International," "SCI," "Dignity" (including "Dignidad," "Dignite," and other translations of Dignity into languages other than English), or "Dignity Memorial"; or
 - vi. any other assets, rights, or agreements not needed by the Acquirer if the Commission approves a Divestiture Agreement that does not divest, grant or transfer such assets, rights, or agreements.
- O. "Divestiture Business" means all activities of Respondent related to:
- 1. providing Funeral Services and Cemetery Services at the Davis Funeral Home and Memorial Park, 6200 South Eastern Avenue, Las Vegas, Nevada 89119; and
 - 2. marketing, promoting, selling and maintaining Davis Pre-Need Contracts.

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- P. “Divestiture Business Employee(s)” means any and all full-time, part-time, or contract employees of SCI whose duties, at any time during the ninety (90) days preceding the Acquisition Effective Date, related primarily to the Divestiture Business.
- Q. “Divestiture Business Intellectual Property” means all Intellectual Property related to or used in the Divestiture Business.
- R. “Divestiture Business License(s)” means a worldwide, royalty-free, paid-up, perpetual, irrevocable, transferable, sublicensable, non-exclusive license(s) to the following:
1. Divestiture Business Intellectual Property not included in the Divestiture Assets;
 2. Divestiture Business Records not included in the Divestiture Assets,

provided, however, that the Divestiture Business License(s) need not include rights to, or documents or records (or portions thereof) exclusively containing, (i) commercial names, trade names, “doing business as” (d/b/a) names, registered and unregistered trademarks, service marks and applications using the words “Alderwoods,” “Service Corporation International,” “SCI,” “Dignity,” (including “Dignidad,” “Dignite,” and other translations of Dignity into languages other than English), or “Dignity Memorial,” (ii) national proprietary or licensed advertising programs, (iii) national proprietary products associated with Respondent's Dignity Memorial program, (iv) national proprietary software used to service a national network of funeral homes and cemeteries or (v) generally available software;

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provided, further, that Divestiture Business License(s) need not include any Divestiture Business Intellectual Property or Divestiture Business Records not needed by the Acquirer if the Commission approves a Divestiture Agreement without it.

- S. “Divestiture Business Records” means all information, documents and records, including all electronic records wherever stored, that are related to or used in the Divestiture Business, including without limitation, client and customer lists, referral sources, research and development reports, production reports, service and warranty records, equipment logs, operating guides and manuals, financial and accounting documents, creative materials, advertising materials, promotional materials, studies, reports, correspondence, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses, customer lists, customer contracts, employee lists, salaries and benefits information, and, subject to legal requirements, copies of all personnel files.
- T. “Divestiture Closing Date” means the date on which Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Assets to an Acquirer pursuant to this Order.
- U. “Funeral Services” means all activities relating to the promotion, marketing, sale and provision of funeral services and funeral goods, including, but not limited to, goods and services used to care for and prepare bodies for burial, cremation, or other final disposition; and goods and services used to arrange, supervise, or conduct the funeral ceremony or final disposition of human remains.

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- V. “Intellectual Property” means all intellectual property owned or licensed (as licensor or licensee) by Respondent, in which Respondent has a proprietary interest, including (i) commercial names, trade names, “doing business as” (d/b/a) names, registered and unregistered trademarks, logos, service marks and applications; (ii) all patents, patent applications, inventions and discoveries that may be patentable; (iii) all registered and unregistered copyrights in both published works and unpublished works; (iv) all know-how, trade secrets, confidential or proprietary information, protocols, quality control information, customer lists, software, technical information, data, process technology, plans, drawings and blue prints; and (v) all rights in websites and internet domain names presently used by Respondent.
- W. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other business entity.
- X. “Tangible Personal Property” means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, and other items of tangible personal property (other than inventories) of every kind owned or leased by Respondent, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.
- Y. “Third Party” means any Person other than Respondent, Palm, or Acquirer.

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- Z. “Transitional Services” means assistance with respect to providing Funeral Services or Cemetery Services, including assistance relating to administrative and support services.

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

- A. Respondent shall divest the Divestiture Assets and convey the Divestiture Business License at no minimum price, absolutely and in good faith, as on-going businesses, no later than ninety (90) days from the Acquisition Date, to an Acquirer and in a manner that receives the prior approval of the Commission.
- B. Any Divestiture Agreement between Respondent and the Acquirer shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of such Divestiture Agreement shall constitute a failure to comply with this Order.
- C. Prior to the Divestiture Closing Date, Respondent shall secure all consents and waivers from all Third Parties that are necessary to allow Respondent to divest the Divestiture Assets, convey the Divestiture Business License, and allow the Acquirer to operate the Divestiture Business;
- provided, however,* Respondent may satisfy this requirement as to a particular Third Party by certifying that the Acquirer has executed the necessary agreements directly with such Third Party.
- D. Prior to the Divestiture Closing Date, Respondent shall take all actions necessary to ensure that Divestiture Assets meet federal, state, local and municipal

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requirements necessary to allow the transfer of the Divestiture Assets to the Acquirer.

- E. Respondent shall not enforce any agreement against a Third Party or the Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Acquirer to acquire or use the Divestiture Assets and/or operate the Divestiture Business.
- F. Respondent shall not, after the Acquisition Effective Date, use, directly or indirectly, any Confidential Business Information or disclose or convey any Confidential Business Information, directly or indirectly, to any Person except as follows:
 - 1. Respondent may disclose Confidential Business Information to the Acquirer or proposed Acquirer (as the case may be) or other Persons specifically authorized by such Acquirer or proposed Acquirer to receive such information; and
 - 2. So long as Respondent does not disclose Confidential Business Information to any Persons who have operational responsibility for the Palm Business, Respondent may use Confidential Business Information as needed:
 - a. to comply the requirements of this Order or the Order to Maintain Assets;
 - b. to comply with Respondent's obligations to the Acquirer under the Divestiture Agreement(s);
 - c. to comply with applicable law; or

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- d. to enforce the terms of any Divestiture Agreement or defend against any dispute or legal proceeding,

provided that Confidential Business Information may be disclosed to Third Parties only as necessary for the purposes authorized by this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement with the Acquirer (but Respondent shall not be deemed to have violated this requirement if the Acquirer withholds such agreement unreasonably); and Respondent shall use its best efforts to obtain a protective order to protect the confidentiality of such Confidential Business Information during any adjudication;

provided, further, that Respondent may continue to use Confidential Business Information included in the Divestiture Business License(s) to the extent such information was previously used by Respondent in connection with assets other than those being transferred to Acquirer pursuant to this Order and/or the Divestiture Agreement.

- G. On or before the Divestiture Closing Date, Respondent shall provide written notification of the restrictions on the use of the Confidential Business Information contained in the Order to all employees who were involved in the Divestiture Business.
- H. Within ten (10) days of a request by the Commission or by an Acquirer or proposed Acquirer (as applicable), Respondent shall provide the Acquirer or proposed Acquirer (as applicable) with the following information for each Divestiture Business Employee, and to the extent permitted by law:

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1. name, job title or position, date of hire and effective service date;
 2. a specific description of the employee's responsibilities;
 3. the base salary or current wages;
 4. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year and current target or guaranteed bonus, if any;
 5. employment status (i.e., active or on leave or disability; full-time or part-time);
 6. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
 7. at the option of the proposed Acquirer or Acquirer (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.
- I. Respondent shall not interfere with the employment by the Acquirer of any Divestiture Business Employee; shall not offer any incentive to such employees to decline employment with the Acquirer or to accept other employment with the Respondent; and shall eliminate any contractual impediments that may deter such employee from accepting employment with the Acquirer including, but not limited to, removing any non-compete or confidentiality provisions of employment or other contracts that would affect the ability of such employee to be employed by the

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Acquirer, and paying, or transferring to the account of the employee, all current and accrued bonuses, pensions and other current and accrued benefits.

- J. For a period of two (2) years after the Divestiture Date, Respondent shall not, directly or indirectly, solicit, induce or attempt to solicit or induce any Divestiture Business Employee(s) who have accepted offers of employment with the Acquirer, or who are employed by the Acquirer, to terminate their employment relationship with the Acquirer; provided, however, a violation of this provision will not occur if: (1) the person'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.
- K. At the request of the Acquirer, Respondent shall use its best efforts to assist the Acquirer in the fulfillment of any Pre-need Contract relating to the sale of a Dignity Memorial Funeral Plan entered into by Respondent prior to the date of divestiture of the applicable funeral home or cemetery; provided, however, that this Paragraph requires Respondent to assist only with such goods and services that the Acquirer cannot reasonably provide on its own.
- L. For a period ending six (6) months after the date all Divestiture Assets and Divestiture Licenses have been fully and finally transferred and conveyed to the Acquirer, Respondent shall provide Transitional Services to the Acquirer, at no more than Respondent's Direct Cost, as needed to assist the Acquirer in using the Divestiture Assets to operate the Divestiture

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Business as a viable and ongoing business providing Funeral Services and Cemetery Services at least equivalent to those provided by Respondent prior to the Divestiture Date. Respondent shall not (i) require the Acquirer to pay compensation for Transitional Services that exceeds the Direct Cost of providing such goods and services, or (ii) terminate its obligation to provide Transitional Services because of a material breach by the Acquirer of any agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction.

- M. The purpose of this Order is to ensure that the Divestiture Business remains a competitive and viable provider of Funeral Services and Cemetery Services independent of Respondent and to remedy in a timely manner the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. For a period of ten (10) years from the date this Order becomes final, Respondent shall not, without providing advance written notification to the Commission, (i) acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any concern, corporate or non-corporate, or in any assets engaged in the provision of Cemetery Services in Clark County, Nevada.
- B. The prior notification required by this Paragraph III shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter

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referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of the Respondent and not of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), the Respondent shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Paragraph V may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however,* that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

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

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.

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- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of the proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the Interim Monitor.
- C. Not later than ten (10) days after the appointment of an Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of this Order in a manner consistent with the purposes of the Order.
- D. Respondent shall facilitate the ability of the Interim Monitor(s) to comply with the duties and obligations set forth in this Order, and shall take no action that interferes with or hinders the Interim Monitor's authority, rights, or responsibilities as set forth herein or in any agreement between the Interim Monitor(s) and Respondent.
- E. The Interim Monitor's duties and responsibilities shall include the following:
1. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 2. the Interim Monitor shall have the power and authority to monitor Respondent's compliance with this Order and shall exercise such power and

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authority and carry out his or her duties and responsibilities in a manner consistent with the purposes of this Order and in consultation with the Commission;

3. the Interim Monitor may, in his or her sole discretion, consult with third parties in the exercise of his or her duties under this Order, or under any agreement between the Interim Monitor and Respondent; and
 4. the Interim Monitor shall evaluate the reports submitted by Respondent pursuant to this Order, and within thirty (30) days from the date the Interim Monitor receives these reports, report in writing to the Commission concerning performance by Respondent of its obligations under the Order.
- F. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- G. The Interim Monitor shall serve until six (6) months after Respondent has fully and finally transferred to the Acquirer all Divestiture Assets and all Divestiture Business Records,
- provided, however,* that the Interim Monitor's service shall not exceed two (2) years from the date the Order becomes final;

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provided, further, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of this Order.

- H. If the Commission determines that an Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor pursuant to the procedures contained in this Paragraph.
- I. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- J. The Interim Monitor appointed pursuant to this Order may be the same person appointed as an Interim Monitor under the Order to Maintain Assets or the Divestiture Trustee(s) pursuant to this Order.

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

- A. If Respondent has not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Divestiture Assets and Divestiture Licenses as required by this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General of the United States 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

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Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey such assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General of the United States from seeking civil penalties or any other available relief, 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 shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

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1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
2. The Divestiture Trustee shall have twelve (12) months after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; provided, however, that the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent shall extend the time for divestiture

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under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; provided, however, that if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondent from among those approved by the Commission; provided further, however, that Respondent shall select such Person within five (5) days after receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees

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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 all of the relevant assets required to be divested by this Order.

6. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; provided, however, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order and the Order to Maintain Assets in this matter.
8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

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9. 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, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

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

- A. Within five (5) days of the Acquisition, Respondent shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. 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:
 1. Within thirty (30) days after this Order becomes final, and every thirty (30) days thereafter until Respondent has fully transferred the Divested

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Assets and Divestiture Licenses as required by this Order and

2. Every sixty (60) days thereafter until the termination of the period during which Respondent is required to provide Transitional Services under the Order and, if applicable, the Divestiture Agreement.
- C. Respondent shall submit a copy of its report concerning compliance with this Order to the Interim Monitor (if one has been appointed). Respondent shall include in its report, among other things that are required from time to time, a full description of its efforts to comply with the Order, including the status of the divestiture and transfer of the Divestiture Assets and Divestiture Licenses; a description of all Transitional Services provided to Acquirer; a description of all substantive contacts with Acquirer, the Interim Monitor (if one has been appointed) and any other Persons related to compliance with the terms of this Order and/or the Divestiture Agreement(s), and any correspondence with proposed Acquirer, Acquirer, Interim Monitor or other Third Party related to such contacts that is dated after the Divestiture Closing Date; and any other actions taken by Respondent relating to compliance with the terms of this Order and/or the Divestiture Agreements. The final compliance report required by this Paragraph V shall include a statement that the divestiture has been accomplished in the manner approved by the Commission and shall include the date the divestiture was accomplished.
- D. One (1) year after this Order becomes final, annually for the next nine (9) years, on the anniversary of the date the Order becomes final, and at other times as the

Decision and Order

Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

VII.

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

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or
- C. any other change in Respondent, including without limitation, assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VIII.

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

- A. Access, during business 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, which copying services shall be provided by Respondent at the request of the authorized

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representative(s) of the Commission and at the expense of Respondent; and

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

IX.

IT IS FURTHER ORDERED that this Order shall terminate on January 6, 2020.

By the Commission.

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

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

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

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Maintain Assets:

1. Respondent Service Corporation International (“SCI”) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its corporate head office and principal place of

Order to Maintain Assets

business located at 1929 Allen Parkway, Houston, Texas 77109.

2. The 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 to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “SCI” means Service Corporation International, its directors, officers, employees, agents, representatives, successors and assigns; and its subsidiaries, divisions, groups, and affiliates controlled by Service Corporation International (including, after the Acquisition Date, Palm) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Palm” means Palm Mortuary, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its headquarters address at 1325 North Main Street, Las Vegas, Nevada 89101, and the subsidiaries, divisions, groups, and affiliates controlled by Palm Mortuary, Inc.
- C. “Respondent” means SCI.
- D. “Commission” means the Federal Trade Commission.

Order to Maintain Assets

- E. “Consent Agreement” means the Agreement Containing Consent Orders in this matter.
- F. “Decision and Order” means the:
1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
 2. Final Decision and Order issued by the Commission in this matter.
- G. “Confidential Business Information” means information not in the public domain related to the Divestiture Business, except for any information that was or becomes generally available to the public other than as a result of a disclosure by Respondent, or was available, or becomes available, to Respondent on a non-confidential basis, but only if, to the knowledge of Respondent, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.
- H. “Confidential Palm Business Information” means information not in the public domain that is used in the Palm Business.
- I. “Divestiture Business” means all activities of Respondent related to:
1. providing Funeral Services and Cemetery Services at the Davis Funeral Home and Memorial Park, 6200 South Eastern Avenue, Las Vegas, Nevada 89119; and

Order to Maintain Assets

2. marketing, promoting, selling and maintaining Pre-Need Contracts for Funeral Services and/or Cemetery Services at the Davis Funeral Home and Memorial Park, 6200 South Eastern Avenue, Las Vegas, Nevada, 89119, or the Davis Funeral Home, 2127 West Charleston Boulevard, Las Vegas, Nevada, 89102.
- J. “Divestiture Employee” means any and all full-time, part-time, or contract employees of Respondent whose duties relate primarily to the Divestiture Business and such other SCI employees as are necessary to maintain the full economic viability, marketability, and competitiveness of the Divestiture Business and operate such Business in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance of the assets of such Business).
- K. “Interim Monitor” means any monitor appointed pursuant to this Order to Maintain Assets or the Decision and Order.
- L. “Orders” means the Decision and Order and this Order to Maintain Assets.
- M. “Palm Business” means the assets and business of Palm that are acquired by Respondent pursuant to the Acquisition Agreement.

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

- A. From the date Respondent executes the Consent Agreement until the date this Order to Maintain Assets terminates, Respondent shall take all actions necessary

Order to Maintain Assets

to maintain the full economic viability, marketability, and competitiveness of the Divestiture Business and to prevent the destruction, removal, wasting, deterioration, or impairment of such Business (except for ordinary wear and tear). Further, Respondent shall not sell, transfer, encumber, or otherwise impair the Divestiture Business other than in the manner prescribed in the Decision and Order.

- B. From the date Respondent executes the Consent Agreement until this Order to Maintain Assets terminates, Respondent shall maintain the operations of the Divestiture Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business). In operating and maintaining the Divestiture Business, Respondent shall:
1. provide the Divestiture Business with sufficient working capital to operate at least at current rates of operation and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities;
 2. continue, at least at their scheduled pace, any additional expenditures for the Divestiture Business that were authorized prior to the date the Consent Agreement was signed by Respondent including, but not limited to, promotional, marketing and sales expenditures;
 3. use best efforts to maintain and increase sales of the Divestiture Business and provide such resources as may be necessary to respond to competition against the Divestiture Business;
 4. provide such support services to the Divestiture Business as were being provided as of the date the

Order to Maintain Assets

Consent Agreement was signed by Respondent;
and

5. use best efforts to preserve and maintain existing relationships with the customers, suppliers, vendors, private and governmental entities and others having business relations with the Divestiture Business.
- C. From the date Respondent executes the Consent Agreement until this Order to Maintain Assets terminates, Respondent shall:
1. provide the Divestiture Employees with the authority and resources necessary to maintain and operate the Divestiture Business in a manner consistent with past practice and this Order to Maintain Assets;
 2. ensure that no Divestiture Employee has responsibilities or duties related to the operation or management of the Palm Business;
 3. continue all financial and other benefits of the Divestiture Employees and provide financial incentives to such employees to continue in their positions and to operate and maintain the Divestiture Business in a manner consistent with past practice and this Order to Maintain Assets;
 4. replace any Divestiture Employee who leaves the employ of Respondent with an employee of similar skill, training and expertise, and treat such employee as a Divestiture Employee under the terms of this Order to Maintain Assets;

Order to Maintain Assets

5. require, as a condition of continued employment, that Respondent employees and representatives with access to Confidential Palm Business Information agree not to disclose such Information to any Divestiture Employee; and
 6. require, as a condition of continued employment, that each Divestiture Employee agree not to disclose any Confidential Business Information to anyone other than a fellow Divestiture Employee, except that Confidential Business Information may be provided to employees or representatives of Respondent as needed for tax, legal, regulatory or financial reporting purposes provided such Confidential Business Information is not disclosed to anyone with operational responsibility for the Palm Business.
- D. Within ten (10) days of a request by the Commission or by an Acquirer or proposed Acquirer (as applicable), Respondent shall provide the Acquirer or proposed Acquirer (as applicable) with the following information for each Divestiture Business Employee, as and to the extent permitted by Law:
1. name, job title or position, date of hire and effective service date;
 2. a specific description of the employee's responsibilities;
 3. the base salary or current wages;
 4. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year and current target or guaranteed bonus, if any;

Order to Maintain Assets

5. employment status (i.e., active or on leave or disability; full-time or part-time);
 6. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
 7. at the option of the proposed Acquirer or Acquirer (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.
- E. Respondent shall not interfere with the employment by the Acquirer of any Divestiture Business Employee; 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 contractual impediments that may deter such employees from accepting employment with the Acquirer including, but not limited to, removing 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 paying, or transferring to the account of the employee, all current and accrued bonuses, pensions and other current and accrued benefits.
- F. For a period of two (2) years after the Divestiture Date, Respondent shall not, directly or indirectly, solicit, induce or attempt to solicit or induce any Divestiture Business Employee who has accepted an offer of employment with the Acquirer, or who is employed by the Acquirer, to terminate his or her employment relationship with the Acquirer; provided, however, a violation of this provision will not occur if: (1) the person's employment has been terminated by the

Order to Maintain Assets

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.

- G. Respondent shall not, after the Acquisition Effective Date, use, directly or indirectly, any Confidential Business Information or disclose or convey any Confidential Business Information, directly or indirectly, to any Person except as follows:
1. Respondent may disclose Confidential Business Information to the Acquirer or proposed Acquirer (as the case may be) or other Persons specifically authorized by such Acquirer or proposed Acquirer to receive such information; and
 2. So long as Respondent does not disclose Confidential Business Information to any Persons who have operational responsibility for the Palm Business, Respondent may use Confidential Business Information as needed:
 - a. to comply with the requirements of this Order or the Decision and Order;
 - b. to comply with Respondent's obligations to the Acquirer under the Divestiture Agreement(s);
 - c. to comply with applicable law; or
 - d. to enforce the terms of any Divestiture Agreement or defend against any dispute or legal proceeding,

Order to Maintain Assets

provided, that Confidential Business Information may be disclosed to Third Parties only as necessary for the purposes authorized by this Paragraph pursuant to an appropriate confidentiality order, agreement or arrangement with the Acquirer (but Respondent shall not be deemed to have violated this requirement if the Acquirer withholds such agreement unreasonably); and Respondent shall use its best efforts to obtain a protective order to protect the confidentiality of such Confidential Business Information during any adjudication;

provided, further, that Respondent may continue to use Confidential Business Information included in the divestiture Business License(s) to the extent such information was previously used by Respondent in connection with assets other than those being transferred to Acquirer pursuant to this Order and/or the Divestiture Agreement.

- H. On or before the Divestiture Closing Date, Respondent shall provide written notification of the restrictions on the use of the Confidential Business Information contained in the Order to all employees who were involved in the Divestiture Business.

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

- A. At any time after Respondent signs the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order to Maintain Assets and the Decision and Order.

Order to Maintain Assets

- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of the proposed Interim Monitor, Respondent shall be deemed to have consented to the selection of the Interim Monitor.
- C. Not later than ten (10) days after the appointment of an Interim Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers on the substitute Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondent's compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.
- D. Respondent shall facilitate the ability of the Interim Monitor(s) to comply with the duties and obligations set forth in this Order to Maintain Assets, and shall take no action that interferes with or hinders the Interim Monitor's authority, rights, or responsibilities as set forth herein or any agreement between the Interim Monitor(s) and Respondent.
- E. The Interim Monitor's duties and responsibilities shall include the following:
1. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 2. the Interim Monitor shall have the power and authority to monitor Respondent's compliance with this Order to Maintain Assets and shall exercise

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such power and authority and carry out his or her duties and responsibilities in a manner consistent with the purposes of this Order to Maintain Assets and in consultation with the Commission;

3. the Interim Monitor may, in his or her sole discretion, consult with third parties in the exercise of his or her duties under this Order to Maintain Assets or under any agreement between the Interim Monitor and Respondent; and
 4. the Interim Monitor shall evaluate the reports submitted by Respondent pursuant to this Order to Maintain Assets, and within thirty (30) days from the date the Interim Monitor receives these reports, report in writing to the Commission concerning performance by Respondent of his or her obligations under the Order.
- F. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- G. The Interim Monitor shall serve until termination of this Order to Maintain Assets.
- H. If the Commission determines that an Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor pursuant to the procedures contained in this Paragraph.
- I. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional

Order to Maintain Assets

orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

- J. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as an Interim Monitor or Divestiture Trustee(s) pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every thirty (30) days thereafter until Respondent has fully complied with its obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets as required by the Decision and 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 to Maintain Assets and the related Decision and Order; provided, however, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent pursuant to the Decision and Order.

V.

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

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or

Order to Maintain Assets

- C. any other change in Respondent, including without limitation, assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VI.

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

- A. Access, during business 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, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and
- B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

VII.

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

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the

Analysis to Aid Public Comment

provisions of Commission Rule 2.34, 16 C.F.R. § 2.34;
or

- B. The later of:
1. The day after all Divestiture Assets have been divested and all Divestiture Licenses have been conveyed, as required by and described in the Decision and Order, or
 2. The day the Decision and Order becomes final.

By the Commission.

**ANALYSIS OF THE 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 Orders (“Consent Agreement”) from Service Corporation International (“SCI”) that will completely remedy the anticompetitive effects that would likely result from SCI’s proposed acquisition of Palm Mortuary, Inc. (“Palm”). Under the terms of the proposed Consent Agreement, SCI is required to divest a cemetery, Davis Memorial Park, an associated funeral home in the Las Vegas, Nevada, metropolitan area, rights to the Davis trade name, and the pre-need service contracts relating to both the associated Davis Funeral Home and a second Davis Funeral Home owned by SCI in the Las Vegas area. The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make it final.

Analysis to Aid Public Comment

SCI, doing business as Alderwoods (Nevada) Inc., and Palm entered into an agreement for SCI to acquire 100 percent of Palm's outstanding voting securities on August 5, 2009. The Commission's Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45, as amended, by lessening competition in the provision and sale of cemetery services in the Las Vegas, Nevada, metropolitan area.

II. The Parties

SCI is a public corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1929 Allen Parkway, Houston, Texas 77019. SCI currently is the third largest provider of funeral home and cemetery services in the Las Vegas metropolitan area, where SCI operates two funeral homes and one funeral home and cemetery combination facility.

Palm is a privately-held corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its office and principal place of business located at 1325 N. Main Street, Las Vegas, Nevada 89101. In the Las Vegas metropolitan area, Palm operates five funeral home and cemetery combination facilities, three standalone funeral homes, and one mausoleum, making it the largest provider in the area of both funeral home and cemetery services.

III. The Complaint

According to the Commission's proposed Complaint, the relevant product market in which SCI and Palm compete is the provision and sale of cemetery services in the Las Vegas, Nevada, metropolitan area. Cemetery services include the traditional products and services offered by perpetual care cemeteries,

Analysis to Aid Public Comment

including burial spaces, opening and closing of graves, memorials and burial vaults, mausoleum spaces, cemetery maintenance and upkeep, and advance disposition planning.

Concentration in the market for cemetery services in the Las Vegas area is very high, and the proposed acquisition would further increase concentration levels. Post-acquisition, the combined entity will have a 76 percent share in the cemetery services market.¹ Post-acquisition, the Herfindahl-Hirschman Index (“HHI”) for cemetery services will be 6261, and the acquisition will increase HHI levels by 1876.

According to the Commission’s proposed Complaint, entry into the cemetery services market is unlikely to be timely, likely, or sufficient to prevent anticompetitive effects in the Las Vegas area. Entry would be difficult because of the limited availability of geographically-desirable land, zoning regulations and other statutory restrictions, and high sunk costs. An entrant would also need to build a customer base in the face of competition from well-established cemeteries that are not capacity constrained and have long-standing reputations and heritage traditions in the community.

Finally, the proposed Complaint alleges that the proposed Acquisition will eliminate significant competition between SCI and Palm in the highly concentrated cemetery services market and increase the likelihood that SCI would be able to unilaterally raise prices or exercise market power through coordinated interaction among competitors.

IV. The Consent Agreement

The proposed Consent Agreement would preserve competition completely in the relevant market alleged in the Complaint by

¹ In calculating market shares, the Commission relied on the number of “calls” (funerals or interments) of each competitor rather than dollar revenues.

Analysis to Aid Public Comment

requiring that SCI divest to a Commission-approved acquirer the Davis combination cemetery/funeral home facility, rights to the Davis trade name, and all the pre-need service contracts associated with the Davis combination facility and with a second Davis funeral home in the Las Vegas metropolitan area (collectively the “Divestiture Business”). Divestiture of the pre-need service contracts associated with a second Davis funeral home in the Las Vegas area is to help ensure the competitiveness and viability of the Divestiture Business.

The proposed Consent Agreement requires that the divestiture occur no later than ninety (90) days after SCI consummates its acquisition of Palm. If SCI divests the assets during the public comment period, and if, at the time the Commission decides to make the Order final, the Commission notifies SCI that either the purchaser is not an acceptable acquirer or that the asset purchase agreement is not an acceptable manner of divestiture, then SCI must immediately rescind the transaction in question and divest those assets within six (6) months of the date the Order becomes final to an acquirer and in a manner that receives the prior approval of the Commission.

The Consent Agreement further requires SCI to maintain the economic viability, marketability, and competitiveness of the Divestiture Business until the potential acquirer is approved by the Commission and the divestiture is complete. For six (6) months following the divestiture, SCI is required to provide transitional services, as needed, to assist the acquirer of the Divestiture Business.

The proposed Consent Agreement also allows the Commission to appoint an interim monitor to ensure SCI's compliance with the Order to Maintain Assets and a trustee to divest any divestiture assets that SCI fails to timely divest. The Commission also may seek civil penalties from SCI for non-compliance with the Consent Agreement.

Analysis to Aid Public Comment

The proposed Consent Agreement prohibits SCI from acquiring any interest or assets engaged in the provision of cemetery services in the Las Vegas metropolitan area for ten (10) years without providing prior written notice to the Commission. In addition, SCI is required to file periodic reports of compliance with the proposed orders.

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 Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF

**WATSON PHARMACEUTICALS, INC.
AND
ROBIN HOOD HOLDINGS, LTD.**

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

*Docket No. C-4276; File No. 091 0116
Filed, December 1, 2009 — Decision, January 7, 2010*

This consent order addresses the \$1.75 billion acquisition by Watson Pharmaceuticals, Inc., of Robin Hood Holdings. The complaint alleges that the acquisition would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act by lessening competition in the U.S. markets for the manufacture and sale of generic cabergoline tablets and generic dronabinol capsules. The Consent Agreement requires Watson to divest its rights and assets in generic cabergoline to Impax Laboratories, Inc., and requires Arrow to spin-off its wholly owned subsidiary, Resolution Chemicals Ltd., which is currently developing generic dronabinol capsules, to a new entity to be owned in part by Resolution's current management. The Consent Agreement also requires Arrow to sell the U.S. generic dronabinol marketing rights to Impax.

Participants

For the *Commission*: *Stephanie C. Bovee, David A. Garcia
Jennifer Lee, and Anne Schenof.*

For the *Respondents*: *Maria Raptis and Steven C. Sunshine,
Skadden, Arps, Slate, Meagher & Flom LLP; and Daniel Hemli
and David A. Schwartz, Wachtell, Lipton, Rosen & Katz.*

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

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Respondent Watson Pharmaceuticals, Inc. (“Watson”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Robin Hood Holdings Limited d/b/a Arrow Group (“Arrow”), a limited liability company subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the 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. “Commission” means the Federal Trade Commission.
2. “FDA” means the United States Food and Drug Administration.
3. “Respondent(s)” means Watson and Arrow, individually and collectively.
4. “ANDA” means “Abbreviated New Drug Application” filed with the FDA for approval of a U.S. generic drug.

II. RESPONDENTS

5. Respondent Watson is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its head office and principal place of business located at 311 Bonnie Circle, Corona, California 92880. Watson is engaged in the research, development, manufacture, and sale of generic pharmaceutical products.

6. Respondent Arrow is a private limited liability company organized, existing, and doing business under and by virtue of the laws of Malta, with its head office located at 57 St. Christopher Street, Valletta, Malta. Cobalt Laboratories, Inc. (“Cobalt”) is a wholly-owned subsidiary of Arrow, with its principal place of

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business at 24840 S. Tamiami Trl., Suite 1, Bonita Springs, Florida 34134. Arrow is engaged in the research, development, manufacture, and sale of generic pharmaceutical products.

7. 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 companies 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

8. On June 16, 2009, Watson and Arrow entered into a Share Purchase Agreement (the “Acquisition Agreement”) whereby Watson proposes to acquire all of the outstanding shares of Arrow for approximately \$1.75 billion (the “Acquisition”).

IV. THE RELEVANT MARKETS

9. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the manufacture and sale of the following generic pharmaceutical products:

- a. cabergoline tablets; and
- b. dronabinol capsules.

10. 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 MARKETS

11. Cabergoline tablets are used to treat Parkinson’s disease and hyperprolactinemic disorders (presence of abnormally high

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levels of the hormone prolactin in the blood). The patent for the branded version of the drug expired in December 2005. In the U.S. there are only three suppliers of generic cabergoline tablets: Cobalt, Par and Teva. Watson is the only actual potential entrant.

12. Dronabinol capsules are used to treat nausea in chemotherapy patients and loss of appetite and weight loss in HIV patients. Currently the only suppliers of generic dronabinol capsules are Watson and Par Pharmaceutical Companies, Inc. Arrow is one of a limited number of companies capable of entering this generic market in a timely manner and is uniquely positioned to make a significant market impact.

VI. ENTRY CONDITIONS

13. Entry into the relevant product markets described in Paragraph 9 would not be timely, likely, or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. Entry would not take place in a timely manner because the combination of generic drug development times and FDA drug approval requirements take at least two years. Entry would not be likely because the relevant markets are relatively small, limiting sales opportunities for any potential new entrant.

VII. EFFECTS OF THE ACQUISITION

14. The effects of the Acquisition, if consummated, may be to substantially lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by eliminating potential competition between Watson and Arrow in the markets for the manufacture and sale of generic cabergoline tablets and dronabinol capsules, thereby: (1) increasing the likelihood that the combined entity would forego or delay the launch of Watson's generic cabergoline tablets and Arrow's generic dronabinol capsules; and (2) increasing the likelihood that the combined entity would delay or

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eliminate the substantial additional price competition that would have resulted from Watson's independent entry into the generic cabergoline tablet market and Arrow's independent entry into the generic dronabinol capsule market.

VII. VIOLATIONS CHARGED

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

16. The Acquisition described in Paragraph 5, 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 first day of December, 2009, issues its Complaint against said Respondents.

By the Commission, Commissioner Harbour recused.

DECISION AND ORDER [Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Watson Pharmaceuticals, Inc. ("Watson"), of Respondent Robin Hood Holdings Limited d/b/a Arrow Group ("Arrow"), and Respondents having been furnished thereafter with

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a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Watson is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its headquarters address at 311 Bonnie Circle, Corona, California 92880.

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2. Respondent Arrow is a private limited liability company organized, existing and doing business under and by virtue of the laws of Malta, with its headquarters address at 57 St. Christopher Street, Valletta, Malta. Cobalt Laboratories Inc. is a wholly-owned subsidiary of Respondent Arrow, with its principal place of business at 24870 S. Tamiami Trl., Suite 1, Bonita Springs, FL 34134.
3. The 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 the Order, the following definitions shall apply:

- A. "Watson" means Watson Pharmaceuticals, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Watson (including, but not limited to, Watson Laboratories, Inc.), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition, Watson shall include Arrow.
- B. "Arrow" means Robin Hood Holdings Limited d/b/a Arrow Group, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Arrow (including, but not limited to, Resolution Chemicals Limited, Cobalt Laboratories Inc., and Cobalt Pharmaceuticals

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Inc.), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

- C. “Respondent(s)” means Watson and Arrow, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer(s)” means the following:
 - 1. Impax;
 - 2. Reso; or
 - 3. a Person approved by the Commission to acquire particular assets or rights that Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- F. “Acquisition” means the acquisition of shares of Arrow by Watson as contemplated by the Share Purchase Agreement (“Share Purchase Agreement”), dated as of June 16, 2009, by and among Watson Laboratories, Inc., a wholly-owned subsidiary of Watson, Robin Hood Holdings Limited, the shareholders of Robin Hood Holdings Limited, and Anthony Selwyn Tabatznik, an individual solely with respect to Section 6.15 and related provisions of the Share Purchase Agreement, and all attachments, amendments, exhibits, and schedules related thereto.
- G. “Acquisition Date” means the date on which the Acquisition occurs pursuant to the Share Purchase Agreement.
- H. “Agency(ies)” means any government regulatory

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authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term “Agency” includes, without limitation, the United States Food and Drug Administration (“FDA”), and the United States Drug Enforcement Agency (“DEA”).

- I. “ANDA” means abbreviated new drug application for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between a Respondent and the FDA related thereto.
- J. “API” means active pharmaceutical ingredient.
- K. “Barr-Watson Agreement” means the Asset Purchase Agreement between Barr Laboratories, Inc., and Watson Laboratories, Inc., dated November 24, 2008.
- L. “Cabergoline API Agreement” means the agreement, dated August 7, 2003, by and among Teva Pharmaceutical Industries Ltd., Chemicals Works of Gedeon Richter Ltd., and Gedeon Richter USA, Inc., as subsequently assigned to Barr Laboratories, Inc., and thereafter to Watson Laboratories, Inc., pursuant to the Barr-Watson Agreement.
- M. “Cabergoline Assets” means all of Respondent Watson’s rights, title and interest in and to, the following assets:
 - 1. ANDA No. 77-843, and any supplements, amendments, or revisions thereto;

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2. Product Scientific and Regulatory Material related to the Cabergoline Product;
 3. Cabergoline API Agreement; and
 4. any other assets relating to the Cabergoline Product divested by Barr Laboratories, Inc. to Watson in the Barr-Watson Agreement.
- N. “Cabergoline Divestiture Agreement” means:
1. the Asset Purchase Agreement between Watson Laboratories, Inc., and Impax Laboratories, Inc., dated November 4, 2009, and any attachments, amendments, exhibits, and schedules related thereto. This Asset Purchase Agreement is attached to this Order and contained in non-public Appendix I; or
 2. any agreement that receives the prior approval of the Commission between Respondents and an Acquirer for the divestiture of the Cabergoline Assets entered into pursuant to Paragraph II.A (or Paragraph V) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.
- O. “Cabergoline Product” means all Products that contain the active pharmaceutical ingredient generically known as cabergoline in Development, manufactured, marketed or sold by Respondent Watson pursuant to ANDA No. 77-843, and any supplements, amendments, or revisions thereto.
- P. “cGMP” means current Good Manufacturing Practice as set forth in the United States Federal, Food, Drug, and Cosmetic Act, as amended, and includes all rules

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and regulations promulgated by the FDA thereunder.

- Q. “Closing Date” means the date on which the Respondents (or a Divestiture Trustee) consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets or rights related to a Divestiture Product to an Acquirer pursuant to this Order.
- R. “Confidential Business Information” means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Divestiture Product(s);

provided however, that the restrictions contained in this Order regarding the Respondents’ use, conveyance, provision, or disclosure of “Confidential Business Information” shall not apply to the following:

1. information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by Respondent(s);
2. information related to the Cabergoline Product that were researched, Developed, manufactured, marketed, or sold by Respondent Watson that Respondent Arrow can demonstrate it obtained without the assistance of Respondent Watson prior to the Acquisition;
3. information related to the Dronabinol Product that were researched, Developed, manufactured,

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- marketed, or sold by Respondent Arrow that Respondent Watson can demonstrate it obtained without the assistance of Respondent Arrow prior to the Acquisition;
4. information that is required by law to be publicly disclosed;
 5. information that does not directly relate to the Divestiture Product(s);
 6. information relating to either Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of Products that does not discuss with particularity the Divestiture Product(s); or
 7. information specifically excluded from the assets to be divested.
- S. "Development" means all preclinical and clinical drug development activities, including formulation, test method development and stability testing, toxicology, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting clinical trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing.
- T. "Direct Cost" means a cost not to exceed the cost of labor, material, travel and other expenditures to the

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extent the costs are directly incurred to provide the relevant assistance or service.

- U. “Divestiture Product(s)” means the Cabergoline Product and/or the Dronabinol Product.
- V. “Divestiture Trustee” means any trustee appointed by the Commission pursuant to Paragraph V of this Order.
- W. “Dronabinol ANDA Assets” means all of Respondent Arrow’s rights, title and interest in and to, the following assets:
 - 1. ANDA No. 77-740, and any supplements, amendments, or revisions thereto; and
 - 2. Product Scientific and Regulatory Material related to the Dronabinol Product.
- X. “Dronabinol ANDA Divestiture Agreement” means:
 - 1. the Asset Purchase Agreement between Cobalt Pharmaceuticals Inc., and Impax Laboratories, Inc., dated November 4, 2009, and any attachments, amendments, exhibits, and schedules related thereto. The Dronabinol ANDA Agreement is attached to this Order and contained in non-public Appendix II; or
 - 2. any agreement that receives the prior approval of the Commission between Respondents and an Acquirer for the divestiture of the Dronabinol ANDA Assets entered into pursuant to Paragraph III.A (or Paragraph V) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.

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- Y. “Dronabinol Development and API Business” means all of Respondent Arrow’s rights, title and interest in and to, the following:
1. Product Intellectual Property related to the Dronabinol Product;
 2. Product Manufacturing Technology related to the Dronabinol Product; and
 3. the business related to the research, Development, manufacture and supply of the Dronabinol Product API.
- Z. “Dronabinol Product” means all Products that contain the active pharmaceutical ingredient generically known as tetrahydrocannabinol or “THC” in Development, manufactured, marketed or sold by Respondent Arrow pursuant to ANDA No. 77-740, and any supplements, amendments, or revisions thereto.
- AA. “Geographic Territory” shall mean the United States of America, including all its territories and possessions, unless otherwise specified.
- BB. “Impax” means Impax Laboratories, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 30831 Huntwood Avenue, Hayward, CA 94544.
- CC. “Interim Monitor” means any monitor appointed pursuant to Paragraph IV of this Order.
- DD. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders in this

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matter.

- EE. “Ownership Interest” means any and all rights, present or contingent, to hold any voting or nonvoting stock, share capital, equity or other interests, or beneficial ownership in a Person.
- FF. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Closing Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related to any Product of or owned by Respondent as of the Closing Date.
- GG. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.
- HH. “Product” means any pharmaceutical, biological, or generic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient.
- II. “Product Intellectual Property” means all of the following related to a Divestiture Product:
 - 1. Patents;

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2. Product Trademarks, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; and
3. rights to obtain and file for patents and copyrights and registrations thereof;

provided, however, “Product Intellectual Property” does not include the corporate names or corporate trade dress of “Watson” or “Arrow,” or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondents or the related logos thereof.

- JJ. “Product Manufacturing Technology” means all manufacturing technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of the Divestiture Product(s) including, but not limited to, the following: all product specifications, processes, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA applications conformance and cGMP compliance, and labeling and all other information related to the manufacturing process, supplier lists, and other master documents necessary for the manufacture, control and release of the Product that are owned or controlled by Respondent(s) or which Respondent(s) have the right to receive.
- KK. “Product Scientific and Regulatory Material” means all

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technological, scientific, chemical, biological, pharmacological, toxicological, regulatory, and clinical trial materials and information related to the Divestiture Product(s) that are owned and controlled by Respondent(s) or which Respondent(s) have a right to receive including, but not limited to:

1. pharmacokinetic study reports related to the specified Divestiture Product(s);
2. bioavailability study reports (including reference listed drug information) related to the specified Divestiture Product(s);
3. bioequivalence study reports (including reference listed drug information) related to the specified Divestiture Product(s);
4. all correspondence to the Respondent(s) from the FDA and from the Respondent(s) to the FDA relating to the ANDA submitted by, on behalf of, or acquired by, the Respondent(s) related to the specified Divestiture Product;
5. annual and periodic reports related to the above-described ANDA, including any safety update reports;
6. FDA approved Product labeling related to the specified Divestiture Product(s);
7. currently used product package inserts (including historical change of controls summaries) related to the specified Divestiture Product(s);
8. FDA approved patient circulars and information related to the specified Divestiture Product(s);

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9. adverse events/serious adverse event summaries related to the specified Divestiture Product(s);
 10. summary of Product complaints from physicians related to the specified Divestiture Product(s);
 11. summary of Product complaints from customers related to the specified Divestiture Product(s); and
 12. Product recall reports filed with the FDA related to the specified Divestiture Product(s).
- LL. “Product Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Divestiture Product(s).
- MM. “Reso” means Reso Holdings Limited, a limited company organized, existing, and doing business under and by virtue of the laws the United Kingdom, with its headquarters address at Wedgwood Way, Stevenage, Hertfordshire SG1 4QT, United Kingdom.
- NN. “Resolution” means Resolution Chemicals Limited, a limited company, organized, existing, and doing business under and by virtue of the laws of the United Kingdom, with its headquarters address at Wedgwood Way, Stevenage, Hertfordshire SG1 4QT, United Kingdom. “Resolution” includes, among other things, the Dronabinol Development and API Business.
- OO. “Resolution Divestiture Agreement” means:
1. the Purchase Agreement between Arrow Group

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ApS and Reso Holdings Limited, dated November 3, 2009, and any attachments, amendments, exhibits, and schedules related thereto. The Dronabinol Business Agreement is attached to this Order and contained in non-public Appendix III; or

2. any agreement that receives the prior approval of the Commission between Respondents and an Acquirer for the divestiture of Resolution entered into pursuant to Paragraph III.B (or Paragraph V) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.

PP. "Remedial Agreements" means:

1. any agreement between Respondent(s) and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final; and/or
2. any agreement between Respondent(s) and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish

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the requirements of the Order.

- QQ. “Retained Product(s)” means any Product(s) owned by Respondent(s) that are not the Divestiture Products.
- RR. “Teva” means Teva Pharmaceutical Industries Limited, a corporation organized, existing, and doing business under and by virtue of the laws of the Israel, with its headquarters address at 5 Basel Street, P.O. Box 3190, Petach Tikva 49131 Israel. “Teva” includes wholly-owned subsidiary Barr Pharmaceuticals., Inc. (“Barr”), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 400 Chestnut Ridge Road, Woodcliff Lake, New Jersey 07677.
- SS. “Third Party(ies)” means any non-governmental Person other than the following: Respondent Watson, Respondent Arrow, or the Acquirer of the affected assets, rights and Divestiture Product(s).

II.

IT IS FURTHER ORDERED that:

- A. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Cabergoline Assets, absolutely and in good faith, to Impax pursuant to, and in accordance with, the Cabergoline Divestiture Agreement (which agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Impax or to reduce any obligations of Respondents under such agreement), and such agreement, if it becomes a Remedial Agreement related to the Cabergoline Assets is incorporated by reference into

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this Order and made a part hereof;

provided, however, that if Respondents have divested the Cabergoline Assets to Impax prior to the date the Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Impax is not an acceptable purchaser of the Cabergoline Assets, then Respondents shall immediately rescind the transaction with Impax, in whole or in part, as directed by the Commission, and shall divest the Cabergoline Assets within one hundred eighty (180) days from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, however, that if Respondents have divested the Cabergoline Assets to Impax prior to the date the Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Cabergoline Assets to Impax (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Respondents shall:
1. exercise the option to extend the period of time in which to obtain the commercially reasonable assistance of Barr and/or Teva in understanding the

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Cabergoline Assets pursuant to Section 7.7 of the Barr-Watson Agreement; and

2. at the option of the Acquirer of the Cabergoline Assets, and upon reasonable notice and request, use commercially reasonable efforts to further extend the period of time in which such Acquirer has a right to obtain the commercially reasonable assistance of Barr and/or Teva in understanding and transferring the Cabergoline Assets to the Acquirer pursuant to the Barr-Watson Agreement by an additional period of no more than nine (9) months; *provided, however*, that Respondents shall not be deemed in violation of this provision if, after Respondents' good faith commercially reasonable efforts, Barr and/or Teva refuses to extend such period of time.
- C. At the option of the Acquirer of the Cabergoline Assets, and upon reasonable notice and request, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist the Acquirer in the transfer of the Product Scientific and Regulatory Materials related to the Cabergoline Product in order to obtain the necessary approvals for the manufacture and sale of the Cabergoline Product in the Geographic Territory.
- D. Respondents shall:
1. submit to the Acquirer of the Cabergoline Assets, at Respondents' expense, all Confidential Business Information related to the Cabergoline Assets;
 2. deliver such Confidential Business Information to such Acquirer:

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- a. in good faith;
 - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
 - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Interim Monitor (if one is appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Cabergoline Assets that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;
 4. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Cabergoline Product other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondents' obligations to the Acquirer of the Cabergoline Assets under the terms of any Remedial Agreement related to the Cabergoline Assets; or
 - c. applicable law;
 5. not disclose or convey any such Confidential

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Business Information, directly or indirectly, to any Person except the Acquirer of the Cabergoline Assets or other Persons specifically authorized by such Acquirer to receive such information; and

6. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the Development, manufacture, marketing or sales of the Cabergoline Assets to the employees associated with business related to those Retained Products that:
 - a. contain the same active pharmaceutical ingredient; or
 - b. are approved, or in Development for use, in the same field as the Cabergoline Product.
- E. Respondents shall not enforce any agreement against a Third Party or an Acquirer of the Cabergoline Assets to the extent that such agreement may limit or otherwise impair the ability of such Acquirer to acquire or use the Product Manufacturing Technology (including all related intellectual property) related to the Cabergoline Product acquired by such Acquirer from the Third Party. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology.
- F. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to an agreement as described in Paragraph II.E that allows the Third Party to provide the relevant Product Manufacturing Technology to the relevant Acquirer of the Cabergoline Assets. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to such

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Acquirer.

- G. Not later than thirty (30) days after the Closing Date, Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Cabergoline Assets by Respondents' personnel to all of Respondents' employees who:
1. are or were directly involved in the research, Development, manufacturing, distribution, sale or marketing of the Cabergoline Product;
 2. are directly involved in the research, Development, manufacturing, distribution, sale or marketing of Retained Products that contain the same active pharmaceutical ingredient or that are approved for use, or in Development for use, in the same field as the Cabergoline Product; and/or
 3. may have Confidential Business Information related to the Cabergoline Product.
 - a. Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for three (3) year after the Closing Date. Respondents shall provide a copy of such notification to the Acquirer. Respondents shall maintain complete records of all such agreements at Respondents' registered office within the United States of America and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Acquirer with copies of all certifications,

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notifications and reminders sent to Respondents' personnel.

- H. Until Respondents complete the divestiture required by Paragraph II,
1. Respondents shall take such actions as are necessary to:
 - a. maintain the full economic viability and marketability of the businesses associated with the Cabergoline Product;
 - b. minimize any risk of loss of competitive potential for such business;
 - c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Cabergoline Product;
 - d. ensure the assets required to be divested are transferred and delivered to each Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the business associated with the Cabergoline Product; and
 2. Respondents shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the businesses associated with the Cabergoline Product.
- I. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer for the research, Development, manufacture, use, import,

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export, distribution, or sale of the Cabergoline Product under Patents that:

1. are owned or licensed by Respondents as of the day after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter, relating to the Cabergoline Products, or that claims a device relating to the use thereof;
 2. are owned or licensed at any time after the Acquisition Date by Respondents that claim any aspect of research, Development, manufacture, use, import, export, distribution, or sale of the Cabergoline Products, other than such patents that claim inventions conceived by and reduced to practice after the Acquisition Date;
 - a. if such suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Cabergoline Product; or (2) the use, import, export, supply, distribution, or sale of the Cabergoline Product within the Geographic Territory.
- J. Respondents shall also covenant to the Acquirer that as a condition of any assignment, transfer, or license to a Third Party of the Patents described in Paragraph II.I, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue the Acquirer under such patents, if the suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Cabergoline Product; or (2) the use, import, export, supply, distribution, or sale of the

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Cabergoline Product within the Geographic Territory.

- K. Upon reasonable written notice and request from the Acquirer of the Cabergoline Assets to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property related to the Cabergoline Product, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Cabergoline Product; or (2) the use, import, export, supply, distribution, or sale of the Cabergoline Product within the Geographic Territory.
- L. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to the Cabergoline Product a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.
- M. The purpose of the divestiture of the Cabergoline Assets and the related obligations imposed on the Respondents by this Order is:
1. to ensure the continued use of such assets in the research, Development, manufacture, distribution, sale and marketing of the Cabergoline Product within the Geographic Territory;
 2. to create a viable and effective competitor in the relevant market alleged in the Complaint who is independent of the Respondents; and

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3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

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

- A. Not later than ten (10) days after the Acquisition Date, Respondents shall divest the Dronabinol ANDA Assets, absolutely and in good faith, to Impax pursuant to, and in accordance with, the Dronabinol ANDA Agreement (which agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Impax or to reduce any obligations of Respondents under such agreement), and such agreement, if it becomes a Remedial Agreement related to the Dronabinol ANDA Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Dronabinol ANDA Assets to Impax prior to the date the Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Impax is not an acceptable purchaser of the Dronabinol ANDA Assets, then Respondents shall immediately rescind the transaction with Impax, in whole or in part, as directed by the Commission, and shall divest the Dronabinol ANDA Assets within one hundred eighty (180) days from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and

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only in a manner that receives the prior approval of the Commission;

provided further, however, that if Respondents have divested the Dronabinol ANDA Assets to Impax prior to the date the Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Dronabinol ANDA Assets to Impax (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Not later than ten (10) days after the Acquisition Date, Respondents shall divest Arrow's Ownership Interest in Resolution, absolutely and in good faith, to Reso pursuant to, and in accordance with, the Resolution Divestiture Agreement (which agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Reso or to reduce any obligations of Respondents under such agreement), and such agreement, if it becomes a Remedial Agreement related to Resolution is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Ownership Interest in Resolution to Reso prior to the date the Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Reso is not an acceptable purchaser of Ownership Interest in Resolution, then Respondents shall immediately

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rescind the transaction with Reso, in whole or in part, as directed by the Commission, and shall divest the Ownership Interest in Resolution within one hundred eighty (180) days from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further, however, that if Respondents have divested the Ownership Interest in Resolution to Reso prior to the date the Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Ownership Interest in Resolution to Reso (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- C. At an Acquirer's option, and upon reasonable notice and request, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist that Acquirer in the identification and transfer of, in the case of Reso, the Product Manufacturing Technology related to the Dronabinol Product, and in the case of Impax, the Product Scientific and Regulatory Materials related to the Dronabinol Product.
- D. Respondents shall:
 - 1. submit to the Acquirer of the Dronabinol ANDA

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Assets, at Respondents' expense, all Confidential Business Information related to the Dronabinol ANDA Assets, other than Confidential Business Information otherwise owned by Resolution;

2. deliver such Confidential Business Information to such Acquirer:
 - a. in good faith;
 - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
 - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
3. pending complete delivery of all such Confidential Business Information to the Acquirer of the Dronabinol ANDA Assets, provide such Acquirer and the Interim Monitor (if one is appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Dronabinol ANDA Assets that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;
4. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Dronabinol Product other than as necessary to comply with the following:
 - a. the requirements of this Order;

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- b. Respondents' obligations to the Acquirer of the Dronabinol ANDA Assets under the terms of any Remedial Agreement related to the Dronabinol ANDA Assets; or
 - c. applicable law;
 - 5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer of the Dronabinol ANDA Assets or other Persons specifically authorized by such Acquirer to receive such information; and
 - 6. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the Development, manufacture, marketing or sales of the Dronabinol Product to the employees associated with business related to those Retained Products that:
 - a. contain the same active pharmaceutical ingredient;
 - b. are approved, or in Development for use, in the same field as the Dronabinol Product;
 - c. are approved, or in Development for use, in the same field as the Dronabinol Product.
- E. Not later than thirty (30) days after the Closing Date, Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Dronabinol Product by Respondents' personnel to all of Respondents' employees who:

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1. are or were directly involved in the research, Development, manufacturing, distribution, sale or marketing of any Dronabinol Product;
2. are directly involved in the research, Development, manufacturing, distribution, sale or marketing of Retained Products that contain the same active pharmaceutical ingredient or that are approved for use, or in Development for use, in the same field as the Dronabinol Product; and/or
3. may have Confidential Business Information related to the Dronabinol Product.

Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Acquirer. Respondents shall maintain complete records of all such agreements at Respondents' registered office within the United States of America and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

- F. Until Respondents complete the divestitures required by Paragraph III,
1. Respondents shall take such actions as are necessary to:
 - a. maintain the full economic viability and marketability of the businesses associated with the Dronabinol Product including Resolution;

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- b. minimize any risk of loss of competitive potential for such business;
 - c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to the Dronabinol Product including Resolution;
 - d. ensure the assets required to be divested are transferred and delivered to each Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the business associated with the Dronabinol Product; and
2. Respondents shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the businesses associated with the Dronabinol Product including Resolution.
- G. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer(s) for the research, Development, manufacture, use, import, export, distribution, or sale of the Dronabinol Product under Patents that:
1. are owned or licensed by Respondents as of the day after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter, relating to the Dronabinol Product, or that claims a device relating to the use thereof;
 2. are owned or licensed at any time after the

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Acquisition Date by Respondents that claim any aspect of research, Development, manufacture, use, import, export, distribution, or sale of the Dronabinol Product, other than such patents that claim inventions conceived by and reduced to practice after the Acquisition Date;

- a. if such suit would have the potential to interfere with either Acquirers' freedom to practice the following: (1) the research, Development, or manufacture of the Dronabinol Product; or (2) the use, import, export, supply, distribution, or sale of the Dronabinol Product within the Geographic Territory.
- H. Respondents shall also covenant to the Acquirer(s) that as a condition of any assignment, transfer, or license to a Third Party of the Patents described at Paragraph III.G, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue the Acquirer(s) under such patents, if the suit would have the potential to interfere with the Acquirer(s) freedom to practice the following: (1) the research, Development, or manufacture of the Dronabinol Product; or (2) the use, import, export, supply, distribution, or sale of the Dronabinol Product within the Geographic Territory.
- I. Upon reasonable written notice and request from the Acquirer(s) of the Dronabinol ANDA Assets or Resolution to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist the Acquirer(s) to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property related to the Dronabinol Product, if such litigation

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would have the potential to interfere with the Acquirer(s) freedom to practice the following: (1) the research, Development, or manufacture of the Dronabinol Product; or (2) the use, import, export, supply, distribution, or sale of the Dronabinol Product within the Geographic Territory.

- J. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to the Dronabinol Product a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.
- K. The purpose of the divestiture of the Dronabinol ANDA Assets, Resolution, and the related obligations imposed on the Respondents by this Order is:
1. to ensure the continued use of such assets in the research, Development, manufacture, distribution, sale and marketing of the Dronabinol Product within the Geographic Territory;
 2. to create a viable and effective competitor in the relevant market alleged in the Complaint who is independent of the Respondents; and
 3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

IV.

IT IS FURTHER ORDERED that:

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- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets (collectively, “Order”), and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents’ compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.
- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authority, and responsibilities of the Interim Monitor:
 - 1. The Interim Monitor shall have the power and authority to monitor Respondents’ compliance with: the divestiture and asset maintenance obligations of the Orders; the restrictions on the use, conveyance, provision, or disclosure of the

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identified confidential business information under the Orders; and, the related requirements of the Orders. The Interim Monitor shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Interim Monitor shall serve until the date Respondents complete the divestiture of the Divestiture Products in a manner that fully satisfies the requirements of this Order and until the earliest of:
 - a. With respect to each Divestiture Product, the date the Acquirer(s) are approved by the FDA to manufacture such Divestiture Product and able to manufacture such Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents;
 - b. With respect to each Divestiture Product, the date the Acquirer(s) notifies the Commission and Respondents of its intention to abandon its efforts to manufacture such Divestiture Product; or
 - c. With respect to each Divestiture Product, the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer(s) have abandoned their efforts to manufacture such Divestiture Product;

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provided, however, that, with respect to each Divestiture Product, the Interim Monitor's service shall not exceed three (3) years from the date the Order becomes final;

provided further, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with all reasonable requests of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.
5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

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6. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
7. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by an Acquirer with respect to the performance of Respondents' obligations under the Orders or any Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of its obligations under the Orders; *provided, however*, beginning one hundred twenty (120) days after Respondents have filed its final report pursuant to Paragraph VIII.B, and every one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer(s) toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a

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manner consistent with cGMP, independently of Respondents.

8. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- H. The Interim Monitor appointed pursuant to this Order may be the same person appointed as a Divestiture Trustee pursuant to Paragraph V of this Order.

V.

IT IS FURTHER ORDERED that:

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

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- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however,* that the Commission may extend the divestiture period only two (2) times.
 3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books,

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records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, that if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.

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

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7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to Paragraph IV of this Order and the relevant provisions of the Order to Maintain Assets in this matter.
 8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

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VI.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, Respondents shall assure that Respondents' counsel (including in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

- A. To assure Respondents' compliance with this Order, the Order to Maintain Assets, any Remedial Agreement, any law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or
- B. To defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Divestiture Products or assets and businesses associated with those Divestiture Products;

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

provided further, however, that pursuant to this Paragraph VI, Respondents shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the relevant Acquirer (but shall not be deemed to have

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violated this requirement if such Acquirer withholds such agreement unreasonably); and (2) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

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

- A. Any failure by a Respondent to comply with any term of any Remedial Agreement shall constitute a failure to comply with this Order.
- B. Respondents shall include in each Remedial Agreement related to each of the Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligations to the Acquirer pursuant to this Order.
- C. Respondents shall also include in each applicable Remedial Agreement a representation from the Acquirer that such Acquirer shall use commercially reasonable efforts to secure the approvals necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Divestiture Product and to have any such manufacture be independent of Respondents, all as soon as reasonably practicable.
- D. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

VIII.

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IT IS FURTHER ORDERED that:

- A. Within five (5) days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondents have fully complied with its obligations under Paragraphs II and III 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 the Interim Monitor(s). Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant paragraphs of the Order, including a full description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all Persons contacted, including copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning completing the obligations.
- C. One (1) year after the date this Order becomes final, annually for the next nine years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with the Order.

IX.

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

- A. any proposed dissolution of a Respondent;
- B. any proposed acquisition, merger or consolidation of a Respondent; or
- C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

X.

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

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

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

XI.

IT IS FURTHER ORDERED that this Order shall terminate on January 7, 2020.

By the Commission, Commissioner Harbour not participating.

NON-PUBLIC APPENDIX I**CABERGOLINE DIVESTITURE AGREEMENT**

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

NON-PUBLIC APPENDIX II**DRONABINOL ANDA DIVESTITURE AGREEMENT**

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

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NON-PUBLIC APPENDIX III

RESOLUTION DIVESTITURE AGREEMENT

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

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Watson Pharmaceuticals, Inc. (“Watson”), of Respondent Robin Hood Holdings Limited d/b/a Arrow Group (“Arrow”), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Watson is a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its corporate head

Order to Maintain Assets

office and principal place of business located at 311 Bonnie Circle, Corona, California 92880.

2. Respondent Arrow is a private limited liability company organized, existing and doing business under and by virtue of the laws of Malta, with its headquarters address at 57 St. Christopher Street, Valletta, Malta. Cobalt Laboratories Inc. is a wholly-owned subsidiary of Proposed Respondent Arrow, with headquarters address at 24870 S. Tamiami Trl., Suite 1, Bonita Springs, FL 34134.
3. The 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 to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. "Watson" means Watson Pharmaceuticals, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Watson (including, but not limited to, Watson Laboratories, Inc.), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition, Watson shall include Arrow.
- B. "Arrow" means Robin Hood Holdings Limited d/b/a

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Arrow Group, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Arrow (including, but not limited to, Resolution Chemicals Limited, Cobalt Laboratories Inc., and Cobalt Pharmaceuticals Inc.), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

- C. “Respondent(s)” means Watson and Arrow, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer(s)” means the following:
 - 1. Impax;
 - 2. Reso; or
 - 3. a Person approved by the Commission to acquire particular assets or rights that Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- F. “Acquisition” means the acquisition of shares of Arrow by Watson as contemplated by the Share Purchase Agreement (“Share Purchase Agreement”), dated as of June 16, 2009, by and among Watson Laboratories, Inc., a wholly-owned subsidiary of Watson, Robin Hood Holdings Limited, the shareholders of Robin Hood Holdings Limited, and Anthony Selwyn Tabatznik, an individual solely with respect to Section 6.15 and related provisions of the Share Purchase Agreement, and all attachments, amendments, exhibits, and schedules related thereto.

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- G. “Acquisition Date” means the date on which the Acquisition occurs pursuant to the Share Purchase Agreement.
- H. “Agency(ies)” means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term “Agency” includes, without limitation, the United States Food and Drug Administration (“FDA”), and the United States Drug Enforcement Agency (“DEA”).
- I. “ANDA” means abbreviated new drug application for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between a Respondent and the FDA related thereto.
- J. “API” means active pharmaceutical ingredient
- K. “Barr-Watson Agreement” means the Asset Purchase Agreement between Barr Laboratories, Inc., and Watson Laboratories, Inc., dated November 24, 2008.
- L. “Cabergoline API Agreement” means the agreement, dated August 7, 2003, by and among Teva Pharmaceutical Industries Ltd., Chemicals Works of Gedeon Richter Ltd., and Gedeon Richter USA, Inc., as subsequently assigned to Barr Laboratories, Inc., and thereafter to Watson Laboratories, Inc., pursuant to the Barr-Watson Agreement.
- M. “Cabergoline Assets” means all of Respondent

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Watson's rights, title and interest in and to, the following assets:

1. ANDA No. 77-843, and any supplements, amendments, or revisions thereto;
2. Product Scientific and Regulatory Material related to the Cabergoline Product;
3. Cabergoline API Agreement; and
4. any other assets relating to the Cabergoline Product divested by Barr Laboratories, Inc. to Watson in the Barr-Watson Agreement.

N. "Cabergoline Divestiture Agreement" means:

1. the Asset Purchase Agreement between Watson Laboratories, Inc., and Impax Laboratories, Inc., dated November 4, 2009, and any attachments, amendments, exhibits, and schedules related thereto. This Asset Purchase Agreement is attached to this Order and contained in non-public Appendix I; or
2. any agreement that receives the prior approval of the Commission between Respondents and an Acquirer for the divestiture of the Cabergoline Assets entered into pursuant to Paragraph II.A (or Paragraph V) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.

O. "Cabergoline Product" means all Products that contain the active pharmaceutical ingredient generically known as cabergoline in Development, manufactured, marketed or sold by Respondent Watson pursuant to ANDA No. 77-843, and any supplements,

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amendments, or revisions thereto.

- P. “cGMP” means current Good Manufacturing Practice as set forth in the United States Federal, Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.
- Q. “Closing Date” means the date on which the Respondents (or a Divestiture Trustee) consummate a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets or rights related to a Divestiture Product to an Acquirer pursuant to this Order.
- R. “Confidential Business Information” means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Divestiture Product(s);

provided however, that the restrictions contained in this Order regarding the Respondents’ use, conveyance, provision, or disclosure of “Confidential Business Information” shall not apply to the following:

1. information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by Respondent(s);
2. information related to the Cabergoline Product that were researched, Developed, manufactured, marketed, or sold by Respondent Watson that Respondent Arrow can demonstrate it obtained

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without the assistance of Respondent Watson prior to the Acquisition;

3. information related to the Dronabinol Product that were researched, Developed, manufactured, marketed, or sold by Respondent Arrow that Respondent Watson can demonstrate it obtained without the assistance of Respondent Arrow prior to the Acquisition;
 4. information that is required by law to be publicly disclosed;
 5. information that does not directly relate to the Divestiture Product(s);
 6. information relating to either Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of Products that does not discuss with particularity the Divestiture Product(s); or
 7. information specifically excluded from the assets to be divested.
- S. "Development" means all preclinical and clinical drug development activities, including formulation, test method development and stability testing, toxicology, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting clinical trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and

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registration, and regulatory affairs related to the foregoing.

- T. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service.
- U. “Divestiture Product(s)” means the Cabergoline Product and/or the Dronabinol Product.
- V. “Divestiture Trustee” means any trustee appointed by the Commission pursuant to Paragraph V of the Decision and Order.
- W. “Dronabinol ANDA Assets” means all of Respondent Arrow’s rights, title and interest in and to, the following assets:
1. ANDA No. 77-740, and any supplements, amendments, or revisions thereto; and
 2. Product Scientific and Regulatory Material related to the Dronabinol Product.
- X. “Dronabinol ANDA Divestiture Agreement” means:
1. the Asset Purchase Agreement between Cobalt Pharmaceuticals Inc., and Impax Laboratories, Inc., dated November 4, 2009, and any attachments, amendments, exhibits, and schedules related thereto. The Dronabinol ANDA Agreement is attached to the Decision and Order and contained in non-public Appendix II; or
 2. any agreement that receives the prior approval of the Commission between Respondents and an

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Acquirer for the divestiture of the Dronabinol ANDA Assets entered into pursuant to Paragraph III.A (or Paragraph V) of the Decision and Order, and any attachments, amendments, exhibits, and schedules related thereto.

- Y. “Dronabinol Development and API Business” means all of Respondent Arrow’s rights, title and interest in and to, the following:
1. Product Intellectual Property related to the Dronabinol Product;
 2. Product Manufacturing Technology related to the Dronabinol Product; and
 3. the business related to the research, Development, manufacture and supply of the Dronabinol Product API.
- Z. “Dronabinol Product” means all Products that contain the active pharmaceutical ingredient generically known as tetrahydrocannabinol or “THC” in Development, manufactured, marketed or sold by Respondent Arrow pursuant to ANDA No. 77-740, and any supplements, amendments, or revisions thereto.
- AA. “Geographic Territory” shall mean the United States of America, including all its territories and possessions, unless otherwise specified.
- BB. “Impax” means Impax Laboratories, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 30831 Huntwood Avenue, Hayward, CA 94544.

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- CC. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order.
- DD. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders in this matter.
- EE. “Ownership Interest” means any and all rights, present or contingent, to hold any voting or nonvoting stock, share capital, equity or other interests, or beneficial ownership in a Person.
- FF. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Closing Date, and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related to any Product of or owned by Respondent as of the Closing Date.
- GG. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.
- HH. “Product” means any pharmaceutical, biological, or generic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient.

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II. “Product Intellectual Property” means all of the following related to a Divestiture Product:

1. Patents;
2. Product Trademarks, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; and
3. rights to obtain and file for patents and copyrights and registrations thereof;

provided, however, “Product Intellectual Property” does not include the corporate names or corporate trade dress of “Watson” or “Arrow”, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondents or the related logos thereof.

JJ. “Product Manufacturing Technology” means all manufacturing technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of the Divestiture Product(s) including, but not limited to, the following: all product specifications, processes, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA applications conformance and cGMP compliance, and labeling and all other information related to the manufacturing process,

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supplier lists, and other master documents necessary for the manufacture, control and release of the Product that are owned or controlled by Respondent(s) or which Respondent(s) have the right to receive.

KK. "Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory, and clinical trial materials and information related to the Divestiture Product(s) that are owned and controlled by Respondent(s) or which Respondent(s) have a right to receive including, but not limited to:

1. pharmacokinetic study reports related to the specified Divestiture Product(s);
2. bioavailability study reports (including reference listed drug information) related to the specified Divestiture Product(s);
3. bioequivalence study reports (including reference listed drug information) related to the specified Divestiture Product(s);
4. all correspondence to the Respondent(s) from the FDA and from the Respondent(s) to the FDA relating to the ANDA submitted by, on behalf of, or acquired by, the Respondent(s) related to the specified Divestiture Product;
5. annual and periodic reports related to the above-described ANDA, including any safety update reports;
6. FDA approved Product labeling related to the specified Divestiture Product(s);

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7. currently used product package inserts (including historical change of controls summaries) related to the specified Divestiture Product(s);
 8. FDA approved patient circulars and information related to the specified Divestiture Product(s);
 9. adverse events/serious adverse event summaries related to the specified Divestiture Product(s);
 10. summary of Product complaints from physicians related to the specified Divestiture Product(s);
 11. summary of Product complaints from customers related to the specified Divestiture Product(s); and
 12. Product recall reports filed with the FDA related to the specified Divestiture Product(s).
- LL. "Product Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Divestiture Product(s).
- MM. "Reso" means Reso Holdings Limited, a limited company organized, existing, and doing business under and by virtue of the laws the United Kingdom, with its headquarters address at Wedgwood Way, Stevenage, Hertfordshire SG1 4QT, United Kingdom.
- NN. "Resolution" means Resolution Chemicals Limited, a limited company, organized, existing, and doing business under and by virtue of the laws of the United Kingdom, with its headquarters address at Wedgwood Way, Stevenage, Hertfordshire SG1 4QT, United

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Kingdom. "Resolution" includes, among other things, the Dronabinol Development and API Business.

OO. "Resolution Divestiture Agreement" means:

1. the Purchase Agreement between Arrow Group ApS and Reso Holdings Limited, dated November 3, 2009, and any attachments, amendments, exhibits, and schedules related thereto. The Dronabinol Business Agreement is attached to the Decision and Order and contained in non-public Appendix III; or
2. any agreement that receives the prior approval of the Commission between Respondents and an Acquirer for the divestiture of Resolution entered into pursuant to Paragraph III.B (or Paragraph V) of Decision and Order, and any attachments, amendments, exhibits, and schedules related thereto.

PP. "Remedial Agreements" means:

1. any agreement between Respondent(s) and an Acquirer that is specifically referenced and attached to the Decision and Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Decision and Order in connection with the Commission's determination to make Decision and Order final; and/or
2. any agreement between Respondent(s) and an

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Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of the Decision and Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Decision and Order.

- QQ. “Retained Product(s)” means any Product owned by Respondent(s) that are not the Divestiture Products.
- RR. “Teva” means Teva Pharmaceutical Industries Limited, a corporation organized, existing, and doing business under and by virtue of the laws of the Israel, with its headquarters address at 5 Basel Street, P.O. Box 3190, Petach Tikva 49131 Israel. “Teva” includes wholly-owned subsidiary Barr Pharmaceuticals, Inc. (“Barr”), a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 400 Chestnut Ridge Road, Woodcliff Lake, New Jersey 07677.
- SS. “Third Party(ies)” means any non-governmental Person other than the following: Respondent Watson, Respondent Arrow, or the Acquirer of the affected assets, rights and Divestiture Product(s).

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

- A. Respondents shall maintain the full economic viability, marketability and competitiveness of the Cabergoline

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Assets, the Dronabinol ANDA Assets, and Resolution, and shall prevent the destruction, removal, wasting, deterioration, or impairment of the Cabergoline Assets, Dronabinol ANDA Assets, and Resolution except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the businesses related to the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution.

- B. Respondents shall maintain the operations of the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; customers; Agencies; employees; and others having business relations with the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution. Respondents' responsibilities shall include, but are not limited to, the following:
1. providing the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution;

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2. continuing, at least at their scheduled pace, any additional expenditures for the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution, authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all research, Development, manufacturing, distribution, marketing and sales expenditures;
3. providing such resources as may be necessary to respond to competition against the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution and/or to prevent any diminution in sales of the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution, prior to divestiture;
4. making available for use by the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution;
5. providing the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution;
6. providing such support services to the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution as were being provided to such business by Respondent(s) as of the date the Consent Agreement was signed by Respondents; and

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7. maintaining a work force at least as equivalent in size, training, and expertise to what has been associated with the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution for each assets' last fiscal year.
- C. Pending divestiture of the Cabergoline Assets and the Dronabinol ANDA Assets, Respondents shall:
1. not use, directly or indirectly, any Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the relevant Divestiture Product(s) other than as necessary to comply with the following: (1) the requirements of the Orders; (2) Respondents' obligations to an Acquirer under the terms of any Remedial Agreement related to relevant Divestiture Product(s); or (3) applicable Law;
 2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the relevant Acquirer or Persons specifically authorized by the relevant Acquirer or the Commission to receive such information;
 3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the relevant Divestiture Product(s) to the employees associated with business related to those Retained Products that contain the same API or that are approved for the same use as the Divestiture Product(s); and
 4. promptly after the date the Agreement Containing Consent Orders is signed, institute procedures and requirements to ensure that Respondents'

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employees, associated with the Retained Products that contain the same API or that are approved for the same use as the Divestiture Product(s), do not:

- a. provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and
 - b. solicit, access or use any Confidential Business Information that they are prohibited under this Order to Maintain Assets from receiving for any reason or purpose.
- D. Not later than thirty (30) days following the Closing Date, Respondents shall provide to all of Respondents' employees and other personnel who may have access to Confidential Business Information related to the Divestiture Product(s) written or electronic notification of the restrictions on the use of such information by Respondents' personnel. At the same time, if not provided earlier, Respondents shall provide a copy of such notification by e-mail with return receipt requested or similar transmission, and keep an electronic file of such receipts for three (3) year after the Closing Date for the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution. Respondents shall provide a copy of the form of such notification to the relevant Acquirer, the Interim Monitor (if one is appointed), and the Commission. Respondents shall also obtain from each employee covered by this Paragraph II.D an agreement to abide by the applicable restrictions. Respondents shall maintain complete records of all such agreements at Respondents' registered office within the United States and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied

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with. Respondents shall monitor the implementation by its employees and other personnel of all applicable restrictions, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondents' employees and other personnel.

- E. Respondents shall adhere to and abide by the Remedial Agreements (which agreements shall not vary or contradict, or be construed to vary or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondents under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.
- F. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution within the Geographic Territory through their full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

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- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order to Maintain Assets, the proposed Decision and Order (collectively, “Orders”), and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents’ compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.
- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authority, and responsibilities of the Interim Monitor:
 - 1. The Interim Monitor shall have the power and authority to monitor Respondents’ compliance with: the divestiture and asset maintenance

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obligations of the Orders; the restrictions on the use, conveyance, provision, or disclosure of the identified confidential business information under the Orders; and, the related requirements of the Orders. The Interim Monitor shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission.

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Interim Monitor shall serve until the date Respondents complete the divestiture of the Divestiture Products in a manner that fully satisfies the requirements of this Order and until the earliest of:
 - a. With respect to each Divestiture Product, the date the Acquirer(s) are approved by the FDA to manufacture such Divestiture Product and able to manufacture such Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents;
 - b. With respect to each Divestiture Product, the date the Acquirer(s) notifies the Commission and Respondents of its intention to abandon its efforts to manufacture such Divestiture Product; or
 - c. With respect to each Divestiture Product, the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer(s) have

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abandoned their efforts to manufacture such Divestiture Product;

- i. *provided, however,* that, with respect to each Divestiture Product, the Interim Monitor's service shall not exceed three (3) years from the date the Order becomes final;
 - ii. *provided further, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
4. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with all reasonable requests of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.
5. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry

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out the Interim Monitor's duties and responsibilities.

6. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
7. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by an Acquirer with respect to the performance of Respondents' obligations under the Orders or any Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of its obligations under the Orders; *provided, however*, beginning one hundred twenty (120) days after Respondents have filed its final report pursuant to Paragraph VIII.B, and every one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer(s) toward obtaining FDA approval to

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manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

8. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- G. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- H. The Interim Monitor shall serve until termination of this Order to Maintain Assets pursuant to Paragraph VII.
- I. The Interim Monitor appointed pursuant to this Order

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may be the same person appointed as a Divestiture Trustee pursuant to Paragraph V of the proposed Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every thirty (30) days thereafter until Respondents have fully complied with their obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by Paragraphs II and III of the related Decision and Order in this matter, 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 to Maintain Assets and the related Decision and Order; *provided, however,* that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondents pursuant to Paragraph VIII of the Decision and Order.

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V.

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

- A. any proposed dissolution of a Respondent;
- B. any proposed acquisition, merger or consolidation of a Respondent; or
- C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VI.

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

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

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

VII.

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

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The later of:
1. The day after the divestiture of all of the Cabergoline Assets, the Dronabinol ANDA Assets, and Resolution, as required by and described in the proposed Decision and Order, has been completed and each Interim Monitor, in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated; or
 2. The day the related Decision and Order becomes final.

By the Commission, Commissioner Harbour recused.

Analysis to Aid Public Comment

**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 Watson Pharmaceuticals, Inc. (“Watson”) and Robin Hood Holdings (“Arrow”) that is designed to remedy the anticompetitive effects of Watson’s acquisition of Arrow. The proposed Consent Agreement requires Watson to divest its rights and assets in generic cabergoline to Impax Laboratories, Inc. (“Impax”), and requires Arrow to spin-off its wholly owned subsidiary, Resolution Chemicals Ltd. (“Resolution”), which is currently developing generic dronabinol capsules, to a new entity to be owned in part by Resolution’s current management. The Consent Agreement also requires Arrow to sell the U.S. generic dronabinol marketing rights to Impax.

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

Pursuant to a Share Purchase Agreement dated June 16, 2009, Watson proposes to acquire all of the outstanding shares of Arrow in a cash and stock transaction valued at approximately \$1.75 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. markets for the manufacture and sale of generic cabergoline tablets and generic dronabinol capsules. The proposed Consent Agreement will remedy the

Analysis to Aid Public Comment

alleged violations by replacing the lost competition that would result from the acquisition in both of these markets.

I. The Products and Structure of the Markets

The proposed acquisition would eliminate significant future competition by reducing the number of potential generic suppliers in each of the relevant markets. The number of generic suppliers has a direct and substantial effect on generic pricing as each additional generic supplier can have a competitive impact on the market. Because there are already generic equivalents for each of the products at issue here, the branded versions no longer constrain the pricing of the generics.

Cabergoline, the generic name of Pfizer's Dostinex®, is a dopamine receptor agonist used to treat Parkinson's disease and multiple medical problems resulting from excessive production of the hormone prolactin. In the past year, sales of generic cabergoline tablets were in excess of \$44.8 million. The market for generic cabergoline is highly concentrated. Arrow is one of only three companies currently marketing generic cabergoline, along with Par Pharmaceutical Companies Inc. and Teva Pharmaceutical Industries Ltd. Watson has Food and Drug Administration ("FDA") approval to sell cabergoline and is poised to enter the cabergoline market within the next two years. Thus, the proposed acquisition eliminates the likely entry of the fourth generic alternative.

Dronabinol, the generic of Solvay Pharmaceutical's Marinol®, is used to treat nausea and vomiting caused by cancer chemotherapy, as well as loss of appetite and weight loss in HIV patients. Last year sales of generic dronabinol capsules were in excess of \$74.4 million. The market for generic dronabinol is highly concentrated. Watson and Par are the only two suppliers of generic dronabinol. Arrow's subsidiary, Resolution, is developing a generic dronabinol product. Arrow represents one of a limited number of firms capable of developing generic

Analysis to Aid Public Comment

dronabinol and is likely to have a competitive impact in a timely manner.

II. Entry

Entry into the markets for the manufacture and sale of generic cabergoline and generic dronabinol would not be timely, likely or sufficient in its magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. Entry would not take place in a timely manner because the combination of generic drug development times and regulatory requirements, including FDA drug approval, takes at least two years. In addition to the regulatory hurdles facing a potential entrant, unique conditions characterize each market at issue that make additional entry unlikely to occur or be successful.

III. Effects

The proposed acquisition would cause significant anticompetitive harm to consumers in the U.S. markets for the manufacture and sale of cabergoline tablets and dronabinol capsules. In generic pharmaceutical markets, pricing is heavily influenced by the number of competitors that participate in a given market. The price of a generic pharmaceutical generally decreases with the entry of the second, third and even fourth competitor. The proposed transaction would eliminate a likely future competitor in each relevant market and would cause anticompetitive harm to consumers in the U.S. markets by eliminating future competition between Watson and Arrow and by increasing the likelihood that customers will pay higher prices.

IV. The Consent Agreement

The proposed Consent Agreement effectively remedies the proposed acquisition's anticompetitive effects in the relevant product markets. The Consent Agreement requires Watson and Arrow to divest certain rights and assets related to generic cabergoline and generic dronabinol to a Commission-approved

Analysis to Aid Public Comment

acquirer no later than ten days after the acquisition. The acquirer of divested assets must receive the prior approval of the Commission. The Commission's goal in evaluating a possible purchaser of divested assets is to maintain the competitive environment that existed prior to the acquisition.

The Consent Agreement remedies the competitive concerns the acquisition raises in the generic cabergoline market by requiring Watson to divest its generic cabergoline product to Impax Laboratories Inc. Impax is a California-based generic pharmaceutical company with nearly seventy generic pharmaceutical products currently on the market. Impax has a successful track record developing and launching generic pharmaceuticals in the United States. With their resources, capabilities, strong reputation, and experience marketing generic products, Impax is expected to replicate the competition that would be lost with the proposed acquisition.

In order to remedy the competitive concern the acquisition raises in the generic dronabinol market, the proposed Consent Agreement requires Arrow to divest its Resolution subsidiary to a new entity named Reso Holdings, which will be owned in part by Resolution's current management. Resolution's management are the original developers of Arrow's generic dronabinol product and have conducted all of the research and development for Arrow's dronabinol product. The Consent Agreement thereby ensures that development of Arrow's generic dronabinol product will continue without disruption post-divestiture.

The proposed Consent Agreement also requires Arrow to sell the U.S. marketing rights for generic dronabinol to Impax Laboratories, Inc. Impax will replicate Arrow's role as the U.S. marketer for generic dronabinol once Resolution obtains all necessary regulatory approvals.

If the Commission determines that either Impax or Reso Holdings is not an acceptable acquirer of the assets to be divested,

Analysis to Aid Public Comment

or that the manner of the divestitures is not acceptable, the parties must unwind the sale(s) and divest the assets within six months of the date the Order becomes final to another Commission-approved acquirer. If the parties fail to divest within six months, the Commission may appoint a trustee to divest the products.

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 Consent Agreement or to modify its terms in any way.

Complaint Exhibits

IN THE MATTER OF

WORLD INNOVATORS, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4282; File No. 092 3137
Filed, January 12, 2010 — Decision, January 12, 2010

This consent order addresses World Innovators, Inc., alleged false or misleading representations made to consumers concerning its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The complaint alleges that, since at least November 2001, World Innovators has set forth on its website privacy policies and statements about its practices, including statements that it is a current participant in the Safe Harbor when, in fact, from September 2004 until July 2009, World Innovators was not a current participant in the Safe Harbor. The proposed order prohibits World Innovators' representations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party. It contains provisions designed to prevent World Innovators from engaging in the future in practices similar to those alleged in the complaint as well as reporting and compliance provisions.

Participants

For the *Commission*: *Molly Crawford and Katie Ratté.*

For the *Respondents*: appearing *pro se.*

COMPLAINT

The Federal Trade Commission, having reason to believe that World Innovators, 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 World Innovators, Inc. ("World Innovators") is a Connecticut corporation with its principal office or place of

Analysis to Aid Public Comment

business at 22 Bacon Road, Roxbury, Connecticut 06783.

2. Respondent is a list broker that also sells marketing consulting services, including through its website (www.worldinnovators.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. Since at least November 2001, respondent has set forth on its website, www.worldinnovators.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union (“U.S.-EU Safe Harbor Framework” or “Safe Harbor”).

U.S.-EU SAFE HARBOR FRAMEWORK

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection (“Directive”). Enacted in 1995, the Directive sets forth European Union (“EU”) requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission (“EC”) has made a determination that the recipient jurisdiction’s laws ensure the protection of such personal data. *See* Directive 95/46/EC of the European Parliament and of the Council (Oct. 24, 1995), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>. This determination is commonly referred to as meeting the EU’s “adequacy” standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce

Complaint Exhibits

(“Commerce”) and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The Safe Harbor allows U.S. companies to transfer personal data lawfully from the EU. To join the Safe Harbor, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU’s adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission (“FTC”), as well as the U.S. Department of Transportation, are eligible to join the Safe Harbor. A company under the FTC’s jurisdiction that self-certifies to the Safe Harbor principles but fails to implement them may be subject to an enforcement action based on the FTC’s deception authority under Section 5 of the Federal Trade Commission Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor. The listing of companies indicates whether their self-certification is “current” or “not current.” Companies are required to re-certify every year in order to retain their status as “current” members of the Safe Harbor framework. According to the Safe Harbor website, “Organizations should notify the Department of Commerce if their representation to the Department is no longer valid. Failure to do so could constitute a misrepresentation.” *See* Safe Harbor List, *available at* <http://web.ita.doc.gov/safeharbor/shlist.nsf/webPages/safe+harbor+list>.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

9. In September 2001, respondent submitted to Commerce a self-certification to the Safe Harbor. Respondent renewed that self-certification in September 2002 and September 2003.

10. In September 2004, respondent did not renew its self-certification to the Safe Harbor, and Commerce updated

Analysis to Aid Public Comment

respondent's status to "not current" on its public website. Until July 2009, respondent did not renew its self-certification to the Safe Harbor and was in "not current" status on Commerce's website. (Exhibit A, Declaration of Damon C. Greer).

11. Since at least November 2001 to the present, respondent has disseminated or caused to be disseminated privacy policies and statements on the www.worldinnovators.com website, including, but not limited to, the following statements:

World Innovators honors the privacy of its clients and visitors and will uphold the privacy policies set forth by the Direct Marketing Association and the Safe Harbor Principles as outlined by the U.S. Department of Commerce and the European Commissions [*sic*]...World Innovators is a member of the U.S. Department of Commerce Safe Harbor program.

Exhibit B, November 2001 Privacy Policy; Exhibit C, February 2005 Privacy Policy; Exhibit D, September 2006 Privacy Policy; Exhibit E, December 2008 Privacy Policy.

12. Through the means described in Paragraph 11, respondent represented, expressly or by implication, that it is a current participant in the Safe Harbor.

13. In truth and in fact, from September 2004 to July 2009, respondent was not a current participant in the Safe Harbor. Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

14. 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 Exhibits

THEREFORE, the Federal Trade Commission this twelfth day of January, 2010, has issued this complaint against respondent.

By the Commission.

Complaint

EXHIBIT A (continued)

06/09/2009 15:58 FAX 2023263062

RECRDS/FILINGS OFFICE

004/004

6. World Innovators did not submit a self-certification by the September 2004 deadline. To date, I have not received any documents or information from World Innovators to renew its self-certification. World Innovators is in "not current" status on the Commerce website.

I declare under penalty of perjury under the Laws of the United States of America that the foregoing is true and correct. Executed this 9th day of June, 2009, in Washington, D.C.

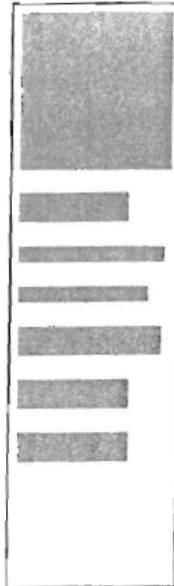


Damon C. Greer
Associate Director for Electronic Commerce
Office of Technology and Electronic Commerce
U.S. Department of Commerce

Complaint

EXHIBIT B

World Innovators, Inc. - Mailing List Managers, Mailing Lists Management & Consultation, Direct Resp... Page 1 of 1



MAILING LIST MANAGEMENT/CONSULTATION DIRECT RESPONSE MARKETING

PRIVACY POLICY STATEMENT
WORLD INNOVATORS, INCORPORATED

World Innovators, Incorporated provides this web site as an informational source for its clients and prospective customers. World Innovators honors the privacy of its clients and visitors and will uphold the privacy policies set forth by the Direct Marketing Association and the Safe Harbor Principles as outlined by the U.S. Department of Commerce and the European Commissions.

World Innovators certifies that as of May 30, 2001 it encourages its list management clients to comply with the Direct Marketing Association Privacy Policy. This policy provides effective guidelines for honoring and respecting the privacy by:

1. Honoring a customer's request not to be included on in-house lists used for solicitations. A name may be removed simply by contacting us to do so.
2. Providing customers with the ability to opt-out of data rental, sale or exchange.
3. Adhering to a customer's request to opt-out of having their information included as part of a data rental, sale or exchange.
4. Using one or more of the DMA Preference Services mail, telemarketing or e-mail to suppress names from campaigns for individuals who have requested not to be included in these solicitation efforts.

Our web site does not recognize a caller or collect e-mail addresses of visitors to our web site. However, if information is requested, we will collect personal information such as name, company and address for future in-house marketing purposes.

World Innovators promises to uphold the highest standard of data privacy and security as per the Direct Marketing Association and the World Innovators' Privacy Policy.

World Innovators is a member of the U.S. Department of Commerce Safe Harbor program.

Any questions or comments regarding the World Innovators Privacy Policy or the Safe Harbor program should be directed in writing to:

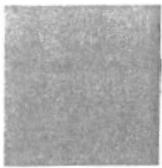
Anne M. Peterson, President
 World Innovators, Incorporated
 72 Park Street
 New Canaan, CT 06840
 or apeterson@worldinnovators.com

© 2001 World Innovators, Inc. - Privacy Statement
 (203)966-0374 worldinnovators@worldinnovators.com

Complaint

EXHIBIT C

World Innovators, Inc. - List Brokerage/Management. Mailing List Managers. Mailing Lists Managemen... Page 1 of 2



[Redacted]

22 Bacon Road, Roxbury, CT 06783
Phone: 860-210-8088 Fax: 860-210-7829

LIST BROKERAGE/MANAGEMENT - DIRECT RESPONSE MARKETING

*PRIVACY POLICY STATEMENT
WORLD INNOVATORS, INCORPORATED*

World Innovators, Incorporated provides this web site as an informational source for its clients and prospective customers. World Innovators honors the privacy of its clients and visitors and will uphold the privacy policies set forth by the Direct Marketing Association and the Safe Harbor Principles as outlined by the U.S. Department of Commerce and the European Commissions.

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3. Adhering to a customer's request to opt-out of having their information included as part of a data rental, sale or exchange.
4. Using one or more of the DMA Preference Services (mail, telemarketing or e-mail) to suppress names from campaigns for individuals who have requested not to be included in these solicitation efforts.

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World Innovators promises to uphold the highest standard of data privacy and security as per the Direct Marketing Association and the World Innovators' Privacy Policy.

World Innovators is a member of the U.S. Department of Commerce Safe Harbor program.

Any questions or comments regarding the World Innovators Privacy Policy or the Safe Harbor program should be directed in writing to:

Complaint

EXHIBIT C (continued)

World Innovators, Inc. - List Brokerage/Management, Mailing List Managers, Mailing Lists Managemen... Page 2 of 2



Anne M. Peterson, President
World Innovators, Incorporated
22 Bacon Road
Roxbury, CT 06783
or apeterson@worldinnovators.com



Complaint

EXHIBIT D

World Innovators, Inc. - List Brokerage/Management, Mailing List Managers, Mailing Lists Manage... Page 1 of 2



22 Bacon Road, Roxbury, CT 06783
Phone: 860-210-8088 Fax: 860-210-7829

LIST BROKERAGE/MANAGEMENT - DIRECT RESPONSE MARKETING

*PRIVACY POLICY STATEMENT
WORLD INNOVATORS, INCORPORATED*

World Innovators, Incorporated provides this web site as an informational source for its clients and prospective customers. World Innovators honors the privacy of its clients and visitors and will uphold the privacy policies set forth by the Direct Marketing Association and the Safe Harbor Principles as outlined by the U.S. Department of Commerce and the European Commissions.

World Innovators certifies that as of May 30, 2001 it encourages its list management clients to comply with the Direct Marketing Association Privacy Policy. This policy provides effective guidelines for honoring and respecting the privacy by:

1. Honoring a customer's request not to be included on in-house lists used for solicitations. A name may be removed simply by contacting us to do so.
2. Providing customers with the ability to opt-out of data rental, sale or exchange.
3. Adhering to a customer's request to opt-out of having their information included as part of a data rental, sale or exchange.
4. Using one or more of the DMA Preference Services (mail, telemarketing or e-mail) to suppress names from campaigns for individuals who have requested not to be included in these solicitation efforts.

Our web site does not recognize a caller or collect e-mail addresses of visitors to our web site. However, if information is requested, we will collect personal information such as name, company and address for future in-house marketing purposes

World Innovators promises to uphold the highest standard of data privacy and security as per the Direct Marketing Association and the World Innovators' Privacy Policy.

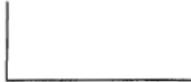
World Innovators is a member of the U.S. Department of Commerce Safe Harbor program.

Any questions or comments regarding the World Innovators Privacy Policy or the Safe Harbor program should be directed in writing to:

Complaint

EXHIBIT D (continued)

World Innovators, Inc. - List Brokerage/Management, Mailing List Managers, Mailing Lists Managemen... Page 2 of 2



Anne M. Peterson, President
World Innovators, Incorporated
22 Bacon Road
Roxbury, CT 06783
or apeterson@worldinnovators.com



Complaint

EXHIBIT E

World Innovators, Inc. - List Brokerage/Management, Mailing List Managers, Mailing Lists Managem... Page 1 of 2

	<p>22 Bacon Road, Roxbury, CT 06783 Phone: 860-210-8088 Fax: 860-210-7829</p>
	LIST BROKERAGE/MANAGEMENT - DIRECT RESPONSE MARKETING
	<p><i>PRIVACY POLICY STATEMENT</i> <i>WORLD INNOVATORS, INCORPORATED</i></p>
	<p>World Innovators, Incorporated provides this web site as an informational source for its clients and prospective customers. World Innovators honors the privacy of its clients and visitors and will uphold the privacy policies set forth by the Direct Marketing Association and the Safe Harbor Principles as outlined by the U.S. Department of Commerce and the European Commissions.</p>
	<p>World Innovators certifies that as of May 30, 2001 it encourages its list management clients to comply with the Direct Marketing Association Privacy Policy. This policy provides effective guidelines for honoring and respecting the privacy by:</p>
	<ol style="list-style-type: none"> 1. Honoring a customer's request not to be included on in-house lists used for solicitations. A name may be removed simply by contacting us to do so. 2. Providing customers with the ability to opt-out of data rental, sale or exchange. 3. Adhering to a customer's request to opt-out of having their information included as part of a data rental, sale or exchange. 4. Using one or more of the DMA Preference Services (mail, telemarketing or e-mail) to suppress names from campaigns for individuals who have requested not to be included in these solicitation efforts.
	<p>Our web site does not recognize a caller or collect e-mail addresses of visitors to our web site. However, if information is requested, we will collect personal information such as name, company and address for future in-house marketing purposes.</p>
	<p>World Innovators promises to uphold the highest standard of data privacy and security as per the Direct Marketing Association and the World Innovators' Privacy Policy.</p>
	<p>World Innovators is a member of the U.S. Department of Commerce Safe Harbor program.</p>
	<p>Any questions or comments regarding the World Innovators Privacy Policy or the Safe Harbor program should be directed in writing to.</p>

Complaint

EXHIBIT E (continued)

World Innovators, Inc. - List Brokerage/Management, Mailing List Managers, Mailing Lists Manageme... Page 2 of 2



Anne M. Peterson, President
World Innovators, Incorporated
22 Bacon Road
Roxbury, CT 06783
or apeterson@worldinnovators.com



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 Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the 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 complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in such complaint, or that any of 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 Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

Decision and Order

1. Respondent World Innovators, Inc. is a Connecticut corporation with its principal office or place of business at 22 Bacon Road, Roxbury, Connecticut 06783.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

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

- A. Unless otherwise specified, “respondent” shall mean World Innovators, Inc. and its subsidiaries, divisions, affiliates, successors and assigns.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy, security, or any other compliance program sponsored by the government or any other third party.

Decision and Order

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

- A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and
- B. any documents, whether prepared by or on behalf of respondent, that calls into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order, 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 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(s) that may affect compliance obligations arising under this order, including, but not limited to: a dissolution,

Decision and Order

assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 sixty (60) days after service of this order, and at such other times as the 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.

VI.

This order will terminate on January 12, 2030, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

- A. any Part in this order that terminates in fewer than twenty (20) years;
- B. this order's application to any respondent that is not named as a defendant in such complaint; and

Decision and Order

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

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

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF PROPOSED CONSENT ORDERS TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, a consent agreement from World Innovators, Inc. (“World Innovators”).

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

This matter concerns alleged false or misleading representations that World Innovators made to consumers concerning its participation in the Safe Harbor privacy framework (“Safe Harbor”) agreed upon by the U.S. and the European Union (“EU”). It is among the Commission’s first cases to challenge deceptive claims about the Safe Harbor. The Safe Harbor provides a mechanism for U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor, a company must self-certify to the U.S. Department of Commerce (“Commerce”) that it complies with seven principles and related requirements. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor. The listing of companies indicates whether their self-certification is “current” or “not current.” Companies are required to re-certify every year in order to retain their status as “current” members of the Safe Harbor framework.

World Innovators is a list broker that also sells marketing consulting services, including through its website (www.worldinnovators.com). According to the Commission’s complaint, since at least November 2001, World Innovators has set forth on its website privacy policies and statements about its

Analysis to Aid Public Comment

practices, including statements that it is a current participant in the Safe Harbor.

The Commission's complaint alleges that World Innovators falsely represented that it was a current participant in the Safe Harbor when, in fact, from September 2004 until July 2009, World Innovators was not a current participant in the Safe Harbor. Specifically, the Commission's complaint alleges that in September 2001, World Innovators submitted to Commerce a self-certification to the Safe Harbor and renewed that self-certification in September 2002 and September 2003. In September 2004, World Innovators did not renew its self-certification to the Safe Harbor, and Commerce updated its status to "not current" on its public website. World Innovators remained in "not current" status on Commerce's website until it submitted a new Safe Harbor self-certification in July 2009.

The proposed order applies to World Innovators' representations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party. It contains provisions designed to prevent World Innovators from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits World Innovators from making misrepresentations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires World Innovators to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that World Innovators submit an initial compliance report to the FTC, and

Analysis to Aid Public Comment

make available to the FTC subsequent reports. Part VI is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

The purpose of the analysis is to facilitate public comment on the proposed order. 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

DIRECTORS DESK LLCCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4281; File No. 092 3140
Filed, January 12, 2010 — Decision, January 12, 2010

This consent order addresses Directors Desk LLC's alleged false or misleading representations made to consumers concerning its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union. The Commission's complaint alleges that Directors Desk falsely represented that it was a current participant in the Safe Harbor when, in fact, from February 2008 until August 2009, Directors Desk was not a current participant in the Safe Harbor. The Commission's complaint alleges that in February 2007, Directors Desk submitted to Commerce a self-certification, which it did not renew in February 2008. Commerce then updated its status to "not current" on the Commerce public website. Directors Desk remained in "not current" status until it submitted a self-certification to Commerce in August 2009. The order prohibits Directors Desk from making representations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party. It contains provisions designed to prevent Directors Desk from engaging in the future in practices similar to those alleged in the complaint, as well as reporting and compliance provisions.

Participants

For the *Commission*: *Molly Crawford and Katie Ratté.*

For the *Respondents*: *Chris Wolf, Esq., Hogan & Hartson .*

COMPLAINT

The Federal Trade Commission, having reason to believe that Directors Desk LLC ("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 Directors Desk LLC (“Directors Desk”) is a Delaware limited liability company with its principal office or place of business at 1 Liberty Plaza, New York, New York 10006.

2. Respondent is in the business of providing a secure online application that allows members of corporate boards of directors to access board meeting materials, board minutes, and other related documents through a website (www.directorsdesk.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 set forth on its website, www.directorsdesk.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union (“U.S.-EU Safe Harbor Framework” or “Safe Harbor”).

U.S.-EU SAFE HARBOR FRAMEWORK

5. The U.S.-EU Safe Harbor Framework provides a method for U.S. companies to transfer personal data outside of Europe that is consistent with the requirements of the European Union Directive on Data Protection (“Directive”). Enacted in 1995, the Directive sets forth European Union (“EU”) requirements for privacy and the protection of personal data. Among other things, it requires EU Member States to implement legislation that prohibits the transfer of personal data outside the EU, with exceptions, unless the European Commission (“EC”) has made a determination that the recipient jurisdiction’s laws ensure the protection of such personal data. *See* Directive 95/46/EC of the European Parliament and of the Council (Oct. 24, 1995), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:EN:HTML>. This determination is commonly referred to as meeting the EU’s

Complaint

“adequacy” standard.

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce (“Commerce”) and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The Safe Harbor allows U.S. companies to transfer personal data lawfully from the EU. To join the Safe Harbor, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU’s adequacy standard.

7. Companies under the jurisdiction of the U.S. Federal Trade Commission (“FTC”), as well as the U.S. Department of Transportation, are eligible to join the Safe Harbor. A company under the FTC’s jurisdiction that self-certifies to the Safe Harbor principles but fails to implement them may be subject to an enforcement action based on the FTC’s deception authority under Section 5 of the Federal Trade Commission Act.

8. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor. The listing of companies indicates whether their self-certification is “current” or “not current.” Companies are required to re-certify every year in order to retain their status as “current” members of the Safe Harbor framework. According to the Safe Harbor website, “Organizations should notify the Department of Commerce if their representation to the Department is no longer valid. Failure to do so could constitute a misrepresentation.” *See* Safe Harbor List, available at <http://web.ita.doc.gov/safeharbor/shlist.nsf/webPages/safe+harbor+list>.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

9. In February 2007, respondent submitted to Commerce a self-certification to the Safe Harbor. That self-certification stated

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that its privacy policy has been effective since June 2004. (Exhibit A, Safe Harbor Certification).

10. In February 2008, respondent did not renew its self-certification to the Safe Harbor, and Commerce updated respondent's status to "not current" on its public website. Until August 2009, respondent did not renew its self-certification to the Safe Harbor and was in "not current" status on Commerce's website. (Exhibit B, Declaration of Damon C. Greer).

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

Directors Desk is a participant in the Safe Harbor program developed by the U.S. Department of Commerce and the European Union. We have certified that we adhere to the Safe Harbor Privacy Principles agreed upon by the U.S. and the E.U. For more information about the Safe Harbor and to view our certification, visit the U.S. Department of Commerce's Safe Harbor web site.

Exhibit C, December 2008 Privacy Policy.

12. Through the means described in Paragraph 11, respondent represented, expressly or by implication, that it is a current participant in the Safe Harbor.

13. In truth and in fact, from February 2008 to August 2009, respondent was not a current participant in the Safe Harbor. Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

14. 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

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Trade Commission Act.

THEREFORE, the Federal Trade Commission this twelfth day of January, 2010, has issued this complaint against respondent.

By the Commission.

Complaint

EXHIBIT A

Page 1 of 2

Organization Information:

Directors Desk, LLC
 2510 N. Pines Road, Suite 207
 Spokane, Washington 99206
 Phone: 509-931-1099
 Fax: 509-267-5465
<http://www.directorsdesk.com>

Contact Information:

Contact Office: Directors Desk Spokane
 Contact Name: Bret Beresford-Wood, President
 Phone: 866-895-3375 x511 Fax: 509-267-5465 Email: bwood@directorsdesk.com

Corporate Officer Information:

Corporate Officer: Bret Beresford-Wood, President
 Phone: 866-895-3375 x511 Fax: 509-267-5465 Email: bwood@directorsdesk.com

Safe Harbor Information:

Signed up to safe harbor 02/15/2007 04:36:53 PM

Next certification 02/15/2008

EU/EEA Countries From Which Personal Information Is Received: France, Belgium, Germany, United Kingdom, Italy

Industry Sector: Computer Services - (CSV) Computer Software - (CSF) Information Services - (INF)

Personal Information Received From the EU: Directors Desk hosts and maintains a secure online application for corporate boards of directors. Certain directors residing in the European Union sit on corporate boards using our services. Such directors are able to access the full set of Directors Desk features to access information including board meeting materials, meeting minutes, documents, and other related materials. They can also communicate with officers and other directors of the corporation using tools within the online application, such as secure email.

Information collected from EU board members ("users") includes personal contact information that is stored in our system and made accessible to officers and fellow directors of the company client in question. This information may include: full name; work information including company name, address, phone and fax; home information including home address, phone, fax, mobile phone; biographical information including other boards on which the individual sits and related professional history; and personal contact information such as email address, wireless text messaging address, and fax number(s). All such personal information is stored online for the purposes of conducting board work for the company in question. As stated in our privacy policy, Directors Desk does not communicate directly with any of its clients' end-users, be these residents of the EU or otherwise, and we take strong measures to safeguard each user's personal information at all times.

Privacy Policy Effective: 6/10/2004

Location: <http://www.directorsdesk.com/privacy.asp>

Regulated by: Federal Trade Commission

Privacy Programs:

Verification: In-House

Dispute Resolution: In the event that any dispute arising out of or related to this policy is not settled by the parties, the parties will attempt in good faith to resolve such dispute by non-binding mediation in accordance with the American Arbitration Association Commercial Mediation Rules.

Personal Data Covered: Online and offline

Human Resource Data Covered: No

Complaint

EXHIBIT A (continued)

Page 2 of 2

Do you agree to cooperate and comply with the European Data Protection Authorities? Select
Appropriate Response

Certification Status: Not Current

Compliance Status:

[Safe Harbor Overview](#) | [Safe Harbor Documents](#) | [Workbook](#) | [Safe Harbor List](#)
[Information Required for Certification](#) | [Certification Form](#)

Complaint

EXHIBIT B (continued)

To date, I have not received any documents or information from Directors Desk to renew its self-certification. Directors Desk is still in "not current" status on the Commerce website.

I declare under penalty of perjury under the Laws of the United States of America that the foregoing is true and correct. Executed this 7th day of June, 2009, in Washington, D.C.



Damon C. Greer
Associate Director for Electronic Commerce
Office of Technology and Electronic Commerce
U.S. Department of Commerce

Complaint

EXHIBIT C

DIRECTORS DESK PRIVACY POLICY

<http://www.directorsdesk.com/company/privacy.asp>**Privacy Policy**

Effective Date: 6/10/2004 - Latest Revision: 2/15/2007 12:02:40 PM

[Home](#)
[Job Opportunities](#)
[Contact Us](#)

Directors Desk, LLC ("Directors Desk") is dedicated to establishing a trusting relationship with its clients and client end-users ("users"), based on respect for personal identity and information, by promoting the use of fair information practices. This privacy statement covers all Web properties ("online applications") owned and maintained by Directors Desk, including but not limited to <http://www.directorsdesk.com> and <https://secure.directorsdesk.com>.

Because Directors Desk wants to demonstrate its commitment to our users' privacy, we are disclosing:

1. What personally identifiable information Directors Desk collects
2. How Directors Desk uses the information
3. With whom Directors Desk may share user information
4. What choices are available to users regarding collection, use and distribution of the information
5. What types of security procedures are in place to protect the loss, misuse or alteration of information under Directors Desk control
6. How users can correct any inaccuracies in the information

Information Collection and Use**Information Collection**

Directors Desk is the sole owner of aggregated system information its web properties, and the clients of Directors Desk are the sole owners of personal user information belonging to their board and committee members entered into their specific Directors Desk account(s). The Directors Desk online applications collect information from users at several different points:

Account Management Screens

In order to use Directors Desk services at any level, a user must first be set up in the Directors Desk online application. This is done by Directors Desk account representatives, administrative users ("Corporate Secretaries") of the client company, or the users themselves. During account setup the following user information fields are required:

- First and last name
- Personal User Name (can be set by the user)

It is highly recommended, but not required, that user accounts also contain a valid email address, in order for the application to be able to send information updates ("Announcements") to the user, in order to keep them abreast of new information related to their board management responsibilities.

User Roster Screens

It is common and recommended practice for a certain level of personal contact information to be placed into the user account, in order to make such information the client company's Roster. The Roster screens are used by board members and other client users to contact fellow board and committee members. To protect users' privacy rights, all fields that are stored in the application for the user are viewable in the user's view of the Roster, and the user is able to add/delete/remove information in each field. Further protecting the user, the application provides each user with a set of personalized "privacy settings" allowing him or her to make choices about how such information is used within their client company Roster. For instance, the user can choose to keep their home or cell phone information private from all users except the Corporate Secretary users.

Use of Information by Directors Desk

Except where Directors Desk account representatives are specifically asked to provide data entry services on the client's behalf, Directors Desk acts as a passive conduit for the entry and distribution of all users' email communications and personal information, and therefore will not monitor, edit, or disclose the contents of a user's information unless Directors Desk in good faith believes that such action is necessary to conform to the edicts of the law or comply with legal process served on Directors Desk. Subject to the legal exceptions listed in the Privacy Policy, Directors Desk will never disclose to any third parties any of the personal information uploaded to our online applications by our users.

Profiling Activities

We store information that we collect through cookies, log files and limited audit trails to create a profile of our users. A profile is stored information that we keep on individual users that details their viewing preferences. Consequently, collected information is tied to the user's personally identifiable information to improve the content of the site for the user. This profile is used only for the purpose of tailoring a user's visit to our online applications, and never to direct marketing promotions or other communications not

Complaint

EXHIBIT C (continued)

DIRECTORS DESK LLC (2013) 1/1/13

<http://www.directorsdesk.com/company/privacy.asp>

directly related to their use of the system. We do not share personally identifiable elements of your profile with other third parties. If shared at all, your profile is shared in aggregate form only, rendering personally identifiable information impossible.

Cookies
A cookie is a piece of data stored on the user's computer tied to information about the user. Usage of a cookie is in no way linked to any personally identifiable information while on our site. We use both session ID cookies and persistent cookies. For the session ID cookie, once users close the browser, the cookie simply terminates. A persistent cookie is a small text file stored on the user's hard drive for an extended period of time. Persistent cookies can be removed by following Internet browser help file directions.

By setting a cookie on our site, users would not have to enter their User Name more than once, thereby saving time while on our site. If users reject the cookie, they may still use our site. The only drawback to this is that the user will be required to re-enter the User Name upon each new site visit. Persistent cookies enable us to track and target the interests of our users to enhance the experience on our site. See the "Profile" section, above.

Due to the secure nature of the application, we allow no business partners to use cookies on our site.

Log Files

Like most online applications, our servers use log files to analyze trends, administer the site, track user's movement in the aggregate, and gather broad demographic information for aggregate use. IP addresses, etc. are not linked to personally identifiable information.

Communications from the Site**Informational Updates**

We do not send users communications, but rather provide our clients with tools allowing them to send communications to other users related to the board work and related processes empowered by Directors Desk. Certain new users will receive a welcoming email issued by their Corporate Secretaries to activate their new account. Established users will occasionally receive emails, cell phone text messages, and faxes (collectively, "Announcements") containing information about new board information that is available for their viewing, new messages they have received from client staff or other board members, or action items such as votes and surveys that need to be completed by the user. All such Announcements are issued exclusively by the designated and Client Company authorized Corporate Secretaries, unless the user has elected to receive proactive notifications of certain new information as it becomes available within their accounts. In which case automated emails are sent out by the system. In all cases, however, the user can modify any email, wireless, and fax addresses at which they receive communications simply by logging into their accounts, or choose to opt out of receiving Announcements entirely. Users thus retain full control over the extent to which they receive information updates at all times.

Service Announcements

On rare occasions it is necessary to send out a strictly service related announcement. For instance, if our service is temporarily suspended for maintenance we might send users an email. Users may opt-out of these communications. However, these communications are never promotional in nature.

Customer Service

We communicate with users on a regular basis to render technical assistance as part of our 24-Hour Help Desk activities. We reply via email or phone, in accordance with the user's wishes, and all such activities are initiated by the user.

Spam and Junk Email

Directors Desk has a zero tolerance policy for abuse. While we cannot be responsible for communications users receive from other users such as fellow board members and Corporate Secretaries on their client company accounts, it is our intention to use all legally available means to prevent distribution and receipt of unsolicited commercial communications through the service. We ask that any users who are annoyed by receipt of such junk email, please report such activity to abuse@directorsdesk.com.

Sharing**Legal Disclaimer**

Though we make every effort to preserve user privacy, we may need to disclose personal information when required by law wherein we have a good-faith belief that such action is necessary to comply with a current judicial proceeding, a court order, legal process served on our online application, or in order to investigate, prevent, or take action regarding illegal activity.

Aggregate Information (non-personally identifiable)

We will always attempt to use aggregated demographic information in any case where user information must be shared, such that no personally identifiable information is disclosed to outside parties. In the event that personally identifiable information must be used, we will first notify clients in accordance with the Subpoena Policy outlined below. Any actions taken there under by our client to protect its users' personal information will be respected subject to limitations imposed by the law.

Business Transitions

In the event Directors Desk goes through a business transition, such as a merger, being acquired by another company, or selling a portion of its assets, users' personal information will, in most instances, be part of the assets transferred. Users will be notified prior to a change of ownership or control of their personal information. If as a result of the business transition, the users' personally identifiable information will be used in a manner different from that stated at the time of collection they will be given a choice not to have their information used in this different manner, as described in the notification of changes section, below.

Links

Directors Desk's online applications may contain links to other sites. As with all site content, these links are not placed in the system by Directors Desk but rather by the Corporate Secretaries of the client company, or other users authorized to post content.

Please be aware that Directors Desk is not responsible for the privacy practices of such other sites. We encourage our users to be aware when they leave our sites and to read the privacy statements of each and every Web site that collects personally identifiable information. This privacy statement applies solely to information collected by Directors Desk's online applications. Information that is collected on these sites does not fall within the auspices of this policy.

DIRECTORS DESK LLC

Complaint

EXHIBIT C (continued)

www.directorsdesk.com

<http://www.directorsdesk.com/company/privacy.asp>**Security**

Directors Desk takes every precaution to protect its users' information. Security falls into several categories and user information is protected both online and off-line.

Secure Sockets Layer

On all screens of the Directors Desk application, information is encrypted and is protected during transit from the client's PC to our servers with the best encryption software in the industry - SSL. While browsing the application, the lock icon on the bottom of Web browsers such as Microsoft Internet Explorer becomes locked, as opposed to un-locked, or open, when users are just "surfing", in order to easily identify to the user that their data is being transmitted securely. To fully protect our users, it is not possible to access the application without using an SSL connection.

Data Encryption

Documents uploaded to the system, as well as database entries containing personal information, are stored in accordance with each client company's data encryption policy. At a minimum, this includes storing all sensitive personal information (such as user passwords, social security numbers, date of birth, etc.) in a fully encrypted format. In many cases, the encryption technologies used will preclude Directors Desk from being able to decrypt the data.

Unauthorized Access

Directors Desk has taken extreme measures to protect user information against unauthorized access. These measures include but are not limited to: a) storing all data in hosting facilities that are SAS-70 Level II Certified, b) storing user information in secure offline repositories not accessible to routine "hacking" attempts, c) engineering sophisticated application security technologies specifically designed to detect and protect against unauthorized data access, d) treating all user information stored in web applications as highly confidential during storage, transmission, and backup.

Protection Against Loss

Directors Desk provides, as part of its service, full data mirroring and nightly tape backups to protect user information from being inadvertently lost or destroyed.

Protection Against Data Corruption and Alteration

Directors Desk uses state-of-the-art technologies, techniques and processes to maintain data integrity at all times. This includes use of an enterprise-level relational database system (RDBMS) that has been tested extensively both in-house and by industry at-large.

Offline Security

In addition to protecting user information stored in electronic systems, we also employ security measures to protect user information off-line. All of our users' information, not just the sensitive information mentioned above, is restricted in our offices. Only employees who need the information to perform a specific job (for example, our customer service representatives) are granted access to personally identifiable information.

Choice and Opt-Out Options

User information is never used for purposes that are not directly related to their board and committee activities. All use of personal information is subject to a full set of "opt-out" options made available to the user. For instance, if the user does not wish to disclose his or her email address, they are able to remove that data from the system. If the user does not wish for other directors to see his or her home or work contact information, again they can remove those fields from the system. If a user's personally identifiable information changes (such as zip code, phone, email or postal address), or if a user no longer desires our service, we provide a way to correct, update or delete/inactivate users' personally identifiable information. This can be done at the Roster profile page of the Directors Desk service patronized by the user.

Notification of Changes

If we decide to change our privacy policy, we will post those changes in this privacy statement, and other places we deem appropriate, so our users are always aware of what information we collect, how we use it, and under what circumstances, if any, we disclose it. We will use information in accordance with the privacy policy under which the information was collected.

If, however, we are going to use users' personally identifiable information in a manner different from that stated at the time of collection we will notify users via email. Users will have a choice as to whether or not we use their information in this different manner. In addition, if we make any material changes in our privacy practices that do not affect user information already stored in our database, we will post a prominent notice on our Web site notifying users of the change. In some cases where we post a notice we will also email users, who have opted to receive communications from us, notifying them of the changes in our privacy practices.

Safe Harbor

Directors Desk is a participant in the Safe Harbor program developed by the U.S. Department of Commerce and the European Union. We have certified that we adhere to the Safe Harbor Privacy Principles agreed upon by the U.S. and the E.U. For more information about the Safe Harbor and to view our certification, visit the U.S. Department of Commerce's Safe Harbor web site. In the event that any dispute arising out of or related to this policy is not settled by the parties, the parties will attempt in good faith to resolve such dispute by non-binding mediation in accordance with the American Arbitration Association Commercial Mediation Rules. No litigation for the resolution of such dispute may be commenced until the parties try in good faith to settle the dispute by such mediation in accordance with such rules and either party has concluded in good faith that amicable resolution through continued mediation of the matter does not appear likely. The parties to the mediation shall share the costs of mediation equally. Any settlement reached by mediation shall be recorded in writing, signed by the parties, and shall be binding on them.

Civil Subpoena Policy

Directors Desk does not release personally identifying information about our customers except in limited instances related to law, security, or safety. To request customer information from Directors Desk in a civil case, you must serve Directors Desk with a valid subpoena, court order, or search warrant and agree to Directors Desk's terms of compensation below.

All civil subpoenas should be directed to:

Directors Desk, LLC
Subpoena Department
2510 N. Pines Road, Suite 207

Complaint

EXHIBIT C (continued)

DIRECTORS DESK PRIVACY POLICY

<http://www.directorsdesk.com/company/privacy.asp>Spokane, WA 99206
Fax: 1-509-297-5465

Upon receipt of a valid subpoena, it is Directors Desk's policy to notify the client whose information is sought. In non-emergency circumstances, Directors Desk will generally not produce the subpoenaed subscriber's identity information until approximately two weeks after receipt of the subpoena, unless a formal objection is filed by the customer or we are legally required to do so.

Directors Desk charges \$90.00 per hour for research (plus additional fees if testimony or deposition is required), \$0.25 per page, and \$22.00 to respond via Federal Express. We will invoice the person or entity submitting the subpoena following receipt and the subpoena proponent must make payment within 15 days from the date of receipt of our invoice. Checks should be made out to Directors Desk, LLC.

It is Directors Desk's policy to release information sufficient to identify our customer only where the party seeking the information has filed a legal action that implicates our customer in some legally cognizable impropriety or wrongdoing or can show that the information requested is material to the issues involved in the underlying case. Directors Desk requests a copy of the complaint and all supporting documentation to indicate how the customer's account information is related to the pending litigation. Note that Directors Desk reserves the right to determine in its sole discretion the applicability of this policy to any particular request and, further, this policy does not create any enforceable legal rights, either for our customers or for requesting parties.

Enforcement and Sanctions

All employees and contractors of Directors Desk are required to sign a written acknowledgement that they have read and agree to abide by the terms of this Privacy Policy. Any infractions are subject to severe penalties, including termination and/or legal action.

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 Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the 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 complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in such complaint, or that any of 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 Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment received from an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Directors Desk LLC is a Delaware limited liability company with its principal office or place of

Decision and Order

business at 1 Liberty Plaza, New York, New York 10006.

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

ORDER**DEFINITIONS**

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

- A. Unless otherwise specified, “respondent” shall mean Directors Desk LLC and its subsidiaries, divisions, affiliates, successors and assigns.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondent and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, website, or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent is a member of, adheres to, complies with, is certified by, is endorsed by, or otherwise participates in any privacy, security, or any other compliance program sponsored by the government or any other third party.

Decision and Order

II.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents relating to compliance with this order, including but not limited to:

- A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and
- B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order, 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 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(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

Decision and Order

emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation(s) about which respondent learns fewer than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. 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 sixty (60) days after service of this order, and at such other times as the 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.

VI.

This order will terminate on January 12, 2030, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

- A. any Part in this order that terminates in fewer than twenty (20) years;
- B. this order's application to any respondent that is not named as a defendant in such complaint; and

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

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

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF PROPOSED CONSENT ORDERS TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, a consent agreement from Directors Desk LLC (“Directors Desk”).

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

This matter concerns alleged false or misleading representations that Directors Desk made to consumers concerning its participation in the Safe Harbor privacy framework (“Safe Harbor”) agreed upon by the U.S. and the European Union (“EU”). It is among the Commission’s first cases to challenge deceptive claims about the Safe Harbor. The Safe Harbor provides a mechanism for U.S. companies to transfer data outside the EU consistent with European law. To join the Safe Harbor, a company must self-certify to the U.S. Department of Commerce (“Commerce”) that it complies with seven principles and related requirements. Commerce maintains a public website, www.export.gov/safeharbor, where it posts the names of companies that have self-certified to the Safe Harbor. The listing of companies indicates whether their self-certification is “current” or “not current.” Companies are required to re-certify every year in order to retain their status as “current” members of the Safe Harbor framework.

Directors Desk provides an online application that allows members of corporate boards of directors to access board meeting materials, board minutes, and other related documents through a website (www.directorsdesk.com). According to the

Analysis to Aid Public Comment

Commission's complaint, Directors Desk set forth on its website privacy policies and statements about its practices, including statements that it is a current participant in the Safe Harbor.

The Commission's complaint alleges that Directors Desk falsely represented that it was a current participant in the Safe Harbor when, in fact, from February 2008 until August 2009, Directors Desk was not a current participant in the Safe Harbor. The Commission's complaint alleges that in February 2007, Directors Desk submitted to Commerce a self-certification, which it did not renew in February 2008. Commerce then updated its status to "not current" on the Commerce public website. Directors Desk remained in "not current" status until it submitted a self-certification to Commerce in August 2009.

The proposed order applies to Directors Desk's representations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party. It contains provisions designed to prevent Directors Desk from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits Directors Desk from making misrepresentations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party.

Parts II through VI of the proposed order are reporting and compliance provisions. Part II requires Directors Desk to retain documents relating to its compliance with the order for a five-year period. Part III requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part IV ensures notification to the FTC of changes in corporate status. Part V mandates that Directors Desk submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VI is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

Analysis to Aid Public Comment

The purpose of the analysis is to facilitate public comment on the proposed order. 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**PFIZER, INC.****AND****WYETH**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7
OF THE CLAYTON ACT*Docket No. C-4267; File No. 091 0053*
Filed, October 14, 2009 — Decision, January 25, 2010

This consent order addresses the acquisition by Pfizer Inc., of all of the issued and outstanding shares of Wyeth. Pfizer and Wyeth are two of only four major suppliers in the relevant cattle, companion animal, and equine health products markets. In the majority of these markets, the transaction would reduce the number of competitors from four to three and give Pfizer between 50 and 100 percent of the market and the acquisition would create a monopoly in the market for equine joint-injected steroids in the United States. The complaint alleges that the acquisition would cause significant competitive harm to consumers in the relevant U.S. markets for cattle, companion animal, and equine health products by eliminating actual, direct, and substantial competition between Pfizer and Wyeth. The Consent Agreement requires Pfizer to divest to Boehringer Ingelheim Vetmedica, Inc., Wyeth's U.S. animal health business in all areas of overlap, except for equine tapeworm parasiticides and equine herpesvirus vaccines. In the area of equine tapeworm parasiticides, the consent order requires Pfizer to return to Virbac S.A. Pfizer's exclusive distribution rights for these products; and in the area of equine herpesvirus vaccines, Pfizer is ordered to divest to BI Pfizer's equine herpesvirus products. The assets for each of the divestitures include all of the relevant intellectual property, customer lists, research and development information, and regulatory materials, as well as two of Wyeth's three U.S. manufacturing facilities.

Participants

For the *Commission*: *Michael R. Barnett, Susan Huber, Lynda Lao, Gregory P Luib, David Von Nirschl, and Kari A. Wallace.*

For the *Respondents*: *Andrew J. Forman and Charles F. (Rick) Rule, Cadwalader, Wickersham & Taft LLP; Harry T.*

Complaint

Robins and Scott A. Stempl, Morgan, Lewis, & Bockius LLP; and Joseph F Tringali, Simpson, Thatcher & Bartlett LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Pfizer Inc. (“Pfizer”), a corporation subject to the jurisdiction of the Commission, and Respondent Wyeth (“Wyeth”), a corporation subject to the jurisdiction of the Commission, have agreed to merge 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 the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Pfizer is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its corporate head office and principal place of business located at 235 East 42nd Street, New York, New York 10017.

2. Respondent Pfizer is engaged in, among other things, the research, development, manufacture, distribution, and sale of human pharmaceutical products, as well as animal health products through its Pfizer Animal Health division.

3. Respondent Wyeth f/k/a American Home Products Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters at 5 Giralda Farms, Madison, New Jersey 07940.

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4. Respondent Wyeth is engaged in, among other things, the research, development, manufacture, distribution, and sale of human pharmaceutical products, as well as animal health products through its Fort Dodge Animal Health (“Fort Dodge”) division.

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

II. THE PROPOSED ACQUISITION

6. Pursuant to an Agreement and Plan of Merger among Pfizer, Wagner Acquisition Corp., and Wyeth dated as of January 25, 2009 (the “Merger Agreement”), Pfizer proposes to acquire all of the issued and outstanding shares of Wyeth (the “Acquisition”). The consideration received by Wyeth shareholders is valued at approximately \$68 billion.

III. THE RELEVANT MARKETS

7. For the purposes of this Complaint, the relevant markets in which to analyze the effects of the Acquisition are the manufacture and sale of:

- a. killed cattle vaccines for the prevention or treatment of viral respiratory disease, including infectious bovine rhinotracheitis, bovine virus diarrhea (type 1 and/or 2), disease caused by parainfluenza 3, and/or disease caused by bovine respiratory syncytial virus;
- b. modified-live cattle vaccines for the prevention or treatment of viral respiratory disease, including infectious bovine rhinotracheitis, bovine virus diarrhea (types 1 and/or 2), disease caused by parainfluenza 3,

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and/or disease caused by bovine respiratory syncytial virus;

- c. cattle vaccines for the prevention or treatment of reproductive disease caused by *Leptospira* and/or *Campylobacter fetus* bacteria;
- d. cattle vaccines for the prevention or treatment of disease caused by *Pasteurella multocida* and/or *Mannheimia haemolytica* bacteria (“cattle pasteurella vaccines”);
- e. pharmaceutical products for the treatment of “lactating-cow” mastitis;
- f. pharmaceutical products for the treatment of “dry-cow” mastitis;
- g. dairy cattle broad-spectrum antibiotics with low milk-withholding times;
- h. cattle macrocyclic lactone parasiticides;
- i. cattle benzimidazole parasiticides;
- j. canine combination vaccines for the prevention or treatment of disease caused by distemper, adenovirus (type 1 and/or 2), parainfluenza, parvovirus, coronavirus, and/or *Leptospira* bacteria;
- k. canine monovalent vaccines for the prevention or treatment of disease caused by parvovirus;
- l. canine monovalent vaccines for the prevention or treatment of disease caused by coronavirus;

Complaint

- m. canine monovalent vaccines for the prevention or treatment of disease caused by *Leptospira* bacteria;
- n. canine vaccines for the prevention or treatment of disease caused by *Bordetella bronchiseptica* bacteria;
- o. feline combination vaccines for the prevention or treatment of feline panleukopenia, rhinotracheitis, chlamydia, and/or disease caused by calicivirus;
- p. feline vaccines for the prevention or treatment of feline leukemia;
- q. companion animal vaccines for the prevention or treatment of rabies;
- r. companion animal cephalosporin antibiotics;
- s. equine tapeworm parasiticides containing praziquantel;
- t. equine vaccines for the prevention or treatment of disease caused by equine herpesvirus; and
- u. equine joint-injected steroids for the prevention or treatment of joint inflammation.

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

IV. THE STRUCTURE OF THE MARKETS

9. The markets for killed cattle respiratory vaccines are highly concentrated, with Pfizer and Fort Dodge accounting for over 50 percent of all killed respiratory vaccines in the United States. The most commonly used killed respiratory vaccine is the 5-way vaccine, which prevents infectious bovine rhinotracheitis (“IBR”), types 1 and 2 of bovine virus diarrhea (“BVD”),

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parainfluenza 3 (“PI3”), and bovine respiratory syncytial virus (“BRSV”). The proposed acquisition will give Pfizer 61 percent of the market for killed 5-way respiratory vaccines, which represents approximately two-thirds of the \$15.3 million in killed respiratory vaccines sold in the United States, leaving Novartis Animal Health (“Novartis”) as Pfizer’s only other significant competitor in this market.

10. The markets for modified-live cattle respiratory vaccines are highly concentrated, with Pfizer and Fort Dodge accounting for over 53 percent of all modified-live respiratory vaccines in the United States. As is the case in the killed respiratory vaccine markets, the largest portion, approximately 53 percent, of the \$63 million in modified-live respiratory vaccine sales is represented by sales of the 5-way modified-live respiratory vaccine, which prevents IBR, BVD (types 1 and 2), PI3, and BRSV. As a result of the proposed acquisition, Pfizer would control over 68 percent of 5-way modified-live respiratory vaccine sales in the United States.

11. The markets for cattle reproductive vaccines include, most significantly: (1) the market for modified-live 10-way vaccines, which contain modified-live viral respiratory and *Leptospira* antigens; (2) the market for killed 10-way vaccines, which contain killed viral respiratory and *Leptospira* antigens; and (3) the market for lepto/vibrio vaccines, which contain *Leptospira* and *Campylobacter fetus* antigens. Each of these markets is highly concentrated. Pfizer and Fort Dodge represent 83 percent of the \$13 million modified-live 10-way sales in the United States, with Intervet/Schering-Plough Animal Health (“ISP”), AgriLaboratories, Ltd. (“AgriLabs”), and Boehringer Ingelheim Vetmedica, Inc. (“BI”) accounting for 11 percent, 4 percent, and 2 percent, respectively. The acquisition also would provide Pfizer with 76 percent of sales in killed 10-way vaccines, with Novartis as the only significant remaining competitor with 18 percent, and AgriLabs a distant third with 6 percent of this \$9 million market. Finally, in the \$2.6 million lepto/vibrio vaccine market, Pfizer and

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Fort Dodge are the third- and second-largest producers, respectively – collectively accounting for almost 39 percent of the market – while Novartis leads the lepto/vibrio market with 41 percent. Pfizer and Novartis would account for nearly 80 percent of lepto/vibrio vaccine sales in the United States following the proposed acquisition.

12. The markets for cattle pasteurella vaccines in the United States are highly concentrated. Currently, Pfizer, Fort Dodge, BI, ISP, and Merial are the only significant suppliers in these markets. The proposed acquisition would reduce the number of competitors in these markets, leaving Pfizer significantly larger than any of its remaining competitors.

13. The markets for lactating-cow and dry-cow mastitis treatments are highly concentrated, with Pfizer and Fort Dodge together accounting for more than 90 percent of sales in each of these markets. The proposed acquisition would increase the Herfindahl-Hirschman Index (“HHI”) by 3,292 points to 8,588 points in the lactating-cow mastitis market, as well as increase the HHI by 4,260 points to 9,011 points in the dry-cow mastitis market.

14. The proposed acquisition would combine two of only three companies that sell dairy cattle broad-spectrum antibiotic products with low milk-withholding times in the United States. Pfizer’s products are considered the most effective antibiotics for dairy cows and have a zero-day withholding period, while Fort Dodge’s product has a low withholding period of two to four days. A generic version of one of Pfizer’s products was recently introduced. As a result of the proposed acquisition, Pfizer would have a near monopoly in the \$162 million market for broad-spectrum antibiotics with low milk-withholding times for dairy cattle.

15. Pfizer, Fort Dodge, and Merial are the only three branded players in the U.S. market for cattle macrocyclic lactone parasiticides. The proposed acquisition would significantly

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increase the concentration in this market, leaving Pfizer with approximately 42 percent of this \$118 million market. Suppliers of generic macrocyclic lactone products do not provide a serious competitive constraint due to their poor reputation in this market. Further, such suppliers sell generic versions of only Merial's product; there are no generic versions of Pfizer's or Fort Dodge's products currently available. The proposed acquisition would increase the HHI in this market by 875 points to 2,381 points.

16. Only Pfizer, Fort Dodge, and ISP offer cattle benzimidazole parasiticides in the United States. ISP accounts for 67 percent of this \$16 million market, with Pfizer and Fort Dodge the only two other market participants. As a result of the proposed acquisition, the HHI in this market would increase by 271 points to a post-acquisition HHI of 5,613 points.

17. Pfizer, Fort Dodge, Merial, and ISP are the only four significant companies that supply canine combination vaccines in the United States. Total U.S. sales of canine combination vaccines are \$126 million. The proposed acquisition would reduce the number of significant suppliers of canine combination vaccines from four to three.

18. Pfizer, Fort Dodge, Merial, and ISP are the only four companies that supply canine monovalent parvovirus vaccines in the United States, a \$2.1 million market. The proposed acquisition would give Pfizer control of 66 percent of the market and would increase the HHI by 2,193 points, from 2,932 to 5,125 points.

19. Pfizer, Fort Dodge, Merial, and ISP are the only four companies that supply canine monovalent coronavirus vaccines in the United States. After the proposed acquisition, Pfizer would have an 81 percent share of this \$2.3 million market. The HHI in this market would increase by 2,155 points to a post-acquisition HHI of 6,869 points.

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20. The proposed acquisition would combine the only two companies that currently supply canine monovalent leptospira vaccines in the United States. Pfizer has a 53 percent share of this \$9.2 million market, and Fort Dodge controls the remaining 47 percent of the market. The proposed acquisition would result in Pfizer having a monopoly in the market for canine monovalent leptospira vaccines, with the HHI increasing from 5,019 to 10,000 points.

21. Pfizer, Fort Dodge, ISP, Merial, and BI are the only five companies that supply canine bordetella vaccines in the United States, sales of which total \$53.3 million. The proposed acquisition would reduce the number of suppliers of canine bordetella vaccines from five to four, with Pfizer significantly larger than its three remaining competitors.

22. Pfizer, Fort Dodge, Merial, and ISP are the only four significant companies that supply feline combination vaccines in the United States. Total U.S. sales of feline combination vaccines are \$28 million. The proposed acquisition would reduce the number of significant suppliers of feline combination vaccines from four to three and produce a firm that is considerably larger than its two remaining competitors.

23. Pfizer, Fort Dodge, Merial, and ISP are the only four companies that supply feline leukemia vaccines in the United States, sales of which total \$38 million. The proposed acquisition would reduce the number of suppliers of feline leukemia vaccines from four to three, with Pfizer again significantly larger than its two remaining competitors.

24. Pfizer, Fort Dodge, Merial, and ISP are the only four companies that offer companion animal rabies vaccines in the United States, sales of which amount to \$60 million. The proposed acquisition would reduce the number of suppliers of companion animal rabies vaccines from four to three.

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25. Pfizer and Fort Dodge are the only two suppliers of branded companion animal cephalosporins in the United States. The only other companion animal cephalosporins are generic human and animal cephalosporin products that may be used to treat companion animals. These products, however, have limited competitive significance because of dosing differences found in the generic human products and a relative lack of technical and research support offered with the generic animal products. After the proposed acquisition, Pfizer would have a 70 percent share of this \$52 million market. The HHI in this market would increase by 709 points to a post-acquisition HHI of 4,900 points.

26. The market for equine tapeworm parasiticides containing praziquantel in the United States is highly concentrated. Pfizer has a 33 percent share of this approximately \$22 million market; Fort Dodge has a 31 percent market share; and Merial has a 36 percent market share. As a result of the proposed acquisition, Pfizer would have 64 percent of the market for equine tapeworm parasiticides, leaving only Merial as a competitor to Pfizer. The HHI in this market would increase by 2,027 points to a post-acquisition HHI of 5,375 points.

27. Pfizer, Fort Dodge, ISP, and BI are the only suppliers of equine herpesvirus vaccines in the United States, sales of which total \$30 million. The proposed acquisition would reduce the number of suppliers of equine herpesvirus vaccines from four to three, with Pfizer significantly larger than its two remaining competitors.

28. The proposed acquisition would combine the only two companies offering joint-injected steroids to treat joint inflammation in equines in the United States. Pfizer has a 60 percent share of this \$7.3 million market, while Wyeth has a 40 percent share. The proposed acquisition would increase the HHI by 4,804 points and create a monopoly in the market for equine joint-injected steroids.

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V. ENTRY CONDITIONS

29. New entry into the relevant markets would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition set forth in Paragraph 31 below. New entry into the relevant markets is a difficult process because of, among other things, the time and cost associated with researching and developing the products, obtaining approval from the United States Food and Drug Administration (in the case of pharmaceutical products) or the United States Department of Agriculture (in the case of biological products) to market the products, and gaining customer acceptance. As a result, new entry into any of these markets sufficient to achieve a significant market impact within two years is unlikely.

30. Expansion by smaller competitors into the relevant markets would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition set forth in Paragraph 31 below.

VI. EFFECTS OF THE ACQUISITION

31. 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 Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between Pfizer and Wyeth for the sale of each of the relevant products in the United States;
- b. by increasing the likelihood that the merged entity will exercise market power unilaterally in the U.S. markets for each of the relevant products;

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- c. by increasing the likelihood and degree of coordinated interaction between or among suppliers in the U.S. markets for each of the relevant products;
- d. by reducing the merged entity's incentives to pursue further innovation in the U.S. markets for each of the relevant products; and
- e. by increasing the likelihood that U.S. customers would be forced to pay higher prices for each of the relevant products.

VII. VIOLATIONS CHARGED

32. The Merger Agreement described in Paragraph 6 above constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

33. The Acquisition described in Paragraph 6 above, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourteenth day of October, 2009, issues its Complaint against said Respondents.

By the Commission, Commissioner Harbour and Commissioner Kovacic recused.

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DECISION AND ORDER
[Public Record Version]

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons pursuant to section 2.34 of its Rules, now in further conformity with the procedure 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 Pfizer is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its corporate head office and principal place of business located at 235 East 42nd St., New York, New York 10017.
2. Respondent Wyeth f/k/a American Home Products Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 5 Giralda Farms, Madison, New Jersey 07940.
3. The 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 the Order, the following definitions shall apply:

- A. "Pfizer" means Pfizer Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Pfizer (including, but not limited to, Wagner Acquisition Corp.), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition, Pfizer shall include Wyeth.
- B. "Wyeth" means Wyeth, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions,

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groups and affiliates in each case controlled by Wyeth (including, but not limited to, Fort Dodge Animal Health), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.

- C. “Respondent(s)” means Pfizer and Wyeth, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer(s)” means the following:
 - 1. a Person specified by name in this Order to acquire particular assets or rights that Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final; or
 - 2. a Person approved by the Commission to acquire particular assets or rights that Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- F. “Acquisition” means the acquisition contemplated by the Agreement and Plan of Merger among Pfizer Inc., Wagner Acquisition Corp. and Wyeth, dated as of January 25, 2009 (“Agreement and Plan of Merger”).
- G. “Agency(ies)” means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term “Agency” includes,

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without limitation, the United States Food and Drug Administration (“FDA”), and the United States Department of Agriculture (“USDA”).

- H. “Agency Manufacturing Standards” means:
1. for any Product regulated by the FDA, current Good Manufacturing Practice, *i.e.*, cGMP, as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder; or
 2. for any Product regulated by the USDA, current manufacturing regulations contained in Title 9 of the Code of Federal Regulations pertaining to veterinary biologics and includes all rules and regulations promulgated by the USDA thereunder.
- I. “Animal Health Pipeline Products” means:
1. all Products in Development by Respondent Wyeth prior to the Effective Date and all Products (other than the Animal Health Products) that were in Development (whether or not such Development has been discontinued) by Respondent Wyeth at any time within the five (5) year period immediately preceding the Effective Date for use in the following Fields:
 - a. the following diseases and pathogens within bovines: pneumonia, reproductive disease, neurological disease, musculoskeletal disease, renal disease, production loss disease, hematological disease, ecto and endoparasites (bovine and ovine), leptospirosis, salmonellosis, Johnne’s disease, mastitis,

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parainfluenza-3 virus, bovine viral diarrhea virus, infectious bovine rhinotracheitis virus, pasteurellosis, bovine respiratory syncytial virus, rhinotracheitis, vibriosis, and enteric disease/ diarrhea, and diseases treatable with chlortetracycline, tetracycline, sulfamethazine, sulfachlorpyridazine, ampicillin, cephalixin, cloxacillin, hetacillin, and/or moxidectin;

- b. the following diseases, pathogens, and pharmacological activities within canines: adenoviruses, bordetellosis, borellosis, coronavirus, enteric disease/diarrhea, respiratory disease, infections, dermatological disease, neurological disease, hepatic disease, renal disease, ophthalmological disease, hematological disease, arthropathy, distemper, influenza, leptospirosis, parvovirus, parainfluenza, and rabies, and diseases treatable with ampicillin, hetacillin, cefadroxil, difloxacin, triamcinolone, and/or etodolac;
- c. the following diseases, pathogens, and pharmacological activities within felines: calicivirus, chlamydia, feline immunodeficiency virus, feline leukemia, panleukopenia, pneumonitis, rabies, rhinotracheitis, enteric disease/diarrhea, ophthalmological disease, hematological disease, neurological disease, immunodeficiency, and diseases treatable with ampicillin, hetacillin, cefadroxil, difloxacin, triamcinolone, and/or etodolac; and
- d. the following diseases, pathogens, and pharmacological activities within equines: rabies, musculoskeletal disease, and diseases treatable with etodolac, triamcinolone, and/or

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hyaluronate.

2. all Products in Development by Respondent Pfizer prior to the Effective Date and all Products that were in Development (whether or not such Development has been discontinued) by Respondent Pfizer at any time within the five (5) year period immediately preceding the Effective Date, other than the Animal Health Products, for use in the following Field: herpes virus within equines.
- J. “Animal Health Product Assets” means all of the specified Respondent’s rights, title and interest in and to all assets related to such Respondent’s business within the Geographic Territory related to each of the respective Animal Health Products and Animal Health Pipeline Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of each such Product, including, without limitation, the following:
1. the Animal Health Product Facilities;
 2. all Product Intellectual Property;
 3. all Product Improvements;
 4. all Product Approvals;
 5. all Product Manufacturing Technology;
 6. all Product Marketing Materials;
 7. all Website(s);
 8. a list of all of the Product Code Numbers, and

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rights, to the extent permitted by Law:

- a. to require Respondent(s) to discontinue the use of those Product Code Numbers in the sale or marketing of Products other than with respect to returns, rebates, allowances, and adjustments for Animal Health Products sold prior to the Effective Date;
- b. to prohibit Respondent(s) from seeking from any customer any type of cross- referencing of those Product Code Numbers with any Retained Product(s);
- c. to seek to change any cross-referencing by a customer of those Product Code Numbers with the Retained Product(s) (including the right to receive notification from Respondent(s) of any such cross-referencing that is discovered by Respondent(s));
- d. to seek cross-referencing from a customer of those Product Code Numbers with the Acquirer's Product Code Numbers;
- e. to approve the timing of Respondents' discontinued use of those Product Code Numbers in the sale or marketing of Products other than with respect to returns, rebates, allowances, and adjustments for Animal Health Products sold prior to the Effective Date; and
- f. to approve any notification(s) from Respondent(s) to any customer(s) regarding the use or discontinued use of such Product Code Numbers by Respondent(s) prior to such notification(s) being disseminated to the customer(s);

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9. all rights to all of Respondents' Applications or Veterinary Biological Product Authorization(s), as applicable;
10. the Master Files related to the above-described Applications including, but not limited to, the pharmacology and toxicology data contained in all Application(s);
11. all Product Development Reports and research data and test results;
12. at the Acquirer's option, all Product Assumed Contracts (copies to be provided to the Acquirer on or before the Closing Date);
13. all strategic safety programs submitted to the FDA or USDA, as applicable, that are designed to decrease product risk by using one or more interventions or tools beyond the package insert;
14. all pharmaco and vaccino vigilance data and records, post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA or USDA, as applicable, to facilitate the investigation of adverse effects;
15. a list of all customers and/or targeted customers for such Animal Health Product(s) and the gross sales (in units and dollars) of such Animal Health Products to such customers on an annual basis for 2007 and 2008, and on monthly a basis for 2009 (year-to-date) including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and

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including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of such Animal Health Products on behalf of the High Volume Account and his or her business contact information;

16. at the Acquirer's option and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods;
17. copies of all unfilled customer purchase orders for such Animal Health Product(s) as of the Closing Date, to be provided to the Acquirer not later than five (5) days after the Closing Date; and
18. all of the relevant Respondent's books, records, and files directly related to the foregoing or to such Animal Health Product(s) and/or Animal Health Pipeline Products;

provided, however, that "Animal Health Product Assets" shall not include: (1) documents relating to either Respondent's general business strategies or practices relating to marketing or sales of Products, where such documents do not discuss with particularity the Animal Health Products and/or the Animal Health Pipeline Products; (2) shall not include administrative, financial, and accounting records; (3) quality control records that are determined by the Interim Monitor or the Acquirer not to be material to the manufacture of the Animal Health Products and/or the Animal Health Pipeline Product(s); (4) Respondent Wyeth's facility located at 2000 Rockford Road, Charles City, Iowa 50616; and (5) assets licensed to

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the Acquirer pursuant to the Animal Health Product Licenses.

provided further, however, that in cases in which documents or other materials included in the relevant assets to be divested contain information: (1) that relates both to such Animal Health Product(s) and/or such Animal Health Pipeline Product(s) and to other Products or businesses of the Respondent(s) and cannot be segregated in a manner that preserves the usefulness of the information as it relates to such Animal Health Product(s) or such Animal Health Pipeline Product(s); or (2) for which the Respondent(s) has a legal obligation to retain the original copies, the Respondent(s) shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the Respondent(s) shall provide such Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondent(s) provides the Acquirer with the above-described information without requiring Respondent(s) completely to divest itself of information that, in content, also relates to Retained Product(s).

- K. “Animal Health Product Core Employee(s)” means the Product Marketing Employees, Product Sales Employees, Product Research and Development Employees and the Product Manufacturing Employees related to each Animal Health Product and/or Animal Health Product Pipeline Product.
- L. “Animal Health Product Divestiture Agreements” means the following agreements:

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1. Amended and Restated Asset Purchase Agreement by and among Pfizer Inc., Wyeth, and Boehringer Ingelheim Vetmedica, Inc., dated September 17, 2009, and all amendments, exhibits, attachments, agreements, and schedules thereto (“Asset Purchase Agreement”);
 2. License Agreement by and among Pfizer Inc., Wyeth, and Boehringer Ingelheim Vetmedica, Inc., in the form attached to the Asset Purchase Agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto;
 3. Master Manufacturing and Supply Agreement by and among Pfizer Inc., Wyeth, and Boehringer Ingelheim Vetmedica, Inc., in the form attached to the Asset Purchase Agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto;
 4. Transitional Services Agreement between Pfizer Inc., and Boehringer Ingelheim Vetmedica, Inc., in the form attached to the Asset Purchase Agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto; and
 5. Transitional Intellectual Property License Agreement by and between Pfizer Inc., Wyeth, and Boehringer Ingelheim Vetmedica, Inc., in the form attached to the Asset Purchase Agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto.
- M. “Animal Health Product Facilities” means all assets comprising each of the facilities of Respondent Wyeth identified below, including, without limitation, all of

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the following: real estate; buildings; warehouses; storage tanks; structures; manufacturing equipment; other equipment; machinery; tools; spare parts; personal property; furniture; fixtures; supplies associated with each particular facility; and other tangible property, owned, leased, or operated on or behalf of Wyeth and located at the locations identified below:

1. 800 Fifth Street NW, Fort Dodge, Iowa, 50501;
and
2. 141 East Riverside, Fort Dodge, Iowa 50501;

provided however, that, at the Acquirer's option, the term "Animal Health Product Facilities" shall exclude such assets located at these facilities as are deemed by the Acquirer, in consultation with the Interim Monitor, to be unnecessary for the Acquirer to Develop, manufacture and sell the Animal Health Products in substantially the same manner as the Respondents.

N. "Animal Health Product Licenses" means all of the following related to the Animal Health Products and/or the Animal Health Pipeline Products:

1. a perpetual, non-exclusive, fully paid-up and royalty-free license(s) with rights to sublicense to all Product Licensed Intellectual Property and all Product Manufacturing Technology related to general manufacturing know-how:
 - a. to research and Develop the Animal Health Products and/or Animal Health Pipeline Products for marketing, distribution or sale within the United States of America;

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- b. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the Animal Health Products and/or Animal Health Pipeline Products within the United States of America;
- c. to import or export the Animal Health Products to or from the United States of America to the extent related to the marketing, distribution or sale of the Animal Health Products and/or Animal Health Pipeline Products in the United States of America; and
- d. to have the Animal Health Products and/or Animal Health Pipeline Products made anywhere in the World for distribution or sale within, or import into the United States of America;

provided further however, that for any Product Licensed Intellectual Property that is the subject of a license from a Third Party to the Respondents, the scope of the rights granted hereunder shall only be required to be equal to the scope of the rights granted by the Third Party to the Respondents;

- 2. a perpetual, exclusive, fully paid-up and royalty-free license(s) with rights to sublicense under all Patents related to the Cydectin[®] Products for all Fields in the Geographic Territory; and
 - 3. a perpetual, non-exclusive, fully paid-up and royalty-free license(s) with rights to sublicense under all Patents related to the InfoVax[®] Patents for all Fields in the Geographic Territory.
- O. “Animal Health Products” means all of the following Products, including without limitation, all dosages, strengths, formulations, salt forms, routes of

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administration, and presentations of a Product, any Product Improvements related to such Products, and any medical and/or veterinary device that are proprietary to the Respondents used for the administration or application of such Products:

1. all of the following Products marketed or sold by Respondent Wyeth prior to the Acquisition for use in animals, but excluding humans:
 - a. “Antivenin Products” means all Products that contain one or more antibodies to one or more venoms from the following viperine snakes: Eastern diamondback (*C. adamanteus*), Western diamondback (*C. atrox*), Central and South American rattlesnake *C. terrificus*, and fer-de-lance (*B. atrox*);
 - b. “Aureomycin Products” means all Products that contain the active pharmaceutical ingredient generically known as chlortetracycline or Aureomycin chlortetra-cycline, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof; *provided however*, the Aureomycin Products do not include the Aureo[®] trademark.
 - c. “Bronchi-Shield[®] Products” means all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the *Bordetella bronchiseptica* bacterium;
 - d. “Calicivax[®] Products” means all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of

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the calicivirus;

- e. “Cefa-Drops[®] Products” and “Cefa-Tabs[®] Products” means all Products that contain the active pharmaceutical ingredient generically known as cefadroxil, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;
- f. “Cydectin[®] Products” means all Products manufactured, marketed, or sold within the Geographic Territory of the United States of America that contain the active pharmaceutical ingredient generically known as moxidectin, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof; *provided however*, that the term “Cydectin[®] Products” includes only those Products containing moxidectin that are sold under the Cydectin[®] trademark;
- g. “Dicural[®] Products” means all Products that contain the active pharmaceutical ingredient generically known as difloxacin, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;
- h. “Dopram[®] Products” means all Products that contain the active pharmaceutical ingredient generically known as doxapram hydrochloride, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;

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- i. “Dry-Clox[®] Products” means all Products that contain the active pharmaceutical ingredient generically known as cloxacillin, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;
- j. “Duramune[®] Products” means:
 - 1) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the canine distemper virus (CDV);
 - 2) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the canine parvovirus (CPV);
 - 3) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the *Leptospira* bacterium, including without limitation, *Leptospira grippotyphosa*, *Leptospira icterohaemorrhagiae*, *Leptospira canicola*, and *Leptospira pomona*; provided however, that the term “Duramune[®] Products” does not include Products containing these Antigens that are uniquely formulated for use in swine and sold under the Suvaxyn[®] trademark;
 - 4) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the canine Adenovirus Type 2 (CAV-2) virus;

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- 5) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the canine adenovirus Type 1 (CAV-1) virus;
 - 6) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the parainfluenza virus;
 - 7) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the canine coronavirus (CCV); and
 - 8) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the bacteria that causes borreliosis, including without limitation, *Borrelia burgdorferi*, *Borrelia afzelii*, and *Borrelia gattinii*; provided however, that the term "Duramune[®] Products" does not include the existing monovalent Product sold under the Lyme Vax[®] trademark;
- k. "Entervene[®] Products" means all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the *Salmonella dublin* bacterium;
- l. "Etogesic[®] Products" means all Products that contain the active pharmaceutical ingredient generically known as etodolac, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;

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- m. “Fel-O-Guard[®] Products” and/or “Fel-O-Vax[®] Products” means:
- 1) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the virus that causes panleukopenia;
 - 2) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the calicivirus virus;
 - 3) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the virus that causes feline viral rhinotracheitis (FVR);
 - 4) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the *Chlamydia psittaci* bacterium;
 - 5) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the virus that causes feline leukemia (FeLV); and
 - 6) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the feline immunodeficiency virus;
- n. “Hetacin[®] Products” means all Products that contain the active pharmaceutical ingredient

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generically known as hetacillin, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;

- o. "Hyaluronate Products" means all Products that contain the active pharmaceutical ingredient generically known as hyaluronate, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;
- p. "Leptovax[®] Products" means all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the *Leptospira* bacterium, including without limitation, *Leptospira grippotyphosa*, *Leptospira icterohaemorrhagiae*, *Leptospira canicola*, and *Leptospira pomona*; provided however, that the term "Leptovax[®] Products" does not include Products containing these Antigens that are uniquely formulated for use in swine and sold under the Suvaxyn[®] trademark;
- q. "Mycopar[®] Products" means all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the *Mycobacterium paratuberculosis* bacterium;
- r. "Oblets[®] Products" means all Products that contain the active pharmaceutical ingredient generically known as sulfamethazine, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;

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- s. “Polyflex[®] Products” means all Products that contain the active pharmaceutical ingredient generically known as ampicillin, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;
- t. “Polyotic[®] Products” means all Products that contain the active pharmaceutical ingredient generically known as tetracycline, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;
- u. “Presponse[®] Products” means:
 - 1) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the *Pasteurella multocida* bacterium; *provided however*, that the term “Presponse[®] Products” does not include Products containing these Antigens that are uniquely formulated for use in poultry; and
 - 2) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the *Mannheimia haemolytica* bacterium;
- v. “Prism[®] Products” (hybrid killed/modified live virus) means:
 - 1) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the virus that causes infectious bovine

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rhinotracheitis (IBR);

- 2) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the virus that causes bovine viral diarrhea (BVD);
 - 3) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the bovine respiratory syncytial virus (BRSV); and
 - 4) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the parainfluenza-3 virus (PI₃);
- w. "Promace[®] Products" means all Products that contain the active pharmaceutical ingredient generically known as acepromazine, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;
- x. "Pyramid[®] Products" (using modified live viruses) means:
- 1) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the virus that causes infectious bovine rhinotracheitis (IBR);
 - 2) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the

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virus that causes bovine viral diarrhea (BVD);

- 3) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the bovine respiratory syncytial virus (BRSV);
 - 4) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the parainfluenza-3 virus (PI₃); and
 - 5) all Products containing any one of the above-described Antigens (1-4) in combination with one or more Antigens derived from, or to stimulate immunity to, one or more strains of *Leptospira* and/or *Mannheimia haemolytica*;
- y. “Rabvac[®] Products” means all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the rabies virus marketed and sold by Respondent Wyeth for use in animals prior to the Acquisition;
- z. “Sedazine[®] Products” means all Products that contain the active pharmaceutical ingredient generically known as xylazine, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;
- aa. “Sulmet[®] Products” means all Products that contain the active pharmaceutical ingredient generically known as sulfamethazine, together

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with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;

- bb. “Synanthic[®] Products” means all Products that contain the active pharmaceutical ingredient generically known as oxfendazole, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;
- cc. “The Puppyshot[®] Products” shall have the same definition as the Duramune[®] Products;
- dd. “ToDAY[®] Products” or “Cefa-Lak[®] Products” means all Products that contain the active pharmaceutical ingredient generically known as cephalixin, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;
- ee. “ToMORROW[®] Products” or “Cefa-Dri[®] Products” means all Products that contain the active pharmaceutical ingredient generically known as cephalixin, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;
- ff. “Triangle[®] Products” (using killed viruses) means:
 - 1) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the virus that causes infectious bovine rhinotracheitis (IBR);

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- 2) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the virus that causes bovine viral diarrhea (BVD);
 - 3) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the bovine respiratory syncytial virus (BRSV);
 - 4) all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the parainfluenza-3 virus (PI₃); and
 - 5) all Products containing any one of the above-described Antigens (1-4) in combination with one or more Antigens derived from, or to stimulate immunity to, one or more strains of *Leptospira* and/or *Mannheimia haemolytica*;
- gg. "Trichguard[®] Products" means all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the *Tritrichomonas foetus* protozoan and all Products containing *Trichomonas foetus* Antigen in combination with one or more Antigens derived from, or to stimulate immunity to, one or more strains of *Leptospira* and/or *Campylobacter fetus*;
- hh. "Trivib[®] Products" means all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of

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any of the following microorganisms:

- 1) *Campylobacter fetus*;
- 2) *Leptospira pomona*;
- 3) *Leptospira hardjo*;
- 4) *Leptospira grippotyphosa*;
- 5) *Leptospira canicola*; and/or
- 6) *Leptospira icterohaemorrhagiae*;

provided however, that the term “Trivib[®] Products” does not include Products containing these Antigens that are uniquely formulated for use in swine and sold under the Suvaxyn[®] trademark;

- ii. “Vetalar[®] Products” means all Products sold under the trademark Vetalar[®] that contain the active pharmaceutical ingredient generically known as ketamine, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof;
- jj. “Vetalog[®] Products” means all Products sold under the trademark Vetalog[®] that contain the active pharmaceutical ingredient generically known as triamcinolone, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof; and
- kk. “Vetisulid[®] Products” means all Products that contain the active pharmaceutical ingredient

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generically known as sodium sulfachlorpyridazine, together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof; and

2. all of the following Products marketed or sold by Respondent Pfizer prior to the Acquisition for use in animals, but excluding humans:
 - a. “Rhinomune[®] Products” means all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the equine herpes virus Type 1 (EHV-1); and
 - b. “Rhino-flu[®] Products” means all Products that contain one or more Antigens derived from, or to stimulate immunity to, one or more strains of the equine herpes virus Type 1 (EHV-1).
- P. “Antigen” means any substance that when introduced to the body stimulates an immunological response. The term “Antigen” includes, without limitation, live or killed viruses, attenuated viruses, parts of viruses, toxins, bacteria, and foreign blood cells.
- Q. “Application(s)” means all of the following, as defined in the United States Federal Food, Drug and Cosmetic Act, as amended: “Investigational New Animal Drug Application” (“INADA”), “New Animal Drug Application” (“NADA”), “Abbreviated New Animal Drug Application” (“ANADA”), or “Conditional New Animal Drug Application” (“CNADA”) for a Product filed or to be filed with the FDA, or its foreign Agency equivalent, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data

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necessary for the preparation thereof, and all correspondence between Respondents and the FDA or other Agency related thereto. The term "Application" and all of the foregoing terms or abbreviations include the foreign equivalents of the above-referenced filings and activities with the foreign counterpart(s) of the FDA.

R. "Biological Manufacturing and Testing Materials" means:

1. Reagents;
2. assays (including, without limitation, potency and microorganism cell protein assays);
3. Master Cells;
4. Master Seeds;
5. hybridomas;
6. antibodies;
7. cell culture media and similar materials;
8. nutrient feed for cells and microorganisms;
9. challenge materials; and
10. references;

to the extent any of the foregoing are being used, suitable for use, have been used, or are planned to be used, by Respondents for the manufacture, use, Development, or commercialization of the Animal Health Product(s) and/or Animal Health Pipeline Products.

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- S. “Boehringer Ingelheim” means Boehringer Ingelheim Vetmedica, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 2621 North Belt Highway, St. Joseph, Missouri 64506-2002.
- T. “Clinical Trial(s)” means a controlled study in animals, including the target species with respect to a particular Product, of the safety or efficacy of a Product, and includes, without limitation, such clinical trials as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other animal study used in research and Development of Animal Health Products and/or Animal Health Pipeline Products.
- U. “Closing Date” means, as to each Divestiture Product, the date on which Respondent(s) (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets related to such Divestiture Product to an Acquirer pursuant to this Order.
- V. “Component(s)” means any active ingredient, Antigen, nucleic acids encoding an Antigen, adjuvant, and/or other component of a Product that is intended to affect the efficacy or safety of an active ingredient of such Product; *provided however*, that Respondents may retain the right, concurrently with the Acquirer’s rights, to use adjuvants and excipients that are used in Divestiture Products and Retained Products.
- W. “Confidential Business Information” means all information owned by, or in the possession or control of, a Respondent that is not in the public domain and

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that is directly related to the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Divestiture Product(s);

provided however, that the restrictions contained in this Order regarding the Respondents' use, conveyance, provision, or disclosure of "Confidential Business Information" shall not apply to the following:

1. information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by Respondent(s);
2. information related to the Divestiture Products that were researched, Developed, manufactured, marketed, or sold by Respondent Pfizer that Respondent Wyeth can demonstrate it obtained without the assistance of Respondent Pfizer prior to the Acquisition;
3. information related to the Divestiture Products that were researched, Developed, manufactured, marketed, or sold by Respondent Wyeth that Respondent Pfizer can demonstrate it obtained without the assistance of Respondent Wyeth prior to the Acquisition;
4. information that is required by Law to be publicly disclosed;
5. information that does not directly relate to the Divestiture Products;
6. information relating to either Respondent's general business strategies or practices relating to research,

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Development, manufacture, marketing or sales of animal health Products that does not discuss with particularity the Divestiture Products; or

7. information specifically excluded from the Animal Health Product Assets.
- X. “Contract Manufacture” means:
1. the manufacture of a Divestiture Product, or ingredient or Component thereof, or
 2. the provision of any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of a Divestiture Product, to be supplied or provided by Respondents to an Acquirer or to the Designee of an Acquirer.
- Y. “Contract Manufacture Product” means any Divestiture Product, or ingredient or Component thereof, for which any part of the manufacturing process is performed by the Respondent(s) prior to the Closing Date at a facility that is not subject to divestiture pursuant to this Order.
- Z. “Designee” means any Person other than a Respondent that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.
- AA. “Development” means all preclinical and clinical drug and biological research and development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials

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for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and registration, and regulatory affairs related to the foregoing. “Develop” means to engage in Development.

- BB. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. “Direct Cost” to the Acquirer for its use of any of Respondents’ employees’ labor shall not exceed the average hourly wage rate for such employee;

provided, however, in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product, “Direct Cost” means such cost as is provided in such Remedial Agreement for that Divestiture Product.

- CC. “Divestiture Product(s)” means the following: the Animal Health Products, the Animal Health Pipeline Products and the Equine Anthelmintic Products, individually and collectively.
- DD. “Divestiture Product Releasee(s)” means the Acquirer for the assets related to a particular Divestiture Product or any Person controlled by or under common control with such Acquirer, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of such Acquirer, or of such Acquirer-affiliated entities.

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- EE. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- FF. “Domain Name” means the domain name(s), universal resource locators (“URL”), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration. “Domain Name” shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.
- GG. “Effective Date” means the earliest of the following dates:
1. the date the Respondents close on the Acquisition pursuant to the Agreement and Plan of Merger;
 2. the date the merger contemplated by the Agreement and Plan of Merger becomes effective by filing the certificate of merger with the Secretary of State of the State of Delaware; or
 3. the date on which Respondent Pfizer acquires, directly or indirectly, fifty (50) percent or more of the voting securities of Respondent Wyeth.
- HH. “Equine Anthelmintic Product(s)” means all Product(s) that are for use within equines and that contain the active pharmaceutical ingredient Ivermectin and any dose form, presentation, or line extension thereof. “Equine Anthelmintic Product(s)” includes, without limitation, any combination of Ivermectin with any other Product, and any Product marketed or sold, or to be marketed or sold under the Equimax[®] or Equell[®] Product Trademarks.

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- II. “Equine Anthelmintic Product Agreement” means the Protocol and Amendment regarding The License and The Supply Agreements for Equimax[®] and Equell[®] Products of Virbac between Pfizer Inc. and Virbac Corporation, dated as of July 24, 2009, and all amendments, exhibits, attachments, agreements, and schedules thereto.
- JJ. “Equine Anthelmintic Product Assets” means all of the specified Respondent’s rights, title and interest in and to all assets related to such Respondent’s business within the United States of America related to each of the respective Equine Anthelmintic Products to the extent legally transferable, including the distribution, marketing, and sale of each such Product, including, without limitation, the following assets related to each of the Equine Anthelmintic Products:
1. all Product Copyrights;
 2. all Product Trademarks;
 3. all Product Tradedresses;
 4. all Product Marketing Materials;
 5. all Websites;
 6. at Virbac’s option, all Product Assumed Contracts (copies to be provided to Virbac on or before the Effective Date);
 7. all rights to obtain and file for patents, trademarks, and copyrights and registrations thereof;
 8. a list of all customers and/or targeted customers for the Equine Anthelmintic Products and the net sales

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(in either units or dollars) of such Products to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of such Equine Anthelmintic Products on behalf of the High Volume Account and his or her business contact information;

9. at Virbac's option and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date including, but not limited to, raw materials, packaging materials, work-in-process and finished goods related to the Equine Anthelmintic Products;
10. copies of all unfilled customer purchase orders for the Equine Anthelmintic Products as of the Closing Date, to be provided to Virbac not later than five (5) days after the Closing Date;
11. at Virbac's option, subject to any rights of the customer, all unfilled customer purchase orders for the Equine Anthelmintic Products; and
12. all of the relevant Respondent's books, records, and files directly related to the foregoing or to the Equine Anthelmintic Products;

provided, however, that "Equine Anthelmintic Product Assets" shall not include: (1) documents relating to either Respondent's general business strategies or practices relating to marketing or sales of Products,

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where such documents do not discuss with particularity the Equine Anthelmintic Products; and (2) shall not include administrative, financial, and accounting records;

provided further, however, that in cases in which documents or other materials included in the relevant assets to be divested contain information: (1) that relates both to the Equine Anthelmintic Products and to other Products or businesses of the Respondent(s) and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Equine Anthelmintic Products; or (2) for which the Respondent(s) has a legal obligation to retain the original copies, the Respondent(s) shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to Virbac, the Respondent(s) shall provide Virbac access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondent(s) provides Virbac with the above-described information without requiring Respondent(s) completely to divest itself of information that, in content, also relates to Retained Product(s).

- KK. Product Marketing Employees related to the Equine Anthelmintic Products.
- LL. “Equine Anthelmintic New Joint Development Partner” means any Person designated by Virbac as its partner to provide any aspect of the research, Dev “Equine Anthelmintic Core Employees” means the elopment, manufacture, use, import, export, distribution, marketing, or sale related to the Equine Anthelmintic Products.

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- MM. “Field” means the prevention, treatment, diagnosis, or control of a particular disease within a particular family, genus, and/or species of non-human animals.
- NN. “Geographic Territory” shall mean the United States of America, including all its territories and possessions, unless otherwise specified.
- OO. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- PP. “High Volume Account(s)” means any retailer, wholesaler or distributor whose annual and/or projected annual aggregate purchase amounts (on a company-wide level), in units or in dollars, of a Divestiture Product in the United States of America from the Respondent was, or is projected to be among the top twenty (20) highest of such purchase amounts by the Respondent’s U.S. customers on any of the following dates: (1) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (2) the end of the last quarter that immediately preceded the Effective Date; (3) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or (4) the end of the last quarter following the Acquisition and/or the Closing Date.
- QQ. “InfoVax[®] Patents” means US Patent No. 5,704,648, Canadian Patent No. 2,237,570 and any and all patent rights claiming priority thereto.
- RR. “Interim Monitor” means any monitor appointed pursuant to Paragraph IV of this Order or Paragraph III

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of the related Order to Maintain Assets.

- SS. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- TT. “Master Cell(s)” means the master cell, working cell, and production cell existing as of the Closing Date required or used in the production of the specified Product(s).
- UU. “Master Files” means submissions made to the FDA in order to provide confidential, detailed information about facilities, processes, or articles used in the manufacturing, processing, packaging, and storing of one or more veterinary drugs, and includes both master files maintained by the FDA Center for Drug Evaluation and Research (generally referred to as drug master files) and those maintained by the FDA Center for Veterinary Medicine (generally referred to as veterinary master files).
- VV. “Master Seed(s)” means the master seed, working seed and production seed existing as of the Closing Date required or used in the production of the specified Products(s).
- WW. “Order Date” means the date on which this Decision and Order becomes final.
- XX. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- YY. “Ownership Interest” means any and all rights, present or contingent, to hold any voting or nonvoting stock, share capital, equity or other interests, or beneficial ownership in a Person.

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- ZZ. “Patent(s)” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related to any Product of or owned or licensed by Respondent(s) as of the Closing Date (*except* where this Order specifies a different time).
- AAA. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.
- BBB. “Process and Analytical Documents” means the following documents, whether in paper, electronic or other format, related to the processes and Product Manufacturing Technology used by Respondents to manufacture Animal Health Products and/or Animal Health Pipeline Products and the applicable analytical methods used by Respondents:
1. Master Cell and Master Seed bank documentation, which includes but is not limited to, the following:
 - a. Master Cell Line and Master Seed Generation Technical Report (including: description of the host cell history, cell line generation procedures, vector construction, and

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selection/cloning, if any, and stability data, and transmissible spongiform encephalopathy (“TSE”) certificates on ingredients);

- b. Preliminary Master Cell and Master Seed Bank Preparation Technical Report (including: description of banking procedures including storage conditions, vial thaw results, and in-house and contract lab test reports (sterility, mycoplasma, and any other contaminants));
- c. Master Cell and Master Seed Stability Technical Report (including: description of methodology, evaluation of cell growth and Master Seed titers (at increasing cell age), and any results of genetic mutation studies);
- d. Master Cell and Master Seed Banking Process Description (including: list of raw materials and suppliers, list of consumables, list of equipment, media and solution recipes, culture working volumes and conditions, criteria for transfer, seed ratios and process set points);
- e. Master Cell and Master Seed Bank Specification (including: quality assurance approved Master Cell and Master Seed bank specification);
- f. Master Cell and Master Seed Bank Raw Materials Documentation (including: list of raw materials, source and lot numbers used for Master Cell and Master Seed banking and verification of origin);
- g. Master Cell and Master Seed Bank Batch Record (including: executed and released batch records for Master Cell and Master Seed

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bank preparation and methodology and certificate of analysis); and

- h. Master Cell and Master Seed Bank Test Reports (including: copy of test reports for safety and quality assurance testing of Master Cell and Master Seed bank by in-house and contract lab);
2. Drug and Biological Substance Process Information Documentation, which includes the following:
 - a. Cell Culture Process Description for Specified Engineering Run (including: list of raw materials and suppliers, list of consumables, list of equipment, media and solution recipes, culture working volumes, criteria for transfer, seed ratios, process set points, sampling requirements, criteria for feeding, and feed schedule);
 - b. Harvest Process Description for Specified Engineering Run (including: list of raw materials and suppliers, list of consumables, list of equipment, solution recipes, process set points, sampling requirements, and criteria for initiating harvest);
 - c. Purification Process Description for Specified Engineering Run (including: list of raw materials and suppliers, list of consumables, list of equipment, solution recipes, process set points, analytic and quality assurance data obtained at the beginning, during and ending of the Run, and sampling requirements);

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- d. Drug Substance Formulation Process Description for Specified Engineering Run (including: list of raw materials and suppliers, list of consumables, list of equipment, solution recipes, process set points, and sampling requirements);
- e. Cell Culture Process Development Reports (*i.e.*, summary of experiments performed during development of the cell culturing process);
- f. Harvest Process Development Reports (*i.e.*, summary of experiments performed during development of the harvesting process);
- g. Purification Process Development Reports (*i.e.*, summary of experiments performed during development of the purification process);
- h. Formulation Process Development Reports (*i.e.*, summary of experiments performed during development of the formulation process);
- i. Viral Clearance Study In-House and Contract Lab Reports (*i.e.*, summary of viral clearance/inactivation study results and conclusions (*i.e.*, total logs clearance));
- j. Drug and Biological Substance Specification (*i.e.*, the quality assurance approved drug substance specification and biological quality standards for all Components);
- k. Drug and Biological Substance Process Raw Materials Documentation (including: list of raw materials used for drug and biological

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substance manufacturing and verification of origin, including specifications and risk assessment);

- l. Batch Records for Agency Manufacturing Standards - Purification (*i.e.*, executed and released batch records, including in-process controls and testing results);
 - m. Batch Records for Agency Manufacturing Standards - Formulation (*i.e.*, executed and released batch records, including in-process controls and testing results);
 - n. Drug Substance Stability Reports (including: summary of drug substance stability); and
 - o. Test Results for Agency Manufacturing Standards (including: antibody concentration, endotoxin, sterility, mycoplasma, *in vitro* viral, and bioburden);
3. Process for Technical Transfer Documentation including: technical transfer plan detailing responsibilities, deliverables and targeted time line; transfer protocols, detailing responsibilities, procedures, sampling plan and criteria for transfer success for each of the following: cell culture process, harvest process, purification process, formulation process; transfer reports summarizing the results of the following transfers: cell culture process, harvest process, purification process, formulation process; and
 4. Analytical Methods for Technical Transfer: potency, identity, and safety assay development report detailing the development and qualification

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of the assay; potency and safety assay transfer protocol, detailing responsibilities, procedures, and criteria for transfer success; and potency assay transfer report summarizing the results of the transfer.

- CCC. "Product(s)" means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its pharmaceutically, biologically, or genetically active ingredient.
- DDD. "Product Approval(s)" means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of the Product within the United States of America, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application or Veterinary Biological Product Authorization.
- EEE. "Product Assumed Contracts" means all of the following contracts or agreements (copies of each such contract to be provided to the Acquirer on or before the Closing Date and segregated in a manner that clearly identifies the purpose(s) of each such contract):
1. that make specific reference to the Divestiture Product(s) and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, the Divestiture Product(s) from the Respondent(s) unless such contract applies generally to the Respondent's sales of Products to that Third Party;

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2. pursuant to which Respondent(s) purchases or had planned to purchase the active pharmaceutical ingredient(s), Biological Manufacturing and Testing Materials, Components, or other necessary ingredient(s) from any Third Party for use in connection with the manufacture of the Divestiture Product(s);
3. relating to any Clinical Trials involving the Divestiture Product(s);
4. with universities or other research institutions for the use of the Divestiture Product(s) in scientific research;
5. relating to the particularized marketing of the Divestiture Product(s) or educational matters relating solely to the Divestiture Product(s);
6. pursuant to which a Third Party manufactures or packages the Divestiture Product(s) on behalf of Respondent(s);
7. pursuant to which a Third Party provides the Product Manufacturing Technology related to the Divestiture Product(s) to Respondent(s);
8. pursuant to which a Third Party is licensed by Respondent(s) to use the Product Manufacturing Technology;
9. constituting confidentiality agreements involving the Divestiture Product(s);
10. involving any royalty, licensing, covenant not to sue, or similar arrangement involving the

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Divestiture Product(s);

11. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the Divestiture Products to Respondent(s) including, but not limited to, consultation arrangements; and/or
12. pursuant to which any Third Party collaborates with Respondent(s) in the performance of research, Development, marketing, distribution or selling of the Divestiture Product(s) or the Divestiture Product(s) business;

provided, however, that where any such contract or agreement also relates to a Retained Product(s), Respondent(s) shall provide to the Acquirer all such rights under the contract or agreement as are related to the Divestiture Product(s), but concurrently may retain similar rights for the purposes of the Retained Product(s).

FFF. "Product Code Numbers means:

1. for Products regulated by the FDA, the National Drug Code ("NDC") numbers, including both the labeler code assigned by the FDA and the additional numbers assigned by an Application holder as a product code for a specific Product; or
2. for Products regulated by any Agency other than the FDA, such labeler code assigned by that Agency and any additional number assigned by the holder of the Product Approvals related to the Product that appear on the packaging or labeling of a specific Product.

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GGG. "Product Copyrights" means rights to all original works of authorship of any kind directly related to the Divestiture Product(s) and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for animal owners and/or breeders, and educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of the Divestiture Product(s) or of any materials used in the research, Development, manufacture, marketing or sale of the Divestiture Product(s), including all copyrights in raw data relating to Clinical Trials of the Divestiture Product(s), all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information, promotional and marketing materials, the Divestiture Product(s) sales forecasting models, medical education materials, sales training materials, and advertising and display materials; all records relating to employees who accept employment with the Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to the Divestiture Product(s) or relating to its biology; all copyrights in adverse experience reports

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and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; all correspondence with the FDA; and all correspondence with the USDA.

HHH. "Product Development Reports" means:

1. Pharmacokinetic study reports related to the specified Divestiture Product(s);
2. Bioavailability study reports (including reference listed drug information) related to the specified Divestiture Product(s);
3. Bioequivalence study reports (including reference listed drug information) related to the specified Divestiture Product(s);
4. all correspondence to the Respondent(s) from the FDA or USDA, as applicable to the specified Product, and from the Respondent(s) to the FDA or USDA, as applicable to the specified Product, relating to the Application(s) or Veterinary Biological Product Authorization(s) submitted by, on behalf of, or acquired by, the Respondent(s) related to the specified Divestiture Product;
5. annual and periodic reports related to the above-described Application(s) or Veterinary Biological Product Authorization(s), including any safety update reports;
6. FDA or USDA, as applicable to the specified Product, approved Product labeling related to the specified Divestiture Product(s);

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7. currently used product package inserts (including historical change of controls summaries) related to the specified Divestiture Product(s);
 8. FDA or USDA, as applicable to the specified Product, approved circulars for animal owners and/or breeders and information related to the specified Divestiture Product(s);
 9. adverse event/serious adverse event summaries related to the specified Divestiture Product(s);
 10. summary of Product complaints from physicians or veterinarians related to the specified Divestiture Product(s);
 11. summary of Product complaints from customers related to the specified Divestiture Product(s); and
 12. Product recall reports including those filed with the FDA or USDA, as applicable to the specified Product, related to the specified Divestiture Product(s).
- III. "Product Employee Information" means the following, for each employee, as and to the extent permitted by Law:
1. a complete and accurate list containing the name of each relevant employee (including former employees who were employed by Respondent(s) within ninety (90) days of the execution date of any Remedial Agreement);
 2. with respect to each such employee, the following information:

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- a. the date of hire and effective service date;
 - b. job title or position held;
 - c. a specific description of the employee's responsibilities related to the relevant Divestiture Product; *provided, however*, in lieu of this description, Respondent(s) may provide the employee's most recent performance appraisal if such appraisal discloses whether the employee has worked on the Divestiture Product;
 - d. the base salary or current wages;
 - e. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year and current target or guaranteed bonus, if any;
 - f. employment status (*i.e.*, active or on leave or disability; full-time or part-time); and
 - g. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
3. at the Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.
- JJJ. "Product Intellectual Property" means all of the following related to a Divestiture Product (other than Product Licensed Intellectual Property):

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1. Patents;
2. Product Copyrights;
3. Product Trademarks, Product Trade Dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; and
4. rights to obtain and file for patents, trademarks, and copyrights and registrations thereof and to bring suit against a Third Party for the past, present or future infringement, misappropriation, dilution, misuse or other violations of any of the foregoing;

provided, however, "Product Intellectual Property" does not include the corporate names or corporate trade dress of "Pfizer" or "Wyeth," or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondents or the related logos thereof.

KKK. "Product Improvements" means all of the following as are in existence as of the Closing Date:

1. for biological preparations, any new, improved or modified composition, formulation or line extension of, or derived from, an Animal Health Product and/or Animal Health Pipeline Product (including, without limitation, the addition, subtraction, substitution and/or modification of one or more Components in an Animal Health Product and/or Animal Health Pipeline Product), including, without limitation, the following:
 - a. the combination of one or more such

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Components with other Components;

- b. the substitution of a Component in an Animal Health Product and/or Animal Health Pipeline Product with a different Component (*e.g.*, without limitation, substitution with an Antigen from the same or a different virus, bacterin, substitution of one strain of virus/bacterium for another, substitution of an Antigen with a nucleic acid encoding an Antigen, substitution of an Antigen by a recombinant Antigen with a nucleic acid encoding an Antigen, and/or substitution of an Antigen by a recombinant Antigen in a viral vector such as baculo-virus vector); and/or
 - c. modification of a Component in an Animal Health Product and/or Animal Health Pipeline Product (*e.g.*, without limitation, modifying the Antigen/virus used in a Product by mutation, chimerization, etc.); and
2. for pharmaceutical preparations, any new, improved or modified composition (*e.g.*, without limitation, structural modifications to the active pharmaceutical ingredients, and/or different salt forms, hydrates or polymorphs of such active pharmaceutical ingredients), combination, formulation or line extension of, or derived from, an Animal Health Product and/or Animal Health Pipeline Product (including, without limitation, the addition, subtraction, substitution and/or modification of one or more Components in an Animal Health Product and/or Animal Health Pipeline Product).
- LLL. "Product Licensed Intellectual Property" means the following:

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1. Patents that are related to a Divestiture Product that Respondent(s) can demonstrate have been routinely used, prior to the Effective Date, for a Retained Product(s) that has been marketed or sold on an extensive basis by a Respondent within the two-year period immediately preceding the Acquisition; and
2. trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information, and all rights in the Geographic Territory to limit the use or disclosure thereof, that are related to a Divestiture Product and that Respondent(s) can demonstrate have been routinely used, prior to the Effective Date, for a Retained Product(s) that has been marketed or sold on an extensive basis by a Respondent within the two-year period immediately preceding the Acquisition;

provided however, that, in cases where the aggregate retail sales of a Retained Product(s) in dollars within the two-year period immediately preceding the Acquisition collectively are less than the aggregate retail sales in dollars within the same period of the Divestiture Product(s) collectively being divested to a particular Acquirer, the above-described intellectual property shall be considered, at the such Acquirer's option, to be Product Intellectual Property and, thereby, subject to assignment to such Acquirer;

provided further, however, that in such cases, Respondents may take a license back from such Acquirer for such intellectual property for use in connection with the Retained Products and such a

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license to Respondents may be a perpetual, fully paid-up and royalty-free license(s) with rights to sublicense.

MMM. "Product Manufacturing Employees" means all salaried employees of Respondents who have directly participated in the planning, design, implementation or operational management of the Product Manufacturing Technology of the specified Divestiture Product(s) (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

NNN. "Product Manufacturing Technology" means:

1. all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of the Divestiture Product(s), including, but not limited to, the following: all techniques and specifications, cell culture processes (including all cell culture processes developed or being developed for use in such manufacture, and results of all experiments used to evaluate such processes), preparation (including vial thaw and inoculum preparation), synthesis, culture (including fed-batch bioreactor culture), recovery and purification (including chromatography and filtration steps), formulation (including concentration, buffer exchange, and excipient addition) and quality control processes, techniques and specifications, analytical methods for process controls and drug substance release, all product specifications, processes, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams,

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chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Application(s) conformance or Veterinary Biologic Product Authorization(s), as applicable, and Agency Manufacturing Standards compliance, and labeling and all other information related to the manufacturing process, and supplier lists;

2. all Biological Manufacturing and Testing Materials related to the Divestiture Products;
 3. all active pharmaceutical ingredients related to the Divestiture Product(s);
 4. all Process and Analytical Documents; and
 5. for those instances in which the manufacturing equipment is not readily available from a Third Party, at the Acquirer's option, all such equipment used to manufacture the Divestiture Product(s).
- OOO. "Product Marketing Employees" means all management level employees of Respondent(s) who directly have participated (irrespective of the portion of working time involved) in the marketing, contracting, or promotion of the specified Divestiture Product(s) in the United States of America within the eighteen (18) month period immediately prior to the Closing Date. These employees include, without limitation, all management level employees having any responsibilities in the areas of sales management, brand management, sales training, market research, veterinary market and other specialty markets, but excluding administrative assistants.

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- PPP. “Product Marketing Materials” means all marketing or promotional materials used specifically in the marketing or sale of a Divestiture Product(s) in the Geographic Territory as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (*e.g.*, detailing reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, Product labels, and packaging, television masters and other similar materials related to the Divestiture Product(s).
- QQQ. “Product Research and Development Employees” means all salaried employees of Respondents who directly have participated in the research, Development, or regulatory approval process, or clinical studies of the specified Divestiture Product(s) (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.
- RRR. “Product Sales Employees” means all employees of Respondent(s) who directly have participated (irrespective of the portion of working time involved) in the detailing, marketing or promotion of the

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Divestiture Product(s) in the United States directly to veterinarians, animal breeders, and/or professional distributors, within the twelve (12) month period immediately prior to the Closing Date. This includes employees trained to perform such detailing for the Divestiture Product(s) within the twelve (12) month period immediately prior to the Closing Date.

- SSS. "Product Trade Dress" means the current trade dress of the Divestiture Product, including but not limited to, Product packaging, and the lettering of the Product trade name or brand name.
- TTT. "Product Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Divestiture Product(s). The term "Product Trademarks" includes, without limitation, all trademarks specifically identified in the definition of Animal Health Products, and any variations of such trademarks.
- UUU. "Proposed Acquirer" means a Person proposed by Respondents (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission as the acquirer for particular assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed by Respondents pursuant to this Order.
- VVV. "Reagent(s)" means the reagents, microorganisms antibodies, sera, proteins, clinical and tissue samples and raw materials used to perform the applicable potency, immunogenicity and/or antigen compatibility

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test with respect to the Products, including without limitation, the reference vaccine for any vaccine Product.

WWW. "Remedial Agreement(s)" means the following:

1. any agreement between Respondent(s) and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final;
2. any agreement between Respondent(s) and a Third Party to effect the assignment of assets or rights of Respondent(s) related to a Divestiture Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final;
3. any agreement between Respondent(s) and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has

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been approved by the Commission to accomplish the requirements of this Order; and/or

4. any agreement between Respondent(s) and a Third Party to effect the assignment of assets or rights of Respondent(s) related to a Divestiture Product to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

XXX. "Retained Product" means any Product(s) other than a Divestiture Product.

YYY. "Supply Cost" means a cost not to exceed the manufacturer's average direct per unit cost in United States dollars of manufacturing the Divestiture Product for the twelve (12) month period immediately preceding the Effective Date. "Supply Cost" shall expressly exclude any intracompany business transfer profit; *provided, however*, that in each instance where: (1) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product, "Supply Cost" means the cost as specified in such Remedial Agreement for that Divestiture Product.

ZZZ. "Technology Transfer Standards" means requirements and standards sufficient to ensure that the information and assets required to be delivered pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (*i.e.*, ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, *inter alia*,

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1. designating employees knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer and/or its Designee, and the Interim Monitor, for the purpose of effecting such delivery;
2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified Divestiture Product(s) that are acceptable to the Acquirer;
3. preparing and implementing a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology (including all related intellectual property) to the Acquirer or its Designee; and
4. providing, in a timely manner, assistance and advice to enable the Acquirer or its Designee to:
 - a. manufacture the specified Divestiture Product(s) in the quality and quantities achieved by the Respondent(s), or the manufacturer and/or developer of such Divestiture Product;
 - b. obtain any Product Approvals necessary for the Acquirer or its Designee, to manufacture, distribute, market, and sell the specified Divestiture Product(s) in commercial quantities and to meet all Agency-approved specifications for such Divestiture Product(s); and

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- c. receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified Divestiture Product(s).

AAAA. "Third Party(ies)" means any non-governmental Person other than the following: Respondent Pfizer, Respondent Wyeth, or the Acquirer of the affected assets, rights and Divestiture Product(s).

BBBB. "Veterinary Biological Product Authorization(s)" means all of the following, as defined in Title 9 of the Code of Federal Regulations: a U.S. Veterinary Biological Product License or Permit, and a U.S. Veterinary Biological Establishment License, for a Product filed or to be filed with the USDA, or its foreign Agency equivalent, and all supplements, amendments, and revisions thereto, all outlines of production, protocols, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondents and the USDA or other Agency related thereto. The term "Veterinary Biological Product Authorization(s)" and all of the foregoing terms or abbreviations include the foreign equivalents of the above-referenced filings and activities with the foreign counterpart(s) of the USDA.

CCCC. "Virbac" means Virbac Corporation, a company organized, existing, and doing business under the laws of the State of Delaware, with headquarters located at 3200 Meacham Boulevard, Fort Worth, Texas 76137. The term "Virbac" also includes the parent corporation of Virbac Corporation, Virbac SA.

DDDD. "Website" means the content of the Website(s) located at the Domain Names, the Domain Names, and all

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copyrights in such Website(s), to the extent owned by Respondents; *provided, however*, “Website” shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by Respondents that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that Respondents can convey its rights, if any, therein; or (2) content unrelated to any of the Divestiture Product(s).

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

- A. Not later than ten (10) days after the Effective Date, Respondents shall divest the Animal Health Product Assets and grant the Animal Health Product Licenses, absolutely and in good faith, to Boehringer Ingelheim pursuant to, and in accordance with, the Animal Health Product Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Boehringer Ingelheim or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Animal Health Product Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Animal Health Product Assets and granted the Animal Health Product Licenses to Boehringer Ingelheim prior to the Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Boehringer Ingelheim is not an acceptable purchaser of the Animal Health Product Assets, then Respondents shall

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immediately rescind the transaction with Boehringer Ingelheim, in whole or in part, as directed by the Commission, and shall divest the Animal Health Product Assets and grant the Animal Health Product Licenses, as applicable, within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers that receive(s) the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further that if Respondents have divested the Animal Health Product Assets and granted the Animal Health Product Licenses to Boehringer Ingelheim prior to the Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which the divestiture or license grant was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Animal Health Product Assets or grant of the Animal Health Product Licenses, as applicable, to Boehringer Ingelheim (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Animal Health Product Assets and grant the Animal Health Product Licenses to an Acquirer of the Animal Health Product Assets, and/or to permit such Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Animal Health Products and/or Animal Health Pipeline Products;

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provided, however, that Respondents may satisfy this requirement by certifying that such Acquirer has executed all such agreements directly with each of the relevant Third Parties.

- C. Respondents shall transfer and deliver, or cause to be transferred and delivered, all Product Manufacturing Technology (including all related intellectual property) related to the Animal Health Products and/or Animal Health Pipeline Products that either Respondent owns, and shall transfer and deliver, or cause to be transferred and delivered, all rights to all Product Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed by either Respondent related to the specified Animal Health Products and/or Animal Health Pipeline Products, to the Acquirer of the related Animal Health Product Assets in a manner consistent with the Technology Transfer Standards. Respondents shall obtain any consents from Third Parties required to comply with this provision.
- D. Respondents shall:
1. upon reasonable written notice and request from an Acquirer of the Animal Health Product Assets to Respondents, Contract Manufacture and deliver to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products at Respondents' Supply Cost, for a period of time sufficient to allow such Acquirer (or the Designee of the Acquirer) to obtain all of the relevant Product Approvals necessary to manufacture and sell in commercial quantities, and in a manner consistent with Agency Manufacturing Standards, the finished Product independently of Respondents

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and to secure sources of supply of the active pharmaceutical ingredients, Biological Manufacturing and Testing Materials, excipients, other ingredients, and/or necessary Components listed in the specified Respondent's Application(s) or Veterinary Biological Product Authorization(s), as applicable, for the Product from Persons other than the Respondents;

2. extend the period of time covered by any Remedial Agreement to Contract Manufacture without further negotiation of the other terms of such Remedial Agreement should the Interim Monitor, in consultation with staff of the Commission, determine that additional time is necessary for the requesting Acquirer to obtain the relevant Product Approvals described above;
3. make representations and warranties to any Acquirer of the Animal Health Product Assets that the Contract Manufacture Product(s) supplied through Contract Manufacture pursuant to a Remedial Agreement meet the relevant Agency-approved specifications. For the Product(s) to be marketed or sold in the Geographic Territory, Respondents shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Product(s) supplied to the Acquirer pursuant to a Remedial Agreement by Respondents to meet Agency Manufacturing Standards. This obligation may be made contingent upon the Acquirer giving Respondents prompt written notice of such claim and cooperating fully in the defense of such claim. The Remedial Agreement shall be consistent with the obligations assumed by Respondents under this

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Order;

provided, however, that Respondents may reserve the right to control the defense of any such litigation, including the right to settle the litigation, so long as such settlement is consistent with Respondents' responsibilities to supply the ingredients and/or Components in the manner required by this Order;

provided further that this obligation shall not require Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondents to the Acquirer;

provided further that in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on Respondents' aggregate liability to the Acquirer resulting from the failure of the Products supplied to the Acquirer pursuant to such Remedial Agreement by Respondents to meet Agency Manufacturing Standards;

4. give priority to supplying a Contract Manufacture Product to any Acquirer of the Animal Health Product Assets over manufacturing and supplying of Products for Respondents' own use or sale;
5. make representations and warranties to any Acquirer of the Animal Health Product Assets that Respondents shall hold harmless and indemnify the

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Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to deliver the Contract Manufacture Products in a timely manner as required by the Remedial Agreement(s) unless Respondents can demonstrate that such failure was entirely beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents;

provided, however, that in each instance where: (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on Respondents' aggregate liability to the Acquirer for such a breach;

6. during the term of any Contract Manufacture between Respondent(s) and any Acquirer of the Animal Health Product Assets, upon written request of such Acquirer or the Interim Monitor, make available to the Acquirer and the Interim Monitor all records that relate to the manufacture of the relevant Contract Manufacture Products that are generated or created after the Closing Date;
7. during the term of any Contract Manufacture between Respondent(s) and any Acquirer of the Animal Health Product Assets, maintain manufacturing facilities necessary to manufacture each of the relevant Contract Manufacture Products in finished form, *i.e.*, suitable for sale to the ultimate consumer/patient; and
8. pending FDA or USDA approval, as applicable to the specified Product, of any Divestiture Product

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that has not yet been approved for commercial scale-up manufacturing and during the term of any Contract Manufacture between Respondent(s) and an Acquirer of the Animal Health Product Assets, provide consultation with knowledgeable employees of Respondents and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling such Acquirer (or the Designee of such Acquirer) to obtain all Product Approvals to manufacture the Animal Health Products in the same quality achieved by, or on behalf of, the Respondents and in commercial quantities, and in a manner consistent with Agency Manufacturing Standards, independently of Respondents, and sufficient to satisfy management of the Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of the Animal Health Products;

The foregoing provisions, II.D.1. -8., shall remain in effect with respect to each Divestiture Product until the earliest of: (1) the date each Acquirer (or the Designee(s) of such Acquirer), respectively, is approved by the FDA or the USDA, as applicable to the specified Product, to manufacture and sell such Divestiture Product and able to manufacture and sell such Divestiture Product in commercial quantities, in a manner consistent with Agency Manufacturing Standards, independently of Respondents; (2) the date the Acquirer of a particular Divestiture Product notifies the Commission and the Respondents of its intention to abandon its efforts to manufacture such Divestiture Product; (3) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer of a particular Divestiture Product has abandoned its efforts to manufacture such

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Divestiture Product; or (4) seven (7) years from the Closing Date.

- E. Respondents shall:
1. submit to the Acquirer of the Animal Health Product Assets, at Respondents' expense, all Confidential Business Information related to the Animal Health Products and the Animal Health Pipeline Products;
 2. deliver such Confidential Business Information to such Acquirer:
 - a. in good faith;
 - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
 - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
 3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Interim Monitor with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Animal Health Products and Animal Health Pipeline Products that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;
 4. not use, directly or indirectly, any such Confidential Business Information related to the

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research, Development, manufacturing, marketing, or sale of the Animal Health Products and/or the Animal Health Pipeline Products other than as necessary to comply with the following:

- a. the requirements of this Order;
 - b. Respondents' obligations to the Acquirer of the Animal Health Products under the terms of any Remedial Agreement related to the Animal Health Products; or
 - c. applicable Law;
5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer of the Animal Health Products or other Persons specifically authorized by such Acquirer to receive such information; and
6. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the Development, manufacture, marketing or sales of the Animal Health Products or the Animal Health Pipeline Products to the employees associated with business related to those Retained Products that:
- a. contain the same active biological or pharmaceutical ingredient;
 - b. are approved, or in Development for use, in the same Field as the Animal Health Products;
 - c. are approved, or in Development for use, in the same Field as the Animal Health Pipeline Products.

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- F. Respondents shall not enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of such Acquirer to acquire or use the Product Manufacturing Technology (including all related intellectual property) related to the Animal Health Products acquired by such Acquirer from the Third Party. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology.
- G. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to an agreement as described in Paragraph II.F. that allows the Third Party to provide the relevant Product Manufacturing Technology to the relevant Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to such Acquirer.
- H. Respondents shall:
1. for each Divestiture Product, for a period of twelve (12) months from the Closing Date, provide the Acquirer with the opportunity to enter into employment contracts with the Animal Health Product Core Employees acquired by such Acquirer. Each of these periods is hereinafter referred to as the "Core Employee Access Period(s)";
 2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (2) ten (10) days after written request by an Acquirer, provide such

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Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Animal Health Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Animal Health Product Core Employee within the time provided herein shall extend the Core Employee Access Period(s) with respect to that employee in an amount equal to the delay;

3. during the Core Employee Access Period(s), not interfere with the hiring or employing by the Acquirer of the Animal Health Product Core Employees related to the particular Animal Health Products acquired by such Acquirer, and remove any impediments within the control of Respondent(s) that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with Respondent(s) that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to such a Animal Health Product Core Employee who has received a written offer of employment from such Acquirer;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph II.H.3. shall not prohibit Respondents from continuing to employ any Animal Health Product Core Employee under the terms of such employee's employment with Respondent(s) prior to the date of the written offer of employment from the Acquirer to such employee;

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4. until the Closing Date, provide all Animal Health Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, market, sell, and manufacture the Animal Health Product(s) consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Animal Health Product(s) and to ensure successful execution of the pre-Acquisition plans for such Animal Health Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Closing Date(s) for the divestiture of the Animal Health Product Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that, subject to those conditions of continued employment prescribed in this Order, this Order does not require nor shall be construed to require Respondents to terminate the employment of any employee or to prevent Respondents from continuing to employ the Animal Health Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year from the Closing Date, not:
 - a. directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer with any amount of responsibility related to an Animal Health Product (“Animal Health Product Employee”) to terminate his or her employment relationship with the Acquirer; or

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b. hire any Animal Health Product Employee;

provided, however, that Respondents may hire any former Animal Health Product Employee whose employment has been terminated by the Acquirer or who independently applies for employment with Respondents, as long as such employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, however, that Respondents may do the following: (1) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Animal Health Product Employees; or (2) hire a Animal Health Product Employee who contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from Respondents.

- I. Respondents shall require, as a condition of employment following divestiture of the Animal Health Product Assets, that each Animal Health Product Core Employee retained by Respondents, his or her direct supervisor, and any other employee designated by the Interim Monitor, sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to the Animal Health Products as strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).
- J. Not later than thirty (30) days after the Closing Date, Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Animal Health Products by

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Respondents' personnel to all of Respondents' employees who:

1. are or were directly involved in the research, Development, manufacturing, distribution, sale or marketing of any of the Animal Health Products;
2. are directly involved in the research, Development, manufacturing, distribution, sale or marketing of Retained Products that contain the same active biological or pharmaceutical ingredient or that are approved for use, or in Development for use, in the same Field as the Animal Health Products; and/or
3. may have Confidential Business Information related to the Animal Health Products and/or the Animal Health Pipeline Products.

Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Acquirer. Respondents shall maintain complete records of all such agreements at Respondents' registered office within the United States of America and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

- K. Until Respondents complete the divestitures required by Paragraphs II.A. and fully transfer and deliver, or cause to be transferred and delivered, the related Product Manufacturing Technology, to the Acquirer of the Animal Health Products and Animal Health

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Pipeline Products,

1. Respondents shall take such actions as are necessary to:
 - a. maintain the full economic viability and marketability of the businesses associated with each Animal Health Product and Animal Health Pipeline Product;
 - b. minimize any risk of loss of competitive potential for such business;
 - c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to each Animal Health Product and Animal Health Pipeline Product;
 - d. ensure the assets required to be divested are transferred and delivered to each Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the business associated with each Animal Health Product and Animal Health Pipeline Product; and
 - e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and
2. Respondents shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the businesses associated with each Animal Health Product and Animal Health Pipeline Product.

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- L. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against an Acquirer or the Divestiture Product Releasee(s) of that Acquirer for the research, Development, manufacture, use, import, export, distribution, or sale of the Animal Health Product(s) acquired by that Acquirer under the following:
1. any Patent owned or licensed by Respondents as of the day after the Effective Date (*excluding* those Patents that claim inventions conceived by and reduced to practice after the Effective Date) that claims a method of making, using, or administering, or a composition of matter, relating to the Animal Health Product(s) acquired by that Acquirer, or that claims a device relating to the use thereof;
 2. any Patents owned or licensed by Respondents at any time after the Effective Date (*excluding* those Patents that claim inventions conceived by and reduced to practice after the Effective Date) that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of the Animal Health Product(s) acquired by that Acquirer;

if such suit would have the potential to interfere with such Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Animal Health Product(s) anywhere in the World for the purposes of marketing or sale in the United States of America; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of a particular Animal Health Product. Respondents shall also covenant to such Acquirer that as a condition of any assignment,

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transfer, or license to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue such Acquirer or the related Divestiture Product Releasee(s) under such Patents, if the suit would have the potential to interfere with that Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Animal Health Product(s) anywhere in the World for the purposes of marketing or sale in the United States of America; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of a particular Animal Health Product;

- M. Upon reasonable written notice and request from an Acquirer to Respondent(s), Respondent(s) shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property related to any of the Animal Health Products, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the research, Development, or manufacture of the Animal Health Product(s) acquired by that Acquirer; or (2) the use, import, export, supply, distribution, or sale of such Animal Health Product(s) within the Geographic Territory.
- N. For any patent infringement suit in which either Respondent is alleged to have infringed a Patent of a Third Party prior to the Closing Date or for such suit as such Respondent has prepared or is preparing as of the Closing Date to defend against such infringement claim(s), and where such a suit would have the potential to interfere with the Acquirer's freedom to

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practice the following: (1) the research, Development, or manufacture of the Animal Health Product(s) acquired by that Acquirer; or (2) the use, import, export, supply, distribution, or sale of such Animal Health Product(s), Respondents shall:

1. cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondent(s) in connection with obtaining resolution of any pending patent litigation involving such Animal Health Product(s);
 2. waive conflicts of interest, if any, to allow either Respondent's outside legal counsel to represent the relevant Acquirer in any ongoing patent litigation involving such Animal Health Product(s); and
 3. permit the transfer to the relevant Acquirer of all of the litigation files and any related attorney work-product in the possession of either Respondent's outside counsel relating to such Animal Health Product(s).
- O. Respondents shall not, in the Geographic Territory:
1. use the Product Trademarks related to the Animal Health Products or any mark confusingly similar to such Product Trademarks, as a trademark, trade name, or service mark;
 2. attempt to register such Product Trademarks;
 3. attempt to register any mark confusingly similar to such Product Trademarks;
 4. challenge or interfere with the relevant Acquirer's

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use and registration of such Product Trademarks;
or

5. challenge or interfere with the relevant Acquirer's efforts to enforce its trademark registrations for and trademark rights in such Product Trademarks against Third Parties;

provided, however, that this paragraph shall not preclude Respondents from continuing to use all trademarks, trade names, or service marks that have been in use in commerce on a Retained Product at any time prior to the Effective Date.

- P. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Animal Health Products a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.
- Q. The purpose of the divestiture of the Animal Health Product Assets and the transfer and delivery of the related Product Manufacturing Technology and the related obligations imposed on the Respondents by this Order is:
 1. to ensure the continued use of such assets in the research, Development, and manufacture of each of the Animal Health Products and/or Animal Health Pipeline Products and for the purposes of the business associated with each Animal Health Product and/or Animal Health Pipeline Product within the Geographic Territory;
 2. to provide for the future use of such assets for the distribution, sale and marketing of each of the

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Animal Health Products and/or Animal Health Pipeline Product in the Geographic Territory;

3. to create a viable and effective competitor, that is independent of the Respondents:
 - a. in the research, Development, and manufacture of each of the Animal Health Products and Animal Health Pipeline Products for the purposes of the business associated with each such Product within the Geographic Territory; and
 - b. the distribution, sale and marketing of each of the Animal Health Products in the Geographic Territory; and
4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that:

- A. Not later than ten (10) days after the Effective Date, Respondents shall divest the Equine Anthelmintic Product Assets (to the extent that such assets are not already owned, controlled or in the possession of Virbac), absolutely and in good faith, to Virbac pursuant to and in accordance with the Equine Anthelmintic Product Agreement (which agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Virbac or to reduce any

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obligations of the Respondents under such agreement), and such agreement, if it becomes the Remedial Agreement for the Equine Anthelmintic Product Assets, is incorporated by reference into this Order and made a part hereof. If Respondents do not divest the Equine Anthelmintic Product Assets to Virbac within the time period described above, the Commission may appoint a Divestiture Trustee to divest the Equine Anthelmintic Product Assets;

provided, however, that if the Respondents have divested the Equine Anthelmintic Product Assets to Virbac prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies the Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Equine Anthelmintic Product Assets to Virbac (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the Equine Anthelmintic Product Assets to Virbac, and/or to permit Virbac to continue the research, Development, manufacture, sale, marketing or distribution of the Equine Anthelmintic Products;

provided, however, that Respondents may satisfy this requirement by certifying that Virbac has executed all such agreements directly with each of the relevant Third Parties.

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- C. Respondents shall not enforce any agreement against a Third Party or Virbac to the extent that such agreement may limit or otherwise impair the ability of Virbac to acquire all Confidential Business Information. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each such Third Party that allows the Third Party to provide all Confidential Business Information within the Third Party's possession or control to Virbac. This includes, but is not limited to, such releases as may be necessary to permit the transfer to Virbac of any attorney work-product related to the Product Intellectual Property in the possession of Respondent Pfizer's outside counsel. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to Virbac.
- D. Until all of Respondent Pfizer's rights to enforce restrictions on the use, disclosure, conveyance or provision of Confidential Business Information are fully assigned or conveyed to Virbac, Respondents shall enforce any agreement against a Third Party to the extent that such agreement prevents or limits the ability of the Third Party to provide any Confidential Business Information to any person or entity other than: (1) Virbac or (2) any Person authorized by Virbac to receive such information.
- E. Upon reasonable notice and request from Virbac to the Respondents, Respondents shall provide, in a timely manner at no greater than Direct Cost, assistance and advice of knowledgeable employees of Respondents as Virbac might reasonably need to transfer the Equine Anthelmintic Product Assets, and shall continue providing such personnel, assistance and training, at the request of Virbac, until such assets are fully transferred to Virbac.

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- F. Respondents shall:
1. submit to Virbac, at Respondents' expense, all Confidential Business Information related to the Equine Anthelmintic Products;
 2. deliver such Confidential Business Information to Virbac:
 - a. in good faith;
 - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
 - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
 3. pending complete delivery of all such Confidential Business Information to Virbac, provide Virbac and the Interim Monitor with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Equine Anthelmintic Products that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;
 4. not use, directly or indirectly, any such Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Equine Anthelmintic Products other than as necessary to comply with the following:
 - a. the requirements of this Order;

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- b. Respondents' obligations to Virbac under the terms of any Remedial Agreement related to the Equine Anthelmintic Products; or
 - c. applicable Law;
5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except Virbac or other Persons specifically authorized by Virbac to receive such information; and
 6. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Equine Anthelmintic Products to the employees associated with business related to those Retained Products that contain the same active biological or pharmaceutical ingredient or that are approved for the use in the Field of parasitic worm disease within equines.
- G. Not later than thirty (30) days after the Closing Date, Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Equine Anthelmintic Products by Respondents' personnel to all of Respondents' employees who:
1. are or were directly involved in the research, Development, manufacturing, distribution, sale or marketing of any of the Equine Anthelmintic Products;
 2. are directly involved in the research, Development, manufacturing, distribution, sale or marketing of Retained Products that contain the same active

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biological or pharmaceutical ingredient or that are approved for use, or that are in Development for use, in the Field of parasitic worm disease within equines; and/or

3. may have Confidential Business Information related to the Equine Anthelmintic Products.

Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Acquirer. Respondents shall maintain complete records of all such agreements at Respondents' registered office within the United States of America and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

H. Respondents shall:

1. for each Equine Anthelmintic Product, for a period of twelve (12) months from the Closing Date, provide Virbac and/or the Equine Anthelmintic New Joint Development Partner with the opportunity to enter into employment contracts with the Equine Anthelmintic Core Employees. Each of these periods is hereinafter referred to as the "Equine Anthelmintic Product Core Employee Access Period(s)"; and
2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the

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Commission to Respondents to provide the Product Employee Information; or (2) ten (10) days after written request by Virbac, provide Virbac with the Product Employee Information related to the Equine Anthelmintic Core Employees. Failure by Respondents to provide the Product Employee Information for any Equine Anthelmintic Core Employee within the time provided herein shall extend the Equine Anthelmintic Product Core Employee Access Period with respect to that employee in an amount equal to the delay;

3. during the Equine Anthelmintic Product Core Employee Access Period(s), not interfere with the hiring or employing by Virbac and/or the Equine Anthelmintic New Joint Development Partner of the Equine Anthelmintic Core Employees, and remove any impediments within the control of Respondent(s) that may deter these employees from accepting employment with Virbac and/or the Equine Anthelmintic New Joint Development Partner, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to an Equine Anthelmintic Product or other contracts with Respondent(s) that would affect the ability or incentive of those individuals to be employed by Virbac and/or the Equine Anthelmintic New Joint Development Partner. In addition, Respondents shall not make any counteroffer to such an employee who has received a written offer of employment from Virbac and/or the and/or the Equine Anthelmintic New Joint Development Partner;

provided, however, that, subject to the conditions of continued employment prescribed in this Order,

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this Paragraph III.H.3. shall not prohibit Respondents from continuing to employ any employee under the terms of such employee's employment with Respondent(s) prior to the date of the written offer of employment from Virbac and/or the Equine Anthelmintic New Joint Development Partner to such employee;

4. until the Closing Date, provide all Equine Anthelmintic Core Employees with reasonable financial incentives to continue in their positions and to market and sell the Equine Anthelmintic Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Equine Anthelmintic Product(s) and to ensure successful execution of the pre-Acquisition plans for such Equine Anthelmintic Product(s). Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Closing Date(s) for the divestiture of the Equine Anthelmintic Product Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that, subject to those conditions of continued employment prescribed in this Order, this Order does not require nor shall be construed to require Respondents to terminate the employment of any employee or to prevent Respondents from continuing to employ an employee in connection with the Acquisition; and

5. for a period of one (1) year from the Closing Date, not:
 - a. directly or indirectly, solicit or otherwise attempt to induce any employee of Virbac with

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any amount of responsibility related to an Equine Anthelmintic Product (“Equine Anthelmintic Product Employee”) to terminate his or her employment relationship with Virbac; or

- b. hire any Equine Anthelmintic Product Employee;

provided, however, that Respondents may hire any former Equine Anthelmintic Product Employee whose employment has been terminated by Virbac or who independently applies for employment with Respondents, as long as such employee was not solicited in violation of the nonsolicitation requirements contained herein;

provided further, however, that Respondents may do the following: (1) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Equine Anthelmintic Product Employees; or (2) hire an Equine Anthelmintic Product Employee who contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from Respondents.

- I. Respondents shall require, as a condition of employment following divestiture of the Equine Anthelmintic Product Assets, that each Equine Anthelmintic Core Employee retained by Respondents, his or her direct supervisor, and any other employee designated by the Interim Monitor, sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to the Animal Health Products as strictly confidential, including the

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nondisclosure of such information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of this Order).

- J. Not later than thirty (30) days after the Closing Date, Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Equine Anthelmintic Products by Respondents' personnel to all of Respondents' employees who:
1. are or were directly involved in the research, Development, manufacturing, distribution, sale or marketing of any of the Equine Anthelmintic Products;
 2. are directly involved in the research, Development, manufacturing, distribution, sale or marketing of Retained Products that contain the same active biological or pharmaceutical ingredient or that are approved for use, or in Development for use, in Field of parasitic worm disease within equines; and/or
 3. may have Confidential Business Information related to the Equine Anthelmintic Products.

Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to Virbac. Respondents shall maintain complete records of all such agreements at Respondent's registered office within the United States of America and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied

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with. Respondents shall provide Virbac with copies of all certifications, notifications and reminders sent to Respondents' personnel.

- K. Respondents shall not, in the United States of America:
1. use the Product Trademarks related to the Equine Anthelmintic Products or any mark confusingly similar to such Product Trademarks, as a trademark, trade name, or service mark;
 2. attempt to register such Product Trademarks;
 3. attempt to register any mark confusingly similar to such Product Trademarks;
 4. challenge or interfere with Virbac's use and registration of such Product Trademarks; or
 5. challenge or interfere with Virbac's efforts to enforce its trademark registrations for and trademark rights in such Product Trademarks against Third Parties;

provided, however, that this paragraph shall not preclude Respondents from continuing to use all trademarks, tradenames, or service marks that have been in use in commerce on a Retained Product at any time prior to the Effective Date.

- L. For a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondents shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any Ownership Interest in Virbac or any

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Person that engages in scientific research, Development, manufacture, distribution, marketing, or selling of the Equine Anthelmintic Product(s). Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of the Respondents and not of any other party to the transaction. Respondents shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition; *provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

- M. The purpose of the divestiture of the Equine Anthelmintic Product Assets and the related obligations imposed on the Respondents by this Order is:

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1. to ensure the continued use of such assets in the research, Development, and manufacture of each of the Equine Anthelmintic Products and for the purposes of the business associated with each Equine Anthelmintic Product within the United States of America;
2. to provide for the future use of such assets for the distribution, sale and marketing of each of the Equine Anthelmintic Products in the United States of America;
3. to create a viable and effective competitor, that is independent of the Respondents:
 - a. in the research, Development, and manufacture of each of the Equine Anthelmintic Products for the purposes of the business associated with each Equine Anthelmintic Product within the United States of America; and
 - b. the distribution, sale and marketing of each of the Equine Anthelmintic Products in the United States of America; and
4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

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

- A. The Commission may appoint a monitor or monitors ("Interim Monitor") to assure that Respondents

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expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, and the Remedial Agreements.

- B. The Commission appoints Dr. Stephen J.D. Bell as Interim Monitor and approves the Monitor Agreement executed by Dr. Bell and Respondents. Dr. Bell shall be subject to all provisions in the Order regarding Interim Monitors.
- C. Respondents shall facilitate the ability of the Interim Monitor to comply with the duties and obligations set forth in this Order, and shall take no action that interferes with or hinders the Interim Monitor's authority, rights and responsibilities as set forth herein, or in any other agreement between the Interim Monitor and Respondents. Respondents may, with the consent of the Interim Monitor, contract with additional consultant(s) to assist the Interim Monitor in carrying out his or her duties, provided that the Interim Monitor shall direct the work of any such consultant(s) and that the rights, duties and responsibilities of such consultant(s) are consistent with the terms of this Order, including, without limitation, the requirement that such consultant shall act in a fiduciary capacity for the benefit of the Commission.
- D. The Interim Monitor's duties and responsibilities shall include the following:
 - 1. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 - 2. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out his

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or her duties and responsibilities in a manner consistent with the purposes of the Order and in consultation with the Commission;

3. the Interim Monitor shall, in his or her sole discretion, consult with third parties in the exercise of his or her duties under this Order, or under any agreement between the Interim Monitor and Respondents;
 4. the Interim Monitor shall evaluate the reports submitted by Respondent pursuant to Paragraph VIII.B. of this Order, and within thirty (30) days from the date the Interim Monitor receives these reports, report in writing to the Commission concerning performance by Respondents of their obligations under the Order;
 5. The Interim Monitor shall report in writing to the Commission concerning Respondents' compliance with its obligations under this Order and the Order to Maintain Assets:
 - a. thirty (30) days after the date this Order becomes final;
 - b. sixty (60) days after the date this Order becomes final;
 - c. every sixty (60) days thereafter through the end of the Interim Monitor's term; and
 - d. in response to a request by the Commission or its staff.
- E. Respondents shall grant and transfer to the Interim Monitor, and such Monitor shall have, all rights,

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powers, and authority necessary to carry out the Monitor's duties and responsibilities, including but not limited to the following:

1. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order and the Order to Maintain Assets;
2. subject to any demonstrated legally recognized privilege, Respondents shall provide the Interim Monitor full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondent's compliance with its obligations under the Order, including, but not limited to, its obligations related to the relevant assets;
3. the Interim Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions to which the Monitor and Respondent agree and that the Commission approves;
4. the Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities;
5. respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any

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

6. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission or require the Interim Monitor to report to Respondents the substance of communications to or from the Commission or the Acquirer.
- F. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- G. The Interim Monitor shall serve until the earliest of:
1. with respect to each Divestiture Product, the date the Acquirer (or its Designee(s)) is approved by the FDA or the USDA, as applicable to the specified Product, to manufacture such Divestiture Product

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and able to manufacture and market such Divestiture Product in commercial quantities, in a manner consistent with Agency Manufacturing Standards, independently of Respondents;

2. with respect to each Divestiture Product, the date the Acquirer notifies the Commission and the Respondents of its intention to abandon its efforts to manufacture such Divestiture Product; or
3. with respect to each Divestiture Product, the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture such Divestiture Product;

provided, however, that, with respect to each Divestiture Product, the Interim Monitor's service shall not exceed seven (7) years from the Order Date;

provided, further, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

- H. If the Commission determines that an Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor:
1. The Commission shall select the substitute Interim Monitor, subject to the consent of Respondent Pfizer, which consent shall not be unreasonably withheld. If Respondent Pfizer has not opposed, in writing, including the reasons for opposing, the selection of a proposed substitute Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Pfizer of the identity of any proposed substitute Interim Monitor,

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Respondents shall be deemed to have consented to the selection of the substitute Interim Monitor.

2. Not later than ten (10) days after the appointment of a substitute Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the substitute Interim Monitor all the rights and powers necessary to permit the substitute Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.
 - I. The Commission may on its own initiative, or at the request of an Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
 - J. An Interim Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

V.

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Animal Health Product Assets or the Equine Anthelmintic Product Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the

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Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey such assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Pfizer, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent Pfizer 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 Pfizer of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.

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- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, that the Commission may extend the divestiture period only two (2) times.
 3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall

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cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, that if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers,

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appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the

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relevant provisions of the Order to Maintain Assets in this matter.

8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

VI.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, Respondents shall assure that Respondents' counsel (including in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer,

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except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

- A. To assure Respondents' compliance with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or
- B. To defend against, respond to, or otherwise participate in any litigation, investigation, audit, process, subpoena or other proceeding relating to the divestiture or any other aspect of the Divestiture Products or assets and businesses associated with those Divestiture Products;

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

provided further, however, that pursuant to this Paragraph VI, Respondents shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the relevant Acquirer (but shall not be deemed to have violated this requirement if such Acquirer withholds such agreement unreasonably); and (2) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VII.

IT IS FURTHER ORDERED that:

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- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by a Respondent to comply with any term of any Remedial Agreement shall constitute a failure to comply with this Order.
- C. Respondents shall include in each Remedial Agreement related to each of the Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligations to the Acquirer pursuant to this Order.
- D. Respondents shall also include in each applicable Remedial Agreement a representation from the Acquirer that such Acquirer shall use commercially reasonable efforts to secure the Product Approvals necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Divestiture Product and to have any such manufacture to be independent of Respondents, all as soon as reasonably practicable.
- E. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

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

- A. Within five (5) days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondents have fully

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complied with the following: Paragraphs II.A., II.B., II.C., II.E.1.-3., II.G., II.H.1.-4., II.I., II.J., and II.K., 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 the Interim Monitor. Respondents shall include in their reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant paragraphs of the Order, including a full description of all substantive contacts or negotiations related to the divestiture of the relevant assets and the identity of all Persons contacted, including copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning completing the obligations.

- C. Respondents shall notify the Commission prior to consenting and/or entering into any agreement with, and/or proposing any remedial or other action from, a non-U.S. Government Entity that might have the effect of causing the Respondents and/or the Acquirer to sell or otherwise dispose of, any assets or intellectual property rights related to the Animal Health Products that relate to Geographic Territories outside the United States of America. Respondents shall include in such notification, among other things that may be required by the staff of the Commission, a full description of all substantive contacts or negotiations related to the sale or disposal of such assets and/or intellectual property rights and the identity of all Persons contacted, including copies of all written communications to and from such Persons, all internal memoranda, and all reports and recommendations concerning the sale

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and/or disposal of such assets and/or intellectual property rights.

- D. One (1) year after the Order Date, annually for the next nine years on the anniversary of the Order Date, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with the Order.

IX.

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

- A. any proposed dissolution of a Respondent;
- B. any proposed acquisition, merger or consolidation of a Respondent; or
- C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

X.

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

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- A. access, during business office hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of such Respondent; and
- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on January 25, 2020.

By the Commission, Commissioner Harbour and Commissioner Kovacic recused.

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NON-PUBLIC APPENDIX II.A

**ANIMAL HEALTH DIVESTITURE PRODUCT
AGREEMENTS**

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

NON-PUBLIC APPENDIX III.A

EQUINE ANTHELMINTIC PRODUCT AGREEMENT

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

NON-PUBLIC APPENDIX IV.A

MONITOR AGREEMENT

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

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

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

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

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Pfizer is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its corporate head office

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and principal place of business located at 235 East 42nd St., New York, New York 10017.

2. Respondent Wyeth f/k/a American Home Products Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 5 Giralda Farms, Madison, New Jersey 07940.
3. The 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 to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. "Pfizer" means Pfizer Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Pfizer (including, but not limited to, Pfizer Animal Health), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each. After the Acquisition, Pfizer shall include Wyeth.
- B. "Wyeth" means Wyeth, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Wyeth (including, but not limited to, Fort Dodge Animal Health), and the respective directors, officers, employees, agents, representatives,

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predecessors, successors, and assigns of each.

- C. “Respondent(s)” means Pfizer and Wyeth, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Decision and Order” means the:
 - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
 - 2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- F. “Divestiture Assets” means the Animal Health Product Assets and the Equine Anthelmintic Product Assets, as defined in the Decision and Order.
- G. “Divestiture Product Business(es)” means the business of the Respondent(s) within the Geographic Territory specified in the Decision and Order related to each of the Divestiture Products, including the research, Development, manufacture, distribution, marketing, and sale of each Divestiture Product and the assets related to such business, including, without limitation, the Divestiture Assets.
- H. “Divestiture Product Core Employees” means the Animal Health Product Core Employees and the Product Marketing Employees related to the Equine Anthelmintic Products, individually and collectively.
- I. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or

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Paragraph IV of the Decision and Order.

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

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

- A. Until the Closing Date, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Divestiture Product Businesses except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair such Divestiture Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the related Divestiture Product Businesses.
- B. Until the Closing Date, Respondents shall maintain the operations of the related Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; the High Volume Accounts; customers; Agencies; employees; and others

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having business relations with each of the respective Divestiture Product Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing each of the respective Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for such Divestiture Product Business;
2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all research, Development, manufacturing, distribution, marketing and sales expenditures;
3. providing such resources as may be necessary to respond to competition against each of the Divestiture Products and/or to prevent any diminution in sales of each of the Divestiture Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Divestiture Assets to an Acquirer;
4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Divestiture Products at the related High Volume Accounts;
5. making available for use by each of the respective Divestiture Product Businesses funds sufficient to perform all routine maintenance and all other

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maintenance as may be necessary to, and all replacements of, the assets related to such business, including without limitation, the Divestiture Assets;

6. providing each of the respective Divestiture Product Businesses with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of such Divestiture Product Business;
 7. providing such support services to each of the respective Divestiture Product Businesses as were being provided to such business by Respondent(s) as of the date the Consent Agreement was signed by Respondents; and
 8. maintaining a work force at least as equivalent in size, training, and expertise to what has been associated with the Divestiture Products for the relevant Divestiture Product's last fiscal year.
- C. Until Respondents fully and finally transfer and deliver a particular Divestiture Asset to the Acquirer, Respondents shall maintain the full economic viability, marketability and competitiveness of such Divestiture Asset, shall prevent its destruction, removal, wasting, deterioration, or impairment and shall maintain such Divestiture Asset in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance).
- D. Until the Closing Date for each of the respective Divestiture Assets, Respondents shall provide all the related Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the relevant Divestiture Products consistent with past

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practices and/or as may be necessary to preserve the marketability, viability and competitiveness of such Divestiture Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent(s) until the Closing Date for the divestiture of the relevant Divestiture Assets has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by Law), and additional incentives as may be necessary to prevent any diminution of the relevant Divestiture Product's competitiveness.

E. Respondents shall:

1. for each Divestiture Product, for a period of twelve (12) months from the Closing Date, provide each Acquirer with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by such Acquirer. Each of these periods is hereinafter referred to as the "Divestiture Product Core Employee Access Period(s)";
2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (2) ten (10) days after written request by an Acquirer, provide such Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the

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delay; and

3. during the Divestiture Product Employee Access Period(s), not interfere with the hiring or employing by the relevant Acquirer of Divestiture Product Core Employees, and shall remove any impediments within the control of Respondent(s) that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondent(s) that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Divestiture Product Core Employee who receives a written offer of employment from the relevant Acquirer;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph II.E.3. shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee under the terms of such employee's employment with Respondent(s) prior to the date of the written offer of employment from the Acquirer to such employee.

F. Respondents shall:

1. not use, directly or indirectly, any Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the relevant Divestiture Product(s) other than as necessary to comply with the following: (1) the requirements of the Orders; (2) Respondents' obligations to an Acquirer under the terms of any Remedial Agreement related to relevant Divestiture Product(s); or (3) applicable Law;

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2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the relevant Acquirer or Persons specifically authorized by the relevant Acquirer or the Commission to receive such information;
 3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the relevant Divestiture Products to the employees associated with business related to those Retained Products that contain the same active biological or pharmaceutical ingredient or that are approved for use in the same Field as the Divestiture Products; and
 4. institute procedures and requirements to ensure that the above-described employees:
 - a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and
 - b. do not solicit, access or use any Confidential Business Information that they are prohibited under this Order to Maintain Assets from receiving for any reason or purpose.
- G. Not later than thirty (30) days following the Closing Date, Respondents shall provide to all of Respondents' employees and other personnel who may have access to Confidential Business Information related to the Divestiture Products written or electronic notification of the restrictions on the use of such information by

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Respondents' personnel. At the same time, if not provided earlier, Respondents shall provide a copy of such notification by e-mail with return receipt requested or similar transmission, and keep an electronic file of such receipts for one (1) year after the Closing Date for each of the respective Divestiture Product Assets. Respondents shall provide a copy of the form of such notification to the Acquirer, the Interim Monitor, and the Commission. Respondents shall also obtain from each employee covered by this Paragraph II.G. an agreement to abide by the applicable restrictions. Respondents shall maintain complete records of all such agreements at Respondents' registered office within the United States and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall monitor the implementation by its employees and other personnel of all applicable restrictions, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondents' employees and other personnel.

- H. Respondents shall adhere to and abide by the Remedial Agreements (which agreements shall not vary or contradict, or be construed to vary or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondents under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.
- I. The purpose of this Order to Maintain Assets is to

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maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses within the Geographic Territory through their full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Divestiture Product Businesses within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Assets except for ordinary wear and tear.

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

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor or monitors (“Interim Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Order to Maintain Assets, the Decision and Order, and the Remedial Agreements.
- B. The Commission appoints Dr. Stephen J.D. Bell as Interim Monitor and approves the Monitor Agreement executed by Dr. Bell and Respondents. Dr. Bell shall be subject to all provisions in this Order to Maintain Assets.
- C. Respondents shall facilitate the ability of the Interim Monitor to comply with the duties and obligations set forth in this Order to Maintain Assets, and shall take no action that interferes with or hinders the Interim Monitor’s authority, rights and responsibilities as set forth herein, or in any other agreement between the Interim Monitor and Respondents. Respondents may, with the consent of the Interim Monitor, contract with

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additional consultant(s) to assist the Interim Monitor in carrying out his or her duties, provided that the Interim Monitor shall direct the work of any such consultant(s) and that the rights, duties and responsibilities of such consultant(s) are consistent with the terms of this Order to Maintain Assets, including, without limitation, the requirement that such consultant shall act in a fiduciary capacity for the benefit of the Commission.

- D. The Interim Monitor's duties and responsibilities shall include the following:
1. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 2. the Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities;
 3. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with this Order to Maintain Assets and shall exercise such power and authority and carry out his or her duties and responsibilities in a manner consistent with the purposes of this order and in consultation with the Commission;
 4. the Interim Monitor shall, in his or her sole discretion, consult with third parties in the exercise of his or her duties under this Order to Maintain Assets or under any agreement between the Interim Monitor and Respondents; and
 5. the Interim Monitor shall evaluate the reports

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submitted by Respondents pursuant to Paragraph IV. of this Order to Maintain Assets, and within thirty (30) days from the date the Interim Monitor receives these reports, report in writing to the Commission concerning performance by Respondents of their obligations under the Order.

- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- F. The Interim Monitor shall serve until termination of this Order to Maintain Assets pursuant to Paragraph VII.
- G. If the Commission determines that an Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor:
 - 1. The Commission shall select the substitute Interim Monitor, subject to the consent of Respondent Pfizer, which consent shall not be unreasonably withheld. If Respondent Pfizer has not opposed, in writing, including the reasons for opposing, the selection of a proposed substitute Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Pfizer of the identity of any proposed substitute Interim Monitor, Respondents shall be deemed to have consented to the selection of the substitute Interim Monitor.
 - 2. Not later than ten (10) days after the appointment of a substitute Interim Monitor, Respondents shall

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execute an agreement that, subject to the prior approval of the Commission, confers on the substitute Interim Monitor all the rights and powers necessary to permit the substitute Interim Monitor to monitor Respondents' compliance with the relevant requirements of this Order and the Decision and Order in a manner consistent with the purposes of each.

- H. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- I. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same persons appointed as a Divestiture Trustee(s) pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every thirty (30) days thereafter until Respondents have fully complied with their obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by Paragraph II.A. and III.A. of the related Decision and Order in this matter, 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 to Maintain Assets and the related Decision and Order; *provided, however,* that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondents pursuant to Paragraph VIII of the Decision and Order.

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V.

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

- A. any proposed dissolution of a Respondent;
- B. any proposed acquisition, merger or consolidation of a Respondent; or
- C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondents made to their principal United States offices or headquarter's address, Respondents shall, without restraint or interference, permit any duly authorized representative of the Commission:

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

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

VII.

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

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The later of:
 - 1. The day after the divestiture of all of the Divestiture Assets, as required by and described in the Decision and Order, has been completed and each Interim Monitor, in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated; or
 - 2. The day the related Decision and Order becomes final.

By the Commission, Commissioner Harbour and Commissioner Kovacic recused.

Analysis to Aid Public Comment

**ANALYSIS OF PROPOSED 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 Orders (“Consent Agreement”) with Pfizer Inc. (“Pfizer”), which is designed to remedy the anticompetitive effects of its proposed acquisition of Wyeth (“Wyeth”). Under the terms of the Consent Agreement, Pfizer must divest to Boehringer Ingelheim Vetmedica, Inc. (“BI”) Wyeth’s U.S. animal health business (“Fort Dodge”) in all areas of overlap, except for equine tapeworm parasiticides and equine herpesvirus vaccines. In the area of equine tapeworm parasiticides, the consent order requires Pfizer to return to Virbac S.A. (“Virbac”) Pfizer’s exclusive distribution rights for these products. In the area of equine herpesvirus vaccines, Pfizer is ordered to divest to BI Pfizer’s equine herpesvirus products. The assets for each of the divestitures include all of the relevant intellectual property, customer lists, research and development information, and regulatory materials, as well as two of Fort Dodge’s three U.S. manufacturing facilities. These divestitures fully preserve the competition that the proposed acquisition would otherwise eliminate.

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

Pursuant to an Agreement and Plan of Merger dated as of January 25, 2009, Pfizer proposes to acquire all of the issued and outstanding shares of Wyeth, whereby each outstanding share of

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Wyeth common stock will be converted into the right to receive \$33 in cash and 0.985 share of Pfizer common stock. Both parties manufacture human and animal health biological and pharmaceutical products. The combined firm would have projected worldwide revenues of almost \$72 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, in U.S. markets for the manufacture and sale of: (1) killed cattle respiratory vaccines; (2) modified-live cattle respiratory vaccines; (3) cattle reproductive vaccines; (4) cattle pasteurized vaccines; (5) lactating-cow mastitis treatments; (6) dry-cow mastitis treatments; (7) dairy cattle broad-spectrum antibiotics with low milk-withholding times; (8) cattle macrocyclic lactone parasiticides; (9) cattle benzimidazole parasiticides; (10) canine combination vaccines; (11) canine monovalent parvovirus vaccines; (12) canine monovalent coronavirus vaccines; (13) canine monovalent leptospira vaccines; (14) canine bordetella vaccines; (15) feline combination vaccines; (16) feline leukemia vaccines; (17) companion animal rabies vaccines; (18) companion animal cephalosporin antibiotics; (19) equine tapeworm parasiticides containing praziquantel; (20) equine herpesvirus vaccines; and (21) equine joint-injected steroids. The proposed Consent Agreement remedies the alleged violations by replacing in each of the relevant markets the lost competition that would result from the acquisition.

II. The Products and Structure of the Markets

The proposed acquisition of Wyeth by Pfizer would combine two of the largest animal health suppliers in the United States. The companies overlap in several animal health markets, and, if consummated, the transaction likely would lead to anticompetitive effects in each of the relevant markets. More specifically, the transaction would decrease the number of competing suppliers in the overlap markets, which number has a direct and substantial effect on the prices of animal health products. The evidence

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shows that customers are able to obtain lower prices by threatening to switch to another supplier or presenting the incumbent supplier with a rival's lower offer. Customers have stated that they generally can negotiate lower prices in markets with more participants and that, historically, they have seen prices rise in markets in which the number of market participants has declined.

Pfizer and Fort Dodge are the market leaders in the area of cattle health products. After the transaction, Pfizer would have over 60 percent of several of the relevant cattle product markets. In the cattle vaccines area, Pfizer and Fort Dodge have broad and significantly overlapping portfolios of respiratory, reproductive, and pasteurella vaccines. Customers can choose the specific vaccine products that most closely match their needs based on several factors, including, among others, disease risk assessments and relative prices.

Killed cattle respiratory vaccines prevent respiratory diseases in pregnant cattle without the risk of causing abortion. Pfizer and Fort Dodge account for over 50 percent of all killed respiratory vaccine sales in the United States. The most commonly used killed respiratory vaccine is the 5-way vaccine, which prevents infectious bovine rhinotracheitis, types 1 and 2 of bovine virus diarrhea, parainfluenza 3, and bovine respiratory syncytial virus. As a result of the acquisition, Pfizer would have 61 percent of the market for killed 5-way respiratory vaccines, leaving Novartis Animal Health ("Novartis") as Pfizer's only other significant competitor.

Modified-live cattle respiratory vaccines prevent the same diseases as killed respiratory vaccines, but contain modified-live rather than killed antigens to stimulate greater protection. Because modified-live respiratory vaccines induce stronger immunities, most customers will use modified-live vaccines for non-pregnant cattle. Pfizer and Fort Dodge account for over 53 percent of all modified-live respiratory vaccine sales in the United

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States. As with killed respiratory vaccines, the 5-way modified-live respiratory vaccine is the most commonly used modified-live cattle respiratory vaccine. As a result of the proposed acquisition, Pfizer would control over 68 percent of the 5-way modified-live respiratory vaccine market.

Cattle reproductive vaccines are used to prevent early- and late-stage abortions in pregnant cattle. The markets for cattle reproductive vaccines include, most significantly: (1) the market for modified-live 10-way vaccines, which contain modified-live viral respiratory and *Leptospira* antigens; (2) the market for killed 10-way vaccines, which contain killed viral respiratory and *Leptospira* antigens; and (3) the market for lepto/vibrio vaccines, which contain *Leptospira* and *Campylobacter fetus* antigens. After the acquisition, Pfizer would have 83 percent of the \$13 million modified-live 10-way market in the United States, with Intervet/Schering-Plough Animal Health (“ISP”), AgriLaboratories, Ltd. (“AgriLabs”), and BI accounting for 11 percent, 4 percent, and 2 percent, respectively. Pfizer also would control 76 percent of sales in killed 10-way vaccines, leaving Novartis with 18 percent and AgriLabs with 6 percent of this \$9 million market. Finally, in the lepto/vibrio vaccine market, Pfizer and Fort Dodge collectively account for almost 39 percent of this \$2.6 million market, and Novartis leads with 41 percent.

Cattle pasteurized vaccines are used to prevent pneumonia as well as lesser respiratory infections in cows caused by *Pasteurella multocida* and *Mannheimia haemolytica* bacteria. Pfizer, Fort Dodge, BI, ISP, and Merial are the only significant suppliers of products in these markets in the United States. The proposed acquisition would reduce the number of competitors in these markets, leaving Pfizer significantly larger than any of its remaining competitors.

Lactating-cow and dry-cow mastitis treatments are used to treat infections of the udder that occur during either lactation or the dry period between pregnancies. The markets for lactating-cow and dry-cow mastitis treatments are highly concentrated, with

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Pfizer and Fort Dodge together accounting for more than 90 percent of sales in each of these markets.

Broad-spectrum antibiotic products with low milk-withholding times can be used to treat a large variety of infections that affect dairy cows.¹ Pfizer's products are considered the most effective antibiotics for dairy cows and have a zero-day withholding period, while Fort Dodge's product has a low withholding period of two to four days. A generic version of one of Pfizer's products was recently introduced. As a result of the proposed acquisition, Pfizer would have a near monopoly in this \$162 million market.

Cattle macrocyclic lactone parasiticides are the newest and most effective class of cattle parasiticides in the United States. They are effective against both internal and external parasites. There are only three branded players in the \$118 million U.S. market: Pfizer, Fort Dodge, and Merial. Although generic versions of Merial's product are available, there are no generic versions of Pfizer's or Fort Dodge's products currently on the market. The proposed acquisition would significantly increase the concentration in this market, leaving Pfizer with approximately 42 percent of the market.

Cattle benzimidazole parasiticides are an older generation of parasiticides used primarily by cattle breeders to treat internal parasites, such as lungworms, tapeworms, and liver flukes. Pfizer, Fort Dodge, and ISP are the only three suppliers to offer

¹ To ensure that antibiotic-contaminated milk is not distributed, the United States Food and Drug Administration ("FDA") has set "withholding times" for each antibiotic product and mandates that any milk that is produced during the withholding period be discarded. A principal consideration for dairy farmers in purchasing antibiotics, therefore, is how quickly they can resume milk production after treatment.

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cattle benzimidazole parasiticides in the United States. After the proposed acquisition, ISP would be the only remaining constraint on Pfizer's ability to raise prices, accounting for 67 percent of this \$16 million market. Pfizer would control the remaining 33 percent of the market.

Beyond cattle health products, Pfizer and Fort Dodge are also two of only four major suppliers in the relevant companion animal vaccines and pharmaceuticals markets. In the majority of these markets, the transaction would reduce the number of competitors from four to three and give Pfizer between 50 and 100 percent of the market. As in the cattle vaccines area, Pfizer and Fort Dodge have broad and significantly overlapping portfolios of companion animal vaccines. Customers can choose the specific vaccine products that most closely match their needs based on several factors, including, among others, vaccination protocols recommended by veterinarians and disease risk assessments.

Canine combination vaccines prevent common canine diseases, such as those caused by canine distemper, adenovirus (types 1 and 2), parainfluenza, parvovirus, coronavirus, and *Leptospira*. Pfizer, Fort Dodge, Merial, and ISP are the only four significant companies that supply canine combination vaccines in the United States. Total U.S. sales of canine combination vaccines are \$126 million. The proposed acquisition would reduce the number of significant suppliers of canine combination vaccines from four to three.

While parvovirus, coronavirus, and leptospira vaccines are all available as part of canine combination vaccines, the monovalent forms are administered as booster shots for puppies that have a particularly high risk of exposure to the disease. Pfizer, Fort Dodge, Merial, and ISP are the only four companies that supply canine monovalent parvovirus vaccines in the United States, a \$2.1 million market. The proposed acquisition would give Pfizer control of 66 percent of the canine monovalent parvovirus vaccines market.

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The same four players – Pfizer, Fort Dodge, Merial, and ISP – are also the only four companies that supply canine monovalent coronavirus vaccines in the United States. The proposed acquisition would further entrench Pfizer as the dominant supplier with an 81 percent share of the \$2.3 million market for canine monovalent coronavirus vaccines.

In the market for canine monovalent leptospira vaccines, the proposed acquisition would combine the only two companies that currently supply such vaccines in the United States. Pfizer currently has a 53 percent share, and Fort Dodge controls the remaining 47 percent of this \$9.2 million market. The proposed acquisition would grant Pfizer complete control over the market for canine monovalent leptospira vaccines.

Canine bordetella vaccines are used primarily to prevent infectious tracheobronchitis, which is the most prevalent upper respiratory infection contracted by dogs in the United States. There are five suppliers of canine bordetella vaccines in the United States: Pfizer, Fort Dodge, ISP, Merial, and BI. Total U.S. sales of canine bordetella vaccines amount to \$53.3 million. The proposed acquisition would reduce the number of suppliers of canine bordetella vaccines from five to four, leaving Pfizer significantly larger than its three remaining competitors.

Feline combination vaccines are used to prevent common feline diseases, such as feline panleukopenia, rhinotracheitis, chlamydia, and calicivirus. Pfizer, Fort Dodge, ISP, and Merial are the only significant suppliers of feline combination vaccines in the United States. Total U.S. sales of feline combination vaccines are \$28 million. The proposed acquisition would reduce the number of significant suppliers of feline combination vaccines from four to three, with Pfizer's sales considerably greater than those of its two remaining competitors.

Feline leukemia vaccines can provide effective protection against feline leukemia, a fatal disease that breaks down a cat's

Analysis to Aid Public Comment

immune system to such an extent that it can no longer defend against otherwise harmless invasions by bacteria, viruses, or other sources of disease. Pfizer, Fort Dodge, Merial, and ISP are the only four companies that supply feline leukemia vaccines in the United States, sales of which are \$38 million. The proposed acquisition would reduce the number of suppliers from four to three, with Pfizer significantly larger than its two remaining competitors.

Companion animal rabies vaccines are used to prevent rabies, a fatal and incurable neurological disease. Pfizer, Fort Dodge, Merial, and ISP are the only four companies that offer companion animal rabies vaccines in the United States. U.S. sales of such vaccines total approximately \$60 million, and the proposed acquisition would reduce the number of suppliers of companion animal rabies vaccines from four to three.

Companion animal cephalosporins are a recent generation of broad-spectrum antibiotics that are effective against both gram-positive and gram-negative organisms and can be used to treat a wide range of infections. Pfizer and Fort Dodge are the only two suppliers of branded companion animal cephalosporins in the United States. The only other companion animal cephalosporins are generic human and animal cephalosporin products that may be used to treat companion animals. These products, however, have limited competitive significance because of dosing differences found in the generic human products and a relative lack of technical and research support offered with the generic animal products. As a result of the proposed acquisition, Pfizer would have 70 percent of this \$52 million market.

In addition to cattle and companion animal products, the proposed acquisition also poses competitive concerns in three equine product markets: tapeworm parasiticides; herpesvirus vaccines; and joint-injected steroids. The market for equine tapeworm parasiticides containing praziquantel consists of products used to treat tapeworms and other internal parasites, which are the leading cause of equine colic in the United States.

Analysis to Aid Public Comment

Currently, Pfizer has a 33 percent share of this approximately \$22 million market; Fort Dodge has a 31 percent market share; and Merial has a 36 percent market share. The proposed acquisition would give Pfizer 64 percent of the market for equine tapeworm parasiticides, leaving Merial as its only remaining competitor.

Equine herpesvirus vaccines are used primarily for the prevention of equine rhinopneumonitis, an upper respiratory disease, which can cause abortion in pregnant mares. Pfizer, Fort Dodge, ISP, and BI are the only suppliers of equine herpesvirus vaccines in the United States, sales of which total \$30 million. The proposed acquisition would reduce the number of suppliers from four to three, with Pfizer significantly larger than its two remaining competitors.

Equine joint-injected steroids can be used to reduce joint inflammation, treat osteoporosis, and prevent lameness in horses. Pfizer has a 60 percent share of this \$7.3 million market, while Fort Dodge has a 40 percent share. The proposed acquisition would create a monopoly in the market for equine joint-injected steroids in the United States.

III. Entry

Entry into the manufacture and sale of the relevant animal health vaccine and pharmaceutical markets would not be timely, likely, or sufficient in its magnitude, character, or scope to deter or counteract the anticompetitive effects of the proposed acquisition. Developing and obtaining United States Department of Agriculture approval (in the case of vaccines) for the manufacture and sale of each of the relevant products can take as many as five years due to substantial regulatory, technological, and intellectual property barriers. Similarly, obtaining FDA approval (in the case of pharmaceutical products) can take five to seven years for a currently developed product and as many as ten or more years for an entirely new product.

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In addition to the regulatory, developmental, and manufacturing hurdles facing a potential entrant, many of the markets at issue are characterized by particular conditions that make new entry unlikely. For example, some products, such as vaccines for cattle, equine, and companion animals, are particularly difficult to manufacture, have relatively small profit opportunities, and have a high potential for adverse reactions and product failure. In other markets, such as those for companion animal vaccines, a substantial initial investment is necessary because veterinarians tend to purchase all their vaccines from a single supplier; as a result, a new entrant must develop a large portfolio of vaccines in order to be a significant competitor.

IV. Effects of the Acquisition

The proposed acquisition would cause significant competitive harm to consumers in the relevant U.S. markets for cattle, companion animal, and equine health products by eliminating actual, direct, and substantial competition between Pfizer and Wyeth. The transaction would increase the likelihood that Pfizer will be able to unilaterally exercise market power, increase the likelihood of coordinated interaction between or among suppliers, reduce Pfizer's incentives to pursue further research and development, and increase the likelihood that consumers will pay higher prices. In each of the relevant markets, the evidence shows that consumers have experienced lower prices, increased research and development, and better service due to the competitive rivalry that exists between market participants – particularly that which currently exists between Pfizer and Wyeth. The evidence also shows that, when any of the competitors experienced supply problems, the remaining competitors increased their prices, and, conversely, that consumers were able to negotiate lower prices when new rivals entered the relevant markets.

V. The Consent Agreement

The proposed Consent Agreement preserves competition in each of the relevant markets alleged in the complaint by requiring

Analysis to Aid Public Comment

that Pfizer divest the following assets to BI no later than ten days after the acquisition: all of the Fort Dodge assets relating to killed cattle respiratory vaccines, modified-live cattle respiratory vaccines, cattle reproductive vaccines, cattle pasteurized vaccines, lactating-cow and dry-cow mastitis treatments, dairy cattle broad-spectrum antibiotic products with low milk-withholding times, cattle macrocyclic lactone parasiticides, cattle benzimidazole parasiticides, canine combination vaccines, canine monovalent parvovirus vaccines, canine monovalent coronavirus vaccines, canine monovalent leptospira vaccines, canine bordetella vaccines, feline combination vaccines, feline leukemia vaccines, companion animal rabies vaccines, companion animal cephalosporins, and equine joint-injected steroids, as well as the Pfizer assets relating to equine herpesvirus vaccines.

The proposed Consent Agreement contains several provisions designed to ensure that these divestitures are successful. Pfizer must provide various transitional services to enable BI to compete against Pfizer immediately following the acquisition, including any technical assistance that BI may need. Pfizer also must provide BI with the regulatory approvals, brand names, marketing materials, customer contracts, and other assets associated with marketing and selling the divested products in the United States.

BI is a reputable supplier of animal health products and is well positioned to manufacture and market the acquired products divested assets and to compete effectively in the relevant markets. In the United States, BI's animal health revenues totaled approximately \$215 million in 2008. Moreover, the acquisition by BI does not present competitive problems in any of the relevant markets because it currently has either a very limited presence or no presence at all in each of those areas. With its resources, capabilities, and experience marketing animal and human health products, BI is well placed to replicate the competition that would be lost with the proposed acquisition.

Analysis to Aid Public Comment

The proposed Consent Agreement also preserves the existing competition in the equine tapeworm parasiticides market by requiring Pfizer to return to Virbac Pfizer's distribution rights for the relevant parasiticide products no later than ten days after the acquisition. In 2000, Virbac entered into a 15-year licensing agreement with Pfizer, under which Virbac grants Pfizer exclusive distribution rights to market and sell the equine tapeworm parasiticide products in the United States. Virbac is particularly well suited to acquire these assets because it currently manufactures the products and has the resources, technical capabilities, and experience to be successful in restoring the competition that would be lost if the proposed Pfizer/Wyeth transaction were to proceed unremedied.

If the Commission determines that either BI or Virbac is not an acceptable acquirer of the assets to be divested, or that the manner of the divestitures is not acceptable, Pfizer must unwind the sale(s) and divest the assets within six months of the date the Order becomes final to another Commission-approved acquirer. If Pfizer fails to divest within the six months, the Commission may appoint a trustee to divest the relevant assets.

The proposed remedy also allows for the appointment of an Interim Trustee, experienced in obtaining regulatory approval and the manufacture of biologics, to oversee the required technology transfers. As part of the proposed remedy, Pfizer is required to execute an agreement conferring all rights and powers necessary for the Interim Trustee to satisfy his responsibilities under the Order to assure successful divestitures. The Commission has appointed Dr. Stephen J.D. Bell of Tunnell Consulting to be the Interim Monitor and it is anticipated that he will obtain support and assistance from his colleague, Mr. Arlo Millen. The monitors will ensure that the Commission remains informed about the status of the proposed divestitures and asset transfers.

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

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constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

Complaint

IN THE MATTER OF**AGRIUM INC.**

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

Docket No. C-4277; File No. 091 0068
Filed, December 22, 2009 — Decision, February 3, 2010

This consent order addresses the \$3.6 billion acquisition by Agrium Inc., of CF Industries Holdings. In the Pacific Northwest, Agrium and CF are the only major suppliers of anhydrous ammonia. The complaint alleges that, in the Pacific Northwest and two adjacent areas in Northern Illinois, Agrium's acquisition of CF would eliminate actual, direct, and substantial competition between Agrium and CF; increase Agrium's ability to exercise market power unilaterally; and substantially increase the level of market concentration and enhance the probability of coordination in the two markets in Northern Illinois. The Consent Agreement, requires Agrium to, among other things, divest anhydrous ammonia terminals in Ritzville, Washington, and Marseilles, Illinois to Terra Industries Inc. or another Commission-approved purchaser. Agrium is also required to divest its rights to market and distribute the anhydrous ammonia produced by Rentech at Rentech's East Dubuque, Illinois manufacturing plant back to Rentech.

Participants

For the *Commission*: *E. Eric Elmore, Victoria Luxardo Jeffries, and Victoria Lippincott.*

For the *Respondents*: *Joseph Simons, Paul, Weiss, Rifkind, Wharton & Garrison LLP; and Joshua Gray, Ian John, and Neal Stoll, Skadden, Arps, Slate, Meagher & Flom LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Agrium Inc. ("Agrium"), a corporation subject to the jurisdiction of the

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Commission, has made an offer to acquire all of the voting securities of CF Industries Holdings, Inc. ("CF"), 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 ("FTC Act"), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Agrium is a Canadian corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 13131 Lake Fraser Drive SE, Calgary, Alberta, Canada, T2J 7E8. In the United States, Agrium operates its chemical and agricultural business through its subsidiary, Agrium USA, headquartered at Suite 1700, 4582 South Ulster Street, Denver, Colorado, 80237. Agrium is a multinational fertilizer and farm products company that develops, manufactures, and markets chemical and agricultural products and services, including nitrogen fertilizers, that it distributes to customers in the Americas and elsewhere.

2. CF is a corporation organized, existing, and doing business under, and by virtue of, the laws of Illinois, with its office and principal place of business located at 4 Parkway North, Suite 400, Deerfield, IL 60015-2590. CF is a fertilizer products company that develops, manufactures, and distributes agricultural products, including nitrogen fertilizers, that it distributes to customers in the Americas and elsewhere.

II. JURISDICTION

3. Agrium and CF are, and at all times relevant herein have been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose businesses are in or affect commerce as

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“commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED TRANSACTION

4. On February 25, 2009, Agrium proposed to CF’s board of directors that Agrium acquire all of the voting securities of CF for approximately \$3.6 billion. CF rejected that offer. Since then, Agrium has proposed several revised offers, which have also been rejected by CF’s board of directors. Most recently, on November 5, 2009, Agrium increased its offer to approximately \$4.5 billion. If CF accepts Agrium’s tender offer, Agrium will hold 100 percent of the voting securities of CF, and CF will become a wholly owned subsidiary of Agrium.

IV. RELEVANT PRODUCT MARKET

5. The relevant line of commerce in which to analyze the effects of the proposed acquisition described herein is the distribution and sale of anhydrous ammonia (“AA”), a form of nitrogen fertilizer, for agricultural application.

6. AA is one of several types of nitrogen fertilizer used in the agricultural sector. Nitrogen fertilizers come in many different chemical forms with varying nitrogen concentrations. Among the different chemical forms, Agrium and CF both produce AA, urea, and urea ammonium nitrate solution. Of these different forms of nitrogen fertilizer, AA has the highest concentration of nitrogen per ton. Customers consider soil and topographical characteristics, equipment, and weather when deciding which type of nitrogen fertilizer to use.

7. AA is injected or knifed into the soil using specialized machinery. Many customers who use AA have made significant investments to acquire the necessary infrastructure and application equipment. Switching from AA to another nitrogen fertilizer would require these customers to abandon the significant investments they have already made and to make additional

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investments to obtain the proper infrastructure and equipment for application of the other nitrogen products.

8. Because of the advantages of using AA for certain topographies and in certain climate conditions, and the substantial capital invested in AA storage and application equipment, most users of AA would not switch to alternative forms of nitrogen fertilizer in response to a significant and sustained increase in price.

V. RELEVANT GEOGRAPHIC MARKETS

9. There are three relevant geographic markets in which to analyze the effects of the proposed acquisition: the Pacific Northwest ("PNW"); East Dubuque, Illinois; and Marseilles, Illinois.

10. In each relevant geographic market, the users of AA would not purchase from terminals located more than approximately 140 miles from their location, even in response to a significant and sustained increase in price. Transportation costs make it difficult for terminal owners to be price competitive and to make profitable sales at distances over generally 140 miles.

VI. MARKET STRUCTURE

11. Each relevant market is highly concentrated, and the proposed transaction will further increase concentration levels.

12. In the PNW, Agrium and CF are the only major distributors and sellers of AA. As a result, the proposed acquisition would reduce the number of significant AA suppliers with storage and distribution assets in the PNW from two to one.

13. In both East Dubuque, Illinois, and Marseilles, Illinois, there are only three major distributors and sellers of AA and the

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proposed acquisition would reduce the number of significant AA suppliers with storage and distribution assets from three to two.

VII. CONDITIONS OF ENTRY

14. New entry or fringe expansion into the relevant markets would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the acquisition. New entry would require several years, including a lengthy process to obtain the regulatory approvals to add new AA storage capacity in a local area. Further, a new entrant would need to build a terminal large enough to benefit from economies of scale, and as a result, would face difficulty in securing sufficient sales to make entry attractive. Together with the high sunk costs associated with the addition of new AA terminal capacity, these difficulties make new entry unlikely.

VIII. EFFECTS OF THE ACQUISITION

15. In the areas identified in paragraphs 9 through 13, above, Agrium and CF compete directly with each other in the distribution and sale of AA. Other competitors are not effective competitive constraints to Agrium or CF in each relevant geographic area, due to factors such as the location of their manufacturing operations and their lack of storage facilities.

16. The effects of the merger, if consummated, may be to substantially lessen competition or tend to create a monopoly in each of 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. Specifically, the merger would:

- a. eliminate actual, direct, and substantial competition between Agrium and CF in the relevant markets;
- b. increase Respondent's ability to exercise market power unilaterally in the relevant markets; and

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- c. substantially increase the level of concentration in the relevant markets, and enhance the probability of coordination in East Dubuque, Illinois and Marseilles, Illinois.

IX. VIOLATIONS CHARGED

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-second day of December, 2009, issues its Complaint against said Respondent.

By the Commission.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition of CF Industries Holdings, Inc., by Agrium Inc. ("Respondent Agrium"), and Respondent Agrium having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Agrium with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C.

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§ 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent Agrium, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent Agrium 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 Agrium 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 Agrium 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 Order”), and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, 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 Agrium Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at 13131 Lake Fraser Drive SE, Calgary, Alberta, T2J7E8, Canada.
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.

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ORDER**I.**

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

- A. “Agrium” means Agrium Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Agrium Inc. (including CF after the Agrium-CF Acquisition Date), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “CF” means CF Industries Holdings, Inc., 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 4 Parkway North, Suite 400, Deerfield, IL 60015-2590.
- C. “Commission” means the Federal Trade Commission.
- D. “Agrium-CF Acquisition Date” means the date on which Agrium acquires a majority of the issued and outstanding shares of common stock of CF on a fully diluted basis.
- E. “Agrium/Rentech Distribution Agreement” means the April 26, 2006, distribution and marketing agreement between Rentech and Royster-Clark Resources LLC, (“RCR”)(which was acquired by Agrium on February 9, 2006) under which Agrium, as RCR’s successor, markets and distributes nitrogen-based fertilizer, including Anhydrous Ammonia, produced by Rentech at Rentech’s plant in East Dubuque, Illinois. The Agrium/Rentech Distribution Agreement is attached as

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Confidential Exhibit A to this Order.

- F. “Agrium/Rentech Distribution Amendment” means the October 13, 2009, amendment to the Agrium/Rentech Distribution Agreement. The Agrium/Rentech Distribution Amendment is attached as Confidential Exhibit B to this Order.
- G. “Anhydrous Ammonia” means the nitrogen-based fertilizer with the scientific formula NH_3 .
- H. “Carseland Facility” means Agrium’s Carseland Nitrogen Operations located approximately 50 km from Calgary, AB, Canada. The Carseland Nitrogen Operations facility produces, among other things, Anhydrous Ammonia, urea, and controlled released urea products.
- I. “Carseland Facility Interest” means a fifty percent (50%) interest in the Carseland Facility being purchased by Terra pursuant to and as defined by the October 18, 2009, agreement between Terra Industries Inc. and Agrium, and amendments thereto, attached as part of the Terra Ritzville Divestiture Agreements.
- J. “CF-Terra Acquisition” means CF’s acquisition of a majority of the issued and outstanding shares of common stock of Terra on a fully diluted basis.
- K. “Confidential Business 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, contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.
- L. “Designated Marseilles Terminal Employee” means all

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of the employees working at the Marseilles Terminal anytime on or after November 1, 2009, and any other Agrium employee who spent more than 50% of his/her time working on Marseilles Terminal issues in the twelve (12) months preceding the Agrium-CF Acquisition Date.

- M. “Designated Ritzville Terminal Employee” means all of the employees working at the Ritzville Terminal anytime on or after November 1, 2009, and any other CF employee who spent more than 50% of his/her time working on Ritzville Terminal issues in the twelve (12) months preceding the Agrium-CF Acquisition Date.
- N. “Illinois-Iowa Area” means the states of Illinois and Iowa.
- O. “Marseilles Terminal” means the Agrium Anhydrous Ammonia, UAN and dry storage facility located at 1801 E. Broadway Street in Marseilles, IL. 61341, and includes, but is not limited to:
 - 1. The real property owned by Agrium related to the Marseilles Terminal together with all rights, interests, improvements, and appurtenances pertaining thereto;
 - 2. All fertilizer terminal related assets, wherever located, such as the unloading systems, warehousing facilities, machinery, fixtures, equipment, technology, know-how, specifications, designs, drawings, processes, quality control data, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and any tangible personal property;
 - 3. Any adjacent strips and gores between the property

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and any abutting properties, and any land lying in or under the bed of any creek, stream, or waterway or any highway, avenue, road, easement, street, alley, or right-of-way, open or proposed, in, on, across, abutting, or adjacent to the property;

4. All certificates for appropriation of water and other water rights generally that relate to the property;
 5. All right, title, interest in and to the contracts relating exclusively or primarily to the Marseilles Terminal;
 6. All rights under warranties and guarantees, express or implied, wherever located;
 7. All dedicated management information systems and information contained in management information systems, and all separately maintained, as well as relevant portions of not separately maintained books, records, and files, wherever located;
 8. All federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, wherever located;
 9. All items of prepaid expense;
 10. All separately maintained, as well as relevant portions of not separately maintained books, records, and files, wherever located; and
 11. Any additional assets defined in the Marseilles Terminal Divestiture Agreement.
- P. "Marseilles Terminal Acquirer" means the Person approved by the Commission to acquire the Marseilles Terminal pursuant to this Order. The Ritzville

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Terminal Acquirer may be the same Person as the Marseilles Terminal Acquirer.

- Q. “Marseilles Terminal Contracts” means contracts that relate exclusively or primarily to the Marseilles Terminal.
- R. “Marseilles Terminal Divestiture Agreement” means all the divestiture agreements, licenses, assignments, and other agreements entered into by the Marseille Terminal Acquirer and Respondent Agrium pursuant to Paragraph III of this Order, including the Terra Divestiture Agreements, or by the Marseilles Terminal Acquirer and the Divestiture Trustee pursuant to Paragraph VI of this Order, or any other agreements, licenses, assignments that effectuate the divestiture of the Marseilles Terminal to the Marseilles Terminal Acquirer.
- S. “Marseilles Terminal Divestiture Date” means the date on which Respondent Agrium or the Divestiture Trustee divests the Marseilles Terminal to the Marseilles Terminal Acquirer pursuant to Paragraph III or Paragraph VII of this Order.
- T. “Medicine Hat Plant” means the nitrogen fertilizer complex owned by Canadian Fertilizers Limited, a joint venture owned in part by CF, and located at 1250 52nd Street, N.W. Medicine Hat, in Alberta, Canada.
- U. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, division, or department, or other business or legal entity.
- V. “PNW” means the Pacific Northwest States of Idaho, Washington, and Oregon.

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- W. “Relating To” or “Related To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- X. “Rentech” means Rentech Development Corporation, a wholly owned subsidiary of Rentech Inc., a Colorado corporation, with its principal office at 1331 17th St., Ste 720, Denver, Colorado, 80202.
- Y. “Ritzville Terminal” means all the assets Related To the CF Ammonia Terminal located at Danekas Road at I-90, Ritzville, WA 99169 and includes, but is not limited to:
1. The real property owned by Agrium related to the Ritzville Terminal together with all rights, interests, improvements, and appurtenances pertaining thereto;
 2. All fertilizer terminal related assets, wherever located, such as the unloading systems, warehousing facilities, machinery, fixtures, equipment, technology, know-how, specifications, designs, drawings, processes, quality control data, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and any tangible personal property;
 3. Any adjacent strips and gores between the property and any abutting properties, and any land lying in or under the bed of any creek, stream, or waterway or any highway, avenue, road, easement, street, alley, or right-of-way, open or proposed, in, on, across, abutting, or adjacent to the property;
 4. All certificates for appropriation of water and other water rights generally that relate to the property;

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5. All right, title, interest in and to contracts relating exclusively or primarily to the Ritzville Terminal;
 6. All rights under warranties and guarantees, express or implied, wherever located;
 7. All dedicated management information systems and information contained in management information systems, and all separately maintained, as well as relevant portions of not separately maintained books, records, and files, wherever located;
 8. All federal, state, and local regulatory agency registrations, permits, and applications, and all documents related thereto, wherever located;
 9. All items of prepaid expense;
 10. All separately maintained, as well as relevant portions of not separately maintained books, records, and files, wherever located; and
 11. Any additional assets defined in the Ritzville Terminal Divestiture Agreement.
- Z. “Ritzville Terminal Acquirer” means the Person approved by the Commission to acquire the Ritzville Terminal pursuant to this Order. The Ritzville Terminal Acquirer may be the same Person as the Marseilles Terminal Acquirer.
- AA. “Ritzville Terminal Contracts” means all right, title, interest in and to contracts relating primarily or exclusively to the Ritzville Terminal.
- BB. “Ritzville Terminal Divestiture Agreements” means all

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the divestiture agreements, licenses, assignments, and other agreements entered into by the Ritzville Terminal Acquirer and Respondent Agrium pursuant to Paragraph II of this Order, including the Terra Ritzville Divestiture Agreements, or by the Ritzville Terminal Acquirer and the Divestiture Trustee pursuant to Paragraph VI of this Order, or any other agreements, licenses, assignments that effectuate the divestiture of the Ritzville Terminal to the Ritzville Terminal Acquirer.

- CC. “Ritzville Terminal Divestiture Date” means the date on which Respondent Agrium or the Divestiture Trustee divests the Ritzville Terminal to the Ritzville Terminal Acquirer pursuant to Paragraph II or Paragraph VII of this Order.
- DD. “Terra” means Terra Industries, Inc. a corporation organized, existing and doing business under and by virtue of the laws of Maryland, with its office and principal place of business located at 600 Fourth Street, in Sioux City, Iowa 51102-6000.
- EE. “Terra Ritzville Divestiture Agreements” means all the divestiture agreements, licenses, assignments, and other agreements entered into by Terra and Respondent Agrium for the divestiture of the Ritzville Terminal and the fifty percent (50%) interest in the Carseland Facility, and the assignment of the Ritzville Terminal Contracts (including by sub-assignment, if necessary). The Terra Ritzville Divestiture Agreements are attached to this Order as Confidential Exhibit C.
- FF. “Terra Marseilles Divestiture Agreements” means all the divestiture agreements, licenses, assignments, and other agreements entered into by Terra and Respondent Agrium for the divestiture of the Marseilles Terminal and the assignment of the Marseilles Terminal

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Contracts (including by sub-assignment, if necessary). The Terra Marseilles Divestiture Agreements are attached to this Order as Confidential Exhibit D.

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

- A. Within forty-five (45) days after the Agrium-CF Acquisition Date, Respondent Agrium shall divest the Ritzville Terminal, and the Carseland Facility Interest, and assign the Ritzville Terminal Contracts (including by sub-assignment if necessary) absolutely and in good faith, to Terra in a manner that receives the prior approval of the Commission and consistent with the Terra Ritzville Divestiture Agreements.
- B. Within one-hundred-eighty (180) days after the Agrium-CF Acquisition Date, Respondent Agrium shall divest itself of any stock or shares in Terra that CF or Respondent Agrium had acquired before the Agrium-CF Acquisition Date. *provided, however*, that this Paragraph II.B. shall only apply if there is no CF-Terra Acquisition such that the terms of Paragraph X of this Order come into effect.
- C. For the time period following the Agrium-CF Acquisition Date that Respondent Agrium holds, directly or indirectly, any interest in Terra; has the ability or right to elect or appoint a Terra Directors; or has any right to Confidential Business Information of or Relating To Terra, Respondent Agrium shall:
 - 1. not elect or appoint a Terra director;
 - 2. not have a director, officer, partner, employee, agent, or representative on any Terra board;

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3. not influence or attempt to influence, directly or indirectly, by voting or otherwise, Terra, or the management or operation of Terra; and
4. not receive or attempt to receive, directly or indirectly, any Confidential Business Information of, from or Relating To Terra.

provided, however, that this Paragraph II.C. shall only apply if there is no CF-Terra Acquisition such that the terms of Paragraph X of this Order come into effect.

- D. Within thirty (30) days after the Agrium-CF Acquisition Date, Respondent Agrium shall give notice to the Commission staff of all assets acquired by CF from Terra, or any other company that sells or produces Anhydrous Ammonia, from July 2009 until the Agrium-CF Acquisition Date (“CF-Terra Assets”).

Such written notification shall contain a detailed description of the CF-Terra Assets; the date of the acquisition; the amount paid for the CF-Terra Assets; and any documents prepared by CF Relating To the acquisition of the CF-Terra Assets (hereinafter the “CF-Terra Asset Notification”). The CF-Terra Asset Notification shall be filed with the Secretary of the Commission, with a simultaneous filing with the Assistant Director for Compliance and the Assistant Director for Mergers II of the Bureau of Competition

- E. If, at the time the Commission determines to make this Order final, the Commission notifies Respondent Agrium that Terra is not an acceptable acquirer of the Ritzville Terminal or that the manner in which the divestiture was accomplished is not acceptable, then, after receipt of such written notification:

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1. Respondent Agrium shall immediately notify Terra of the notice received from the Commission and shall as soon as practicable effect the rescission of the Terra Divestiture Agreements with regard to the Ritzville Terminal; and
2. Respondent Agrium shall, within one-hundred-twenty (120) days from the date this Order becomes final, divest the Ritzville Terminal and assign the Ritzville Terminal Contracts (including by sub-assignment if necessary) absolutely and in good faith, at no minimum price, to the Ritzville Terminal Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. *provided, however,* the Ritzville Terminal Acquirer shall have (a) a secure and stable, independent, long-term source of Anhydrous Ammonia with a capability to supply to the Ritzville Terminal a volume of Anhydrous Ammonia similar to the volume of Anhydrous Ammonia supplied to the Ritzville Terminal before the Ritzville Terminal Divestiture Date at a delivered price of Anhydrous Ammonia consistent with the competitive position of the Ritzville Terminal before the Ritzville Terminal Divestiture Date; (b) an additional secure and stable, independent, long-term source of Anhydrous Ammonia with a capability to supply to the Ritzville Terminal a volume of Anhydrous Ammonia enough to expand the Ritzville Terminal output by 30% over its 2008 output; and (c) a settled transportation plan including, but not limited to, signed contracts with rail or other transportation options, for transportation of the Anhydrous Ammonia from an Anhydrous Ammonia producer/supplier to the Ritzville Terminal. *Provided, further, however,* with respect to assets

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that are to be divested or agreements entered into pursuant to this paragraph at the Ritzville Terminal Acquirer's option, Respondent Agrium need not divest such assets or enter into such agreements only if the Ritzville Terminal Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

- F. If Respondent Agrium is unable to divest pursuant to Paragraph II.A. of this Order if (1) Terra notifies Respondent Agrium that it invokes a termination provision in the Terra Ritzville Divestiture Agreements terminating its obligation to acquire the Ritzville Terminal and the Carseland Facility Interest, or (2) Terra fails to close the Terra Ritzville Divestiture Agreements as required by such agreements or the terms of this Order, then:
1. Respondent Agrium shall, within one (1) day, notify the Commission of Terra's actions and that the Terra Divestiture Agreements are no longer effective as to the Ritzville Terminal ("Terra Ritzville Termination Date"); and
 2. Respondent Agrium shall, within one-hundred-twenty (120) days from the Agrium-CF Acquisition Date, divest the Ritzville Terminal and assign the Ritzville Terminal Contracts (including by sub-assignment if necessary) absolutely and in good faith, at no minimum price, to a Ritzville Terminal Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. *Provided, however,* the Ritzville Terminal Acquirer shall have (a) a secure and stable, independent, long-term source of Anhydrous Ammonia with a capability to supply to the Ritzville Terminal a volume of Anhydrous

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Ammonia similar to the volume of Anhydrous Ammonia supplied to the Ritzville Terminal before the Ritzville Terminal Divestiture Date at a delivered price of Anhydrous Ammonia consistent with the competitive position of the Ritzville Terminal before the Ritzville Terminal Divestiture Date; (b) an additional secure and stable, independent, long-term source of Anhydrous Ammonia with a capability to supply to the Ritzville Terminal a volume of Anhydrous Ammonia enough to expand the Ritzville Terminal output by 30% over its 2008 output; and (c) a settled transportation plan including, but not limited to, signed contracts with rail or other transportation options, for transportation of the Anhydrous Ammonia from an Anhydrous Ammonia producer/supplier to the Ritzville Terminal. *Provided, further, however,* with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the Ritzville Terminal Acquirer's option, Respondent Agrium need not divest such assets or enter into such agreements only if the Ritzville Terminal Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

- G. The Ritzville Terminal Divestiture Agreement shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Commission-approved Acquirer or to reduce any obligations of Respondent Agrium under such agreements, and each such agreement, if approved by the Commission as the Divestiture Agreement, shall be incorporated by reference into this Order and made a part hereof.

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Respondent Agrium shall comply with all terms of the Ritzville Terminal Divestiture Agreement, and any breach by Respondent Agrium of any term of the Ritzville Terminal Divestiture Agreement shall constitute a violation of this Order. If any term of the Ritzville Terminal Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondent Agrium cannot fully comply with both terms, the Order Term shall determine Respondent Agrium's obligations under this Order. Any material modification of the Ritzville Terminal Divestiture Agreement between the date the Commission approves the Ritzville Terminal Divestiture Agreement and the Closing Date, without the prior approval of the Commission, or any failure to meet any material condition precedent to closing (whether waived or not), shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Ritzville Terminal Divestiture Agreement, for a period of five (5) years after the relevant Ritzville Terminal Divestiture Date, any modification of the Ritzville Terminal Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondents shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Ritzville Terminal Divestiture Agreement, or after any failure to meet any condition precedent (material or otherwise) to closing (whether waived or not).

- H. Respondent Agrium shall, prior to the Ritzville Terminal Divestiture Date and as a condition precedent to the consummation of the divestiture pursuant to Paragraph II.A., Paragraph II.B., or Paragraph II.C., secure all consents and waivers from all third parties that are necessary to permit Respondent Agrium to divest the Ritzville Terminal and assign the Ritzville

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Terminal Contracts (including by sub-assignment if necessary) required to be divested and assigned pursuant to this Order to the Ritzville Terminal Acquirer, *provided, however*, Respondent Agrium may satisfy this requirement by certifying that the Ritzville Terminal Acquirer has executed all such agreements directly with each of the relevant third parties.

- I. After the Agrium-CF Acquisition Date and until the Ritzville Terminal Divestiture Date, Respondent Agrium shall take such actions as are necessary to prevent the destruction, removal, wasting, deterioration, or impairment of the facilities Related To the Ritzville Terminal.
- J. Respondent Agrium shall, not later than the Ritzville Terminal Divestiture Date and at the Ritzville Terminal Acquirer's option, enter into one or more transition services agreements for the provision of services to be provided by Respondent Agrium to the Ritzville Terminal Acquirer. Such agreements shall be subject to the prior approval of the Commission and become a part of the Ritzville Terminal Divestiture Agreement.
 1. Such agreements may include, but are not limited to, an agreement providing for supply of Anhydrous Ammonia to the Ritzville Terminal from the Medicine Hat Plant for a period of time until a different stable, independent, long-term source for Anhydrous Ammonia is secured for the Ritzville Terminal, and an agreement for technical assistance.
 2. Respondent Agrium shall not terminate any transition services agreement before the end of the term approved by the Commission without:
 - a. the written agreement of the Ritzville Terminal

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Acquirer and thirty (30) days prior notice to the Commission; or,

- b. in the case of a proposed unilateral termination by Respondent Agrium due to an alleged breach of an agreement by the Ritzville Terminal Acquirer, sixty (60) days prior notice to the Commission of such termination. *provided, however,* such sixty (60) days notice shall only be given after the parties have in good faith:

- (1) attempted to settle the dispute between themselves, and

- (2) engaged in arbitration and received an arbitrator's decision, or

- (3) received a final court decision after all appeals.

- K. The purposes of this Paragraph II of the Order are: (1) to ensure the continuation of the Ritzville Terminal as a going concern in the same manner in which it conducted business as of the Agrium-CF Acquisition Date, (2) to ensure that the Ritzville Terminal Acquirer has the intention and ability to operate the Ritzville Terminal independent of Respondent Agrium, similar to CF's independent use of the Ritzville Terminal, (3) to ensure that the Ritzville Terminal Acquirer has an independent, secure, stable, and long-term source of Anhydrous Ammonia to sell out of the Ritzville Terminal, (4) to ensure that the Ritzville Terminal Acquirer has an independent, secure, stable, and long-term source of Anhydrous Ammonia to expand sales out of the Ritzville Terminal by 30% over its 2008 sales, and (5) to remedy the lessening of competition resulting from the Agrium-CF Acquisition as alleged in the Commission's Complaint.

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

- A. Within forty-five (45) days after the Agrium-CF Acquisition Date, Respondent Agrium shall divest the Marseilles Terminal and assign the Marseilles Terminal Contracts (including by sub-assignment if necessary) absolutely and in good faith, to Terra in a manner that receives the prior approval of the Commission and consistent with the Terra Marseilles Divestiture Agreements.
- B. If, at the time the Commission determines to make this Order final, the Commission notifies Respondent Agrium that Terra is not an acceptable acquirer of the Marseilles Terminal or that the manner in which the divestiture was accomplished is not acceptable, then, after receipt of such written notification:
1. Respondent Agrium shall immediately notify Terra of the notice received from the Commission and shall as soon as practicable effect the rescission of the Terra Divestiture Agreements with regard to the Marseilles Terminal; and
 2. Respondent Agrium shall, within one-hundred-twenty (120) days from the date this Order becomes final, divest the Marseilles Terminal and assign the Marseilles Terminal Contracts (including by sub-assignment if necessary) absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. *Provided, however,* the Marseilles Terminal Acquirer shall have (a) a secure and

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stable, independent source of Anhydrous Ammonia with a capability to supply to the Marseilles Terminal a volume of Anhydrous Ammonia similar to the volume of Anhydrous Ammonia supplied to the Marseilles Terminal before the Marseilles Terminal Divestiture Date at a delivered price of Anhydrous Ammonia consistent with the competitive position of the Marseilles Terminal before the Marseilles Terminal Divestiture Date; and (b) a settled transportation plan including, but not limited to, signed contracts with rail or other transportation options, for transportation of the Anhydrous Ammonia from an Anhydrous Ammonia producer/supplier to the Marseilles Terminal. *Provided, further, however,* with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the Marseilles Terminal Acquirer's option, Respondent Agrium need not divest such assets or enter into such agreements only if the Marseilles Terminal Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

- C. If Respondent Agrium is unable to divest pursuant to Paragraph III.A. of this Order if (1) Terra notifies Respondent Agrium that it invokes a termination provision in the Terra Marseilles Divestiture Agreements terminating its obligation to acquire the Marseilles Terminal, or (2) Terra fails to close the Terra Marseilles Divestiture Agreements as required by such agreements or the terms of this Order, then:
1. Respondent Agrium shall, within one (1) day, notify the Commission of Terra's actions and that the Terra Divestiture Agreements are no longer effective as to the Marseilles Terminal ("Terra Marseilles Termination Date"); and

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2. Respondent Agrium shall, within one-hundred-twenty (120) days from the Agrium-CF Acquisition Date, divest the Marseilles Terminal and assign the Marseilles Terminal Contracts (including by sub-assignment if necessary) absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission. *Provided, however,* the Marseilles Terminal Acquirer shall have (a) a secure and stable, independent source of Anhydrous Ammonia with a capability to supply to the Marseilles Terminal a volume of Anhydrous Ammonia similar to the volume of Anhydrous Ammonia supplied to the Marseilles Terminal before the Marseilles Terminal Divestiture Date at a delivered price of Anhydrous Ammonia consistent with the competitive position of the Marseilles Terminal before the Marseilles Terminal Divestiture Date; and (b) a settled transportation plan including, but not limited to, signed contracts with rail or other transportation options, for transportation of the Anhydrous Ammonia from an Anhydrous Ammonia producer/supplier to the Marseilles Terminal. *Provided, further, however,* with respect to assets that are to be divested or agreements entered into pursuant to this paragraph at the Marseilles Terminal Acquirer's option, Respondent Agrium need not divest such assets or enter into such agreements only if the Marseilles Terminal Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.
- D. The Marseilles Terminal Divestiture Agreement shall not limit or contradict, or be construed to limit or

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contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Commission-approved Acquirer or to reduce any obligations of Respondent Agrium under such agreements, and each such agreement, if approved by the Commission as the Divestiture Agreement, shall be incorporated by reference into this Order and made a part hereof. Respondent Agrium shall comply with all terms of the Marseilles Terminal Divestiture Agreement, and any breach by Respondent Agrium of any term of the Marseilles Terminal Divestiture Agreement shall constitute a violation of this Order. If any term of the Marseilles Terminal Divestiture Agreement varies from the terms of this Order ("Order Term"), then to the extent that Respondent Agrium cannot fully comply with both terms, the Order Term shall determine Respondent Agrium's obligations under this Order. Any material modification of the Marseilles Terminal Divestiture Agreement between the date the Commission approves the Marseilles Terminal Divestiture Agreement and the Closing Date, without the prior approval of the Commission, or any failure to meet any material condition precedent to closing (whether waived or not), shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreements, for a period of five (5) years after the relevant Marseilles Terminal Divestiture Date, any modification of the Marseilles Terminal Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondents shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Marseilles Terminal Divestiture Agreement, or after any failure to meet any condition precedent (material or otherwise) to closing (whether waived or not).

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- E. Respondent Agrium shall, prior to the Marseilles Terminal Divestiture Date and as a condition precedent to the consummation of the divestiture pursuant to Paragraph III.A, Paragraph III.B., or Paragraph III.C., secure all consents and waivers from all third parties that are necessary to permit Respondent Agrium to divest the Marseilles Terminal and assign the Marseilles Terminal Contracts (including by sub-assignment if necessary) required to be divested and assigned pursuant to this Order to the Marseilles Terminal Acquirer, *provided, however*, Respondent Agrium may satisfy this requirement by certifying that the Marseilles Terminal Acquirer has executed all such agreements directly with each of the relevant third parties.
- F. Until the Marseilles Terminal Divestiture Date, Respondent Agrium shall take such actions as are necessary to prevent the destruction, removal, wasting, deterioration, or impairment of the facilities Related To the Marseilles Terminal.
- G. Respondent Agrium shall, not later than the Marseilles Terminal Divestiture Date and at the Marseilles Terminal Acquirer's option, enter into one or more transition services agreements for the provision of services to be provided by Respondent Agrium to the Marseilles Terminal Acquirer. Such agreements shall be subject to the prior approval of the Commission and become a part of the Marseilles Terminal Divestiture Agreement.
1. Such agreements may include, but are not limited to an agreement for technical assistance.
 2. Respondent Agrium shall not terminate any transition services agreement before the end of the

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term approved by the Commission without:

- a. the written agreement of the Marseilles Terminal Acquirer and thirty (30) days prior notice to the Commission; or,
 - b. in the case of a proposed unilateral termination by Respondent Agrium due to an alleged breach of an agreement by the Marseilles Terminal Acquirer, sixty (60) days prior notice to the Commission of such termination. *Provided, however,* such sixty (60) days notice shall only be given after the parties have in good faith:
 - (1) attempted to settle the dispute between themselves, and
 - (2) engaged in arbitration and received an arbitrator's decision, or
 - (3) received a final court decision after all appeals.
- H. The purposes of this Paragraph III of the Order are: (1) to ensure the continuation of the Marseilles Terminal as a going concern in the same manner in which it conducted business as of the Agrium-CF Acquisition Date, (2) to ensure that the Marseilles Terminal Acquirer has the intention and ability to operate the Marseilles Terminal independent of Respondent Agrium, (3) to ensure that the Marseilles Terminal Acquirer has an independent, secure, and stable source of Anhydrous Ammonia to sell out of the Marseilles Terminal, and (4) to remedy the lessening of competition resulting from the Agrium-CF Acquisition as alleged in the Commission's Complaint.

IV.

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IT IS FURTHER ORDERED that:

- A. No later than five (5) days after the Agrium-CF Acquisition Date, Respondent Agrium shall terminate certain portions of the Agrium/Rentech Distribution Agreement, and modify and supplement the Agrium/Rentech Distribution Agreement pursuant to the Agrium/Rentech Distribution Amendment.
- B. The purpose of the terminations, modifications, and supplements described in Paragraph IV.A. of this Order, as agreed-to by Respondent Agrium and Rentech in the Agrium/Rentech Distribution Amendment, is to (1) establish Rentech as a viable distributor and marketer of Anhydrous Ammonia similar to the competitive position Respondent Agrium had pursuant to the Agrium/Rentech Distribution Agreement including, but not limited to, the ability to receive, store, and transport Anhydrous Ammonia for customers in the areas where Respondent Agrium had serviced customers pursuant to the Agrium/Rentech Distribution Agreement; and (2) to remedy the lessening of competition resulting from the Agrium-CF Acquisition as alleged in the Commission's Complaint.

V.

IT IS FURTHER ORDERED that Respondent Agrium and Respondent Agrium's employees shall not, after the divestiture of the Ritzville Terminal and the Marseilles Terminal, use or share, directly or indirectly, any Confidential Business Information Relating To the Ritzville Terminal or the Marseilles Terminal (including, but not limited to, the production, transportation, delivery, storage, distribution, marketing, and sale of Anhydrous Ammonia to or from such terminals) with any of Respondent Agrium's employees who manage, market, store, or sell Anhydrous

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Ammonia to or from Respondent Agrium's Terminals in the PNW or the Illinois-Iowa Area. *Provided, however,* the provisions of this Paragraph V apply except:

- A. As otherwise allowed in this Order or the Hold Separate Order, in this matter;
- B. As provided for in a transition services agreement;
- C. As consented to by the Ritzville Terminal Acquirer or Marseilles Terminal Acquirer;
- D. As required by law;
- E. In negotiating agreements to divest assets pursuant to this Order and engaging in related due diligence;
- F. In complying with this Order;
- G. To the extent necessary to allow Respondent Agrium to comply with the requirements and obligations of the laws of the United States and other countries;
- H. In defending legal claims, investigations or enforcement actions threatened or brought against or related to the Ritzville Terminal or the Marseilles Terminal; and
- I. In obtaining legal advice.

VI.

IT IS FURTHER ORDERED that:

- A. If Respondent Agrium has not fully complied with the obligations as required by Paragraphs II., III., and IV. of this Order, the Commission may appoint a Divestiture Trustee to divest the Ritzville Terminal and

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the Marseille Terminal, and terminate the Agrium/Rentech Marketing Agreement, unless otherwise divested or terminated pursuant to this Order, and enter into other agreements, assignments, and licenses, in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent Agrium shall consent to the appointment of a Divestiture Trustee in such action to effectuate the divestitures and other obligations as described in Paragraphs II, III, and IV. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VI 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 Agrium to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Agrium, which consent shall not be unreasonably withheld. If any other competition authority has appointed a Person to aid in the divestiture of assets that are the same as the assets to be divested pursuant to this Order, the Commission will consider that Person as a possible Divestiture Trustee. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Agrium 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 Agrium of the identity of

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any proposed Divestiture Trustee, Respondent Agrium shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent Agrium 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 divestitures and contract termination required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VI, Respondent Agrium 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 Ritzville Terminal, and/or divest the Marseilles Terminal, and/or terminate the Agrium/Rentech Marketing Agreement, and enter into all agreements, licenses and assignments as described in Paragraphs II, III, and IV of this Order.
 - 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to divest the Ritzville Terminal, and/or divest the Marseilles Terminal, and/or terminate the Agrium/Rentech Marketing Agreement, and enter into all agreements, licenses and assignments as described in Paragraphs II, III, and IV of this Order, absolutely and in good faith, at no minimum price, to one or more acquirers that receives the prior approval of the Commission and in a manner that receives the prior approval of the

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- 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 or periods may be extended by the Commission; *provided, however,* the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Agrium shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Agrium shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Agrium shall extend the time for divestiture under this Paragraph VI in an amount equal to the delay, as determined by the Commission.
 4. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Agrium'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 for

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assets and businesses to be divested pursuant to Paragraph II and Paragraph III, respectively, 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 Agrium from among those approved by the Commission. *provided further, however,* that Respondent Agrium 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 Agrium, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Agrium, 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 the Respondent Agrium, 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 Agrium shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless

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

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
8. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.
9. The Divestiture Trustee shall report in writing to Respondent Agrium and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
10. Respondent Agrium 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.
11. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to

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Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the obligations under Paragraphs II, III, and IV of this Order.
- G. The Divestiture Trustee(s) appointed pursuant to Paragraph VI of this Order may be the same Person appointed as the Hold Separate Trustee or Monitor pursuant to the Hold Separate Order.

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

- A. Beginning from the Agrium-CF Acquisition Date until ninety (90) days after each of the Ritzville Terminal Divestiture Date and the Marseilles Terminal Divestiture Date, Respondent Agrium shall, in a manner consistent with local labor laws:
 - 1. facilitate employment interviews between employees at the Ritzville Terminal and the Ritzville Terminal Acquirer, and between employees at the Marseilles Terminal and the Marseilles Terminal Acquirer, including providing the names and contact information for such

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employees and allowing such employees reasonable opportunity to interview with the Ritzville Terminal Acquirer or the Marseilles Terminal Acquirer, respectively, and shall not discourage such employee from participating in such interviews;

2. not interfere in employment negotiations between each Designated Ritzville Terminal Employee and the Ritzville Terminal Acquirer, or between each Designated Marseilles Terminal Employee and the Marseilles Terminal Acquirer;
3. with respect to each employee who receives an offer of employment from the Ritzville Terminal Acquirer or the Marseilles Terminal Acquirer, respectively:
 - a. not prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict:
 - (1) the Designated Ritzville Terminal Employee from being employed by the Ritzville Terminal Acquirer, and shall not offer any incentive to the Designated Ritzville Terminal Employee to decline employment with the Ritzville Terminal Acquirer; or
 - (2) the Designated Marseilles Terminal Employee from being employed by the Marseilles Terminal Acquirer, and shall not offer any incentive to the Designated Marseilles Terminal Employee to decline employment with the Marseilles Terminal Acquirer.
 - b. cooperate with:

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- (1) the Ritzville Terminal Acquirer in effecting transfer of the Designated Ritzville Terminal Employee to the employ of the Ritzville Terminal Acquirer, if the Designated Ritzville Terminal Employee accepts an offer of employment from the Ritzville Terminal Acquirer; or
 - (2) the Marseilles Terminal Acquirer in effecting transfer of the Designated Marseilles Terminal Employee to the employ of the Marseilles Terminal Acquirer, if the Designated Marseilles Terminal Employee accepts an offer of employment from the Marseilles Terminal Acquirer;
- c. eliminate any contractual provisions or other restrictions entered into or imposed by Respondent Agrium that would otherwise prevent the Designated Ritzville Terminal Employee or Designated Marseilles Terminal Employee from being employed by the Ritzville Terminal Acquirer or Marseilles Terminal Acquirer, respectively;
- d. eliminate any confidentiality restrictions (imposed by Respondent Agrium or CF) that would prevent:
- (1) the Designated Ritzville Terminal Employee who accepts employment with the Ritzville Terminal Acquirer from using or transferring to the Ritzville Terminal Acquirer any information Relating To the operation of the Ritzville Terminal; or
 - (2) the Designated Marseilles Terminal Employee who accepts employment with the

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Marseilles Terminal Acquirer from using or transferring to the Marseilles Terminal Acquirer any information Relating To the operation of the Marseilles Terminal.

- e. unless alternative arrangements are agreed upon with the Ritzville Terminal Acquirer or the Marseilles Terminal Acquirer, retain the obligation to provide for the benefit of:

- (1) any Designated Ritzville Terminal Employee who accepts employment with the Ritzville Terminal Acquirer, all accrued bonuses, vested pensions, and other accrued benefits;

- (2) any Designated Marseilles Terminal Employee, who accepts employment with the Marseilles Terminal Acquirer, all accrued bonuses, vested pensions, and other accrued benefits.

- B. Respondent Agrium shall not, for a period of two (2) years following the Ritzville Terminal Divestiture Date and Marseilles Terminal Divestiture Date, respectively, directly or indirectly, solicit, induce, or attempt to solicit or induce:

- 1. any Designated Ritzville Terminal Employee who is employed by the Ritzville Terminal Acquirer to terminate his or her employment relationship with the Ritzville Terminal Acquirer, unless that employment relationship has already been terminated by the Ritzville Terminal Acquirer; *provided, however*, Respondent Agrium may make general advertisements for employees including, but not limited to, in newspapers, trade publications,

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websites, or other media not targeted specifically at the Ritzville Terminal Acquirer's employees; *provided further, however*, Respondent Agrium may hire Designated Ritzville Terminal Employees who apply for employment with Respondent Agrium as long as such employees were not solicited by Respondent Agrium in violation of this Paragraph.

2. any Designated Marseilles Terminal Employee who is employed by the Marseilles Terminal Acquirer to terminate his or her employment relationship with the Marseilles Terminal Acquirer, unless that employment relationship has already been terminated by the Marseilles Terminal Acquirer; *provided, however*, Respondent Agrium may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the Marseilles Terminal Acquirer's employees; *provided further, however*, Respondent Agrium may hire Designated Marseilles Terminal Employees who apply for employment with Respondent Agrium as long as such employees were not solicited by Respondent Agrium in violation of this Paragraph.

VIII.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final:

- A. Respondent Agrium shall not, without the prior approval of the Commission, acquire, directly or indirectly, any assets divested pursuant to this Order or rescind, modify, or terminate the Agrium/Rentech Distribution Amendment; and

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- B. Respondent Agrium shall not, without providing advance written notification to the Commission in the manner described in this Paragraph VIII.B., and observing the required waiting periods, directly or indirectly, acquire:
1. any stock, share capital, equity, or other interest in any Person, corporate or non-corporate, that owns a terminal that stores Anhydrous Ammonia in the PNW or the Illinois-Iowa Area; or
 2. a terminal that stores Anhydrous Ammonia in the PNW or the Illinois-Iowa Area.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification. The Notification shall be filed with the Secretary of the Commission, with a simultaneous filing with the Assistant Director for Compliance of the Bureau of Competition. The Notification need not be made to the United States Department of Justice, and notification is required only of Respondent Agrium and not of any other party to the transaction. Respondent Agrium shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Agrium shall not consummate the

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transaction until thirty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

provided, however, that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

provided, further, however, that prior notification shall not be required by this Paragraph VIII.B. for an acquisition, if Respondent Agrium holds, after such acquisition, no more than one percent of the outstanding securities or other equity interest in an entity described in this Paragraph VIII.B.

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

- A. Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent Agrium has fully complied with Paragraphs II., III., IV, and VII. of this Order, Respondent Agrium 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 Agrium shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor, Hold Separate Trustee, or Divestiture Trustee, if any Monitor or Trustee has been appointed pursuant to this Order or the Hold Separate Order. Respondent Agrium shall include in its report, among other things that are required from time to time, a full description of the efforts being made to

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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 Agrium shall include in its report copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, Respondent Agrium shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order. Respondent Agrium shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Order and copies of all written communications to and from all persons relating to this Order. Additionally, Respondent Agrium shall include in its compliance report whether or not it made any notifiable acquisitions pursuant to Paragraph VIII. Respondent Agrium shall include a description of such acquisitions including, but not limited to, the identity of the Person or assets acquired, the location of the Person or assets, and a detailed description of the assets or Person.

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

- A. In the event of a CF-Terra Acquisition before the Agrium-CF Acquisition Date, Respondent Agrium shall

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not, without providing advance written notification to the Commission in the manner described in this Paragraph X. and observing the required waiting periods, directly or indirectly acquire CF; and

- B. In the event of a CF-Terra Acquisition before the Agrium-CF Acquisition Date, Respondent Agrium shall not, without providing advance written notification to the Commission in the manner described in this Paragraph X. and observing the required waiting periods, directly or indirectly acquire Terra, through an acquisition of Terra by CF or in any other manner.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification. The Notification shall be filed with the Secretary of the Commission, with a simultaneous filing with the Assistant Director for Compliance of the Bureau of Competition. The Notification need not be made to the United States Department of Justice, and notification is required only of Respondent Agrium and not of any other party to the transaction. Respondent Agrium shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Agrium shall not consummate the transaction until thirty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph for a transaction for which Notification is

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required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

Provided, further, however, that Respondent Agrium's previous notifications pursuant to the Hart-Scott-Rodino Premerger Notification Act for the acquisition of CF shall not qualify as a notification pursuant to this Paragraph X.

Provided, further, however, that the terms of this Order and the Hold Separate Order in this matter shall continue to apply to Respondent Agrium if it does not file a Notification pursuant to this Paragraph X., and that the Commission's decision to request additional information, or not request additional information, under this Paragraph X shall not be construed to indicate whether the Commission believes an acquisition by Respondent Agrium of Terra would violate, or not violate, any law enforced by the Commission.

Provided, further, however, for the avoidance of doubt, the requirements of this Order, including specifically Paragraphs II, III, and IV, shall be binding upon Respondent Agrium whether or not the Commission determines that further relief may be needed for any acquisition by Respondent Agrium of Terra.

XI.

IT IS FURTHER ORDERED that Respondent Agrium shall notify the Commission at least thirty (30) days prior to any proposed:

- A. dissolution of the Respondent Agrium;
- B. acquisition, merger or consolidation of Respondent Agrium; or
- C. other change in the Respondent Agrium, including, but not limited to, assignment and the creation or

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dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

XII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent Agrium, Respondent Agrium shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of Respondent Agrium 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 Agrium related to compliance with this Order, which copying services shall be provided by Respondent Agrium at its expense; and
- B. to interview officers, directors, or employees of Respondent Agrium, who may have counsel present, regarding such matters.

XIII.

IT IS FURTHER ORDERED that this Order shall terminate on February 3, 2020.

By the Commission.

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**CONFIDENTIAL EXHIBIT A
Agrium/Rentech Distribution Agreement**

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

**CONFIDENTIAL EXHIBIT B
Agrium/Rentech Distribution Amendment**

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

**CONFIDENTIAL EXHIBIT C
Terra Ritzville Divestiture Agreements**

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

**CONFIDENTIAL EXHIBIT D
Terra Marseilles Divestiture Agreements**

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

Order to Maintain Assets

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of CF Industries Holdings, Inc., by Agrium Inc. (“Respondent Agrium”), and Respondent Agrium having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Agrium 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 Agrium, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent Agrium 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 Agrium 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 Agrium has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such 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 to Hold Separate and Maintain Assets (“Hold Separate Order”):

1. Respondent Agrium Inc. is a corporation organized,

Order to Maintain Assets

existing and doing business under and by virtue of the laws of Canada, with its office and principal place of business located at 13131 Lake Fraser Drive SE, Calgary, Alberta, T2J7E8, Canada.

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

ORDER**I.**

IT IS ORDERED that, as used in this Hold Separate Order, the following definitions and the definitions in Paragraph I of the Decision and Order attached to the Agreement Containing Consent Orders in this matter and, when made final, Paragraph I of the Decision and Order, which are incorporated herein by reference and made a part hereof, shall apply:

- A. "Decision and Order" means:
 1. the Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
 2. the Final Decision and Order issued and served by the Commission.
- B. "Hold Separate Trustee" means the person appointed pursuant to Paragraph III of this Hold Separate Order.
- C. "Monitor" means any monitor appointed pursuant to Paragraph VII of this Hold Separate Order.
- D. "Orders" means the Decision and Order and this Order

Order to Maintain Assets

to Hold Separate and Maintain Assets.

- E. "Ritzville Held Separate Business" means the Ritzville Terminal and the on-going supply, storage, and sale of Anhydrous Ammonia at the Ritzville Terminal.

II.

IT IS FURTHER ORDERED that from the Agrium-CF Acquisition Date until the Ritzville Terminal Divestiture Date:

- A. Respondent Agrium shall:
1. take such actions as are necessary to maintain the viability and marketability of the Ritzville Terminal and Carseland Facility and to prevent the destruction, removal, wasting, deterioration, or impairment of the Ritzville Terminal and Carseland Facility, except for ordinary wear and tear;
 2. maintain the operations of the Ritzville Terminal and Carseland Facility in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Ritzville Terminal and Carseland Facility; and
 3. use its best efforts to preserve the existing relationships with suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the Ritzville Terminal and Carseland Facility.
- B. Respondent Agrium's responsibilities shall include, but are not limited to, the following:

Order to Maintain Assets

1. Respondent Agrium shall not sell, transfer, encumber or otherwise impair the economic viability, marketability, or competitiveness of the Ritzville Terminal and Carseland Facility;
2. Respondent Agrium shall retain all of Respondent Agrium's rights, title, and interest in the Ritzville Terminal and Carseland Facility, until the Ritzville Terminal Divestiture Date;
3. Respondent Agrium shall maintain a work force at the equivalent or larger size, and with equivalent or better training and expertise, to what has been associated with the Ritzville Terminal and Carseland Facility as of the date Respondent Agrium signed the Consent Agreement;
4. Respondent Agrium shall not offer employees Related To the Ritzville Terminal and Carseland Facility other positions within Respondent Agrium or terminate employees Related To the Ritzville Terminal and Carseland Facility;
5. Respondent Agrium shall do nothing to prevent or discourage suppliers that, prior to the date on which the Consent Agreement was signed, supplied goods and services to the Ritzville Terminal and Carseland Facility from continuing to supply goods and services to the Ritzville Terminal and Carseland Facility;
6. Respondent Agrium shall provide the Ritzville Terminal and Carseland Facility with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their

Order to Maintain Assets

scheduled pace, all capital projects, business plans and promotional activities for the Ritzville Terminal and Carseland Facility;

7. Respondent Agrium shall ensure that the Ritzville Terminal is supplied with Anhydrous Ammonia on an ongoing basis as necessary and appropriate to ensure that the Ritzville Terminal will build up sufficient Anhydrous Ammonia supply to meet seasonal demand for Anhydrous Ammonia;
8. Respondent Agrium shall continue, at least at their scheduled pace, any additional expenditures for the Ritzville Terminal and Carseland Facility authorized prior to the date the Consent Agreement was signed by Respondent Agrium including, but not limited to, all distribution, marketing and sales expenditures;
9. Respondent Agrium shall provide such resources as may be necessary to respond to competition against the Ritzville Terminal and Carseland Facility and/or to prevent any diminution in sales of the Ritzville Terminal and Carseland Facility after the date on which Respondent Agrium signed the Consent Agreement and prior to the Ritzville Terminal Divestiture Date;
10. Respondent Agrium shall make available for use by the Ritzville Terminal and Carseland Facility funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business;
11. Respondent Agrium shall provide the Ritzville Terminal and Carseland Facility with such funds as are necessary to maintain the economic viability,

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marketability and competitiveness of the Ritzville Terminal and Carseland Facility;

12. Respondent Agrium shall provide such support services to the Ritzville Terminal and Carseland Facility as were being provided to the Ritzville Terminal and Carseland Facility as of the Agrium-CF Acquisition Date.
 13. Respondent Agrium shall provide all the Ritzville Terminal and Carseland Facility employees with reasonable financial incentives to continue in their positions consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Ritzville Terminal and Carseland Facility pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent Agrium until the Ritzville Terminal Divestiture Date has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to prevent any diminution of the Ritzville Terminal's competitiveness and the Carseland Facility's competitiveness.
- C. Respondent Agrium shall not interfere with the hiring or employing of the Ritzville Terminal employees as described in Paragraph VII of the proposed Decision and Order, and shall remove any impediments within the control of Respondent Agrium that may deter these employees from accepting employment with the Ritzville Terminal Acquirer including, but not limited to, any noncompete provisions of employment or other contracts with Respondent Agrium that would affect the ability or incentive of those individuals to be

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employed by the Ritzville Terminal Acquirer. In addition, Respondent Agrium shall not make any counteroffer to a Ritzville Terminal employee who receives a written offer of employment from the Ritzville Terminal Acquirer;

Provided, however, subject to the conditions of continued employment prescribed in this Order to Maintain Assets, this Paragraph II.F. shall not prohibit Respondent Agrium from continuing to employ any Designated Ritzville Employee under the terms of such employee's employment with Respondent Agrium prior to the date of the written offer of employment from the Ritzville Terminal Acquirer to such employee.

- D. The purposes of this Paragraph II are to: (1) preserve the Ritzville Terminal and Carseland Facility as a viable, competitive, and ongoing business independent of Respondent Agrium until the divestiture required by the Decision and Order is achieved; (2) prevent interim harm to competition pending the relevant divestitures and other relief; and (3) help remedy any anticompetitive effects of the proposed Agrium-CF Acquisition as alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED, that:

- A. From the Agrium-CF Acquisition Date until the Ritzville Terminal Divestiture Date, Respondent Agrium shall hold the Ritzville Held Separate Business separate, apart, and independent of Respondent Agrium. To hold the Ritzville Held Separate Business separate, Respondent Agrium shall, among other things:

Order to Maintain Assets

1. Not offer CF employees Related To the Ritzville Held Separate Business positions with Respondent Agrium (other than continuing employment at the Ritzville Terminal).
 2. Do nothing to prevent or discourage suppliers that, prior to the Ritzville Terminal Divestiture Date, supplied goods and services to the Ritzville Terminal from continuing to supply goods and services to the Ritzville Terminal.
- B. At any time after the Terra Ritzville Termination Date, the Commission may appoint a Hold Separate Trustee to assure that the Ritzville Held Separate Business is held separate from Respondent Agrium.
1. The Commission shall select the Hold Separate Trustee, subject to the consent of Respondent Agrium, which consent shall not be unreasonably withheld. If Respondent Agrium has not opposed, in writing, including the reasons for opposing, the selection of a proposed Hold Separate Trustee within five (5) business days after notice by the staff of the Commission to Respondent Agrium of the identity of any proposed Hold Separate Trustee, Respondent Agrium shall be deemed to have consented to the selection of the proposed Hold Separate Trustee.
 2. Not later than five (5) business days after appointment of the Hold Separate Trustee, Respondent Agrium shall execute an agreement that, subject to the prior approval of the Commission, confers on the Hold Separate Trustee all the rights and powers necessary to permit the Hold Separate Trustee to perform his duties and responsibilities, pursuant to this Hold Separate

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Order and consistent with the purposes of this Hold Separate Order.

3. Not later than ten (10) business days after appointment of the Hold Separate Trustee, Respondent Agrium shall, pursuant to the Hold Separate 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.
4. Respondent Agrium shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Hold Separate Trustee:
 - a. 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 Ritzville Held Separate Business; for managing the Ritzville Held Separate Business through the Managers; for maintaining the independence of the Ritzville Held Separate Business; and for monitoring Respondent Agrium's compliance with its obligations pursuant to the Orders.
 - b. Subject to all applicable laws and regulations, the Hold Separate Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the Ritzville 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

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by Respondent Agrium in the ordinary course of business that relate to the Ritzville Held Separate Business. Respondent Agrium shall develop such financial or other information as the Hold Separate Trustee may request and shall cooperate with the Hold Separate Trustee. Respondent Agrium shall take no action to interfere with or impede the Hold Separate Trustee's ability to monitor Respondent Agrium's compliance with the Orders or otherwise to perform his/her duties and responsibilities consistent with the terms of this Hold Separate Order.

- c. The Hold Separate Trustee shall have the authority to employ, at the cost and expense of Respondent Agrium, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Hold Separate Trustee's duties and responsibilities.
- d. The Commission may require the Hold Separate Trustee, and Persons hired by 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.
- e. Respondent Agrium may require the Hold Separate Trustee, and Persons hired by 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.

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- f. Thirty (30) days after the appointment of the Hold Separate Trustee pursuant to this Paragraph III.B., 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 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 Ritzville 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.
- g. 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 Agrium, which consent shall not be unreasonably withheld. If Respondent Agrium has not opposed, in writing, including the reasons for opposing, the selection of the substitute Hold Separate Trustee within five (5) business days after notice by the staff of the Commission to Respondent Agrium of the identity of any substitute Hold Separate Trustee, Respondent Agrium shall be deemed to have consented to the selection of the proposed substitute trustee. Respondent Agrium and the substitute Hold Separate Trustee shall execute a new Hold Separate Trustee Agreement, subject to the approval of the Commission, consistent with this Paragraph

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III.B.

- C. Respondent Agrium shall enter into management agreements with one or more persons, approved by Commission staff, to be Managers of the Ritzville Held Separate Business, (1) at any time after the Agrium-CF Acquisition Date and before the Ritzville Terminal Divestiture Date, at the request of Commission staff, or (2) no later than five (5) business days after the appointment of the Hold Separate Trustee.
1. Respondent Agrium shall, pursuant to the management agreements, transfer all rights, powers, and authorities necessary to manage and maintain the Ritzville Held Separate Business, to the Managers.
 2. The Managers shall report directly and exclusively to the Hold Separate Trustee, if one is appointed, or otherwise to Commission staff, and shall manage the Ritzville Held Separate Business independently of the management of Respondent Agrium. The Managers shall not be involved, in any way, in the operations of the other businesses of Respondent Agrium during the term of this Hold Separate Order.
 3. The Managers shall have no financial interests (other than existing options and interests in securities of Respondent Agrium) affected by Respondent Agrium's revenues, profits or profit margins, except that the compensation of the Managers for managing the Ritzville Held Separate Business may include economic incentives dependent on the financial performance of the Ritzville Held Separate Business if there are also sufficient incentives for the Managers to

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operate the Ritzville 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.

4. The Managers shall make no material changes in the present operation of the Ritzville Held Separate Business except with the approval of the Hold Separate Trustee, in consultation with the Commission staff, or Commission staff.
5. The Managers shall have the authority, with the approval of the Hold Separate Trustee or Commission staff, to remove 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 Managers, in consultation with the Hold Separate Trustee or Commission staff, may request Respondent Agrium to, and Respondent Agrium shall, appoint a substitute person, which person the Managers shall have the right to approve.
6. In addition to those employees within the Ritzville Held Separate Business, the Managers may employ such Persons as are reasonably necessary to assist the Managers in managing the Ritzville Held Separate Business.
7. The Commission staff or the Hold Separate Trustee, in consultation with the Commission staff, shall be permitted, to remove the Manager(s) for cause. Within fifteen (15) days after such removal of the Manager(s), Respondent Agrium shall appoint replacement Manager(s), subject to the approval of the Commission, on the same terms and conditions as provided in Paragraph II.C.2 of this Hold Separate Order.

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8. In the event that the Manager(s) cease(s) to act as Managers, then Respondent Agrium shall select substitute Manager(s), subject to the approval of the Hold Separate Trustee, if appointed, and Commission staff, and transfer to the substitute Manager(s) all rights, powers and authorities necessary to permit the substitute Manager(s) to perform his/her/their duties and responsibilities, pursuant to this Hold Separate Order.
- D. No later than five (5) days after the appointment of the Hold Separate Trustee, Respondent Agrium shall circulate to employees of the Ritzville Held Separate Business a copy of this Hold Separate Order and the Consent Agreement with the Commission's press release and analysis to aid public comment.
 - E. The purposes of this Paragraph III are to: (1) preserve the Ritzville Held Separate Business as a viable, competitive, and ongoing business independent of Respondent Agrium until the divestiture required by the Decision and Order is achieved; (2) assure that no Confidential Business Information is exchanged between Respondent Agrium and the Ritzville 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 other relief; and (4) help remedy any anticompetitive effects of the proposed Agrium-CF Acquisition as alleged in the Commission's Complaint.

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

- A. From the Agrium-CF Acquisition Date until the

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Ritzville Terminal Divestiture Date:

1. Respondent Agrium shall not permit any of its employees, officers, or directors to be involved in the operations of the Ritzville Held Separate Business, unless otherwise authorized by this Hold Separate Order.
2. Respondent Agrium, and Respondent Agrium's or CF's personnel operating the Ritzville Held Separate Business, shall retain and maintain all Confidential Business Information of the Ritzville Held Separate Business on a confidential basis, separate and apart from Respondent Agrium and, except as is requested by Respondent Agrium for purposes of the divestiture of the Ritzville Terminal as required by the Decision and Order, in this matter, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to Respondent Agrium or with Respondent Agrium's personnel.
3. Respondent Agrium shall not, directly or indirectly, receive, disclose, or use any Confidential Business Information Related To the Ritzville Terminal to any Person except the Ritzville Terminal Acquirer or other persons specifically authorized by the Ritzville Terminal Acquirer to receive such information, or than as necessary to comply with the following:
 - a. the requirements of the Orders
 - b. applicable laws and regulations.
4. Respondent Agrium shall not provide, disclose or otherwise make available, directly or indirectly,

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any such Confidential Business Information related to the marketing or sales of the Ritzville Terminal to Respondent Agrium's employees associated with Respondent Agrium's Anhydrous Ammonia sales in the PNW.

5. Respondent Agrium shall institute procedures and requirements to ensure that:
 - a. Confidential Business Information Related to the Ritzville Terminal is not provided to, or obtained by, Respondent Agrium's employees associated with Respondent Agrium's Anhydrous Ammonia sales in the PNW;
 - b. Respondent Agrium employees with access to Confidential Business Information Relating To the Ritzville Terminal do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Hold Separate Order; and
 - c. Respondent Agrium's employees associated with Respondent Agrium's Anhydrous Ammonia sales in the PNW do not solicit, access or use any Confidential Business Information that they are prohibited under this Hold Separate Order from receiving for any reason or purpose.
- B. From the Terra Ritzville Termination Date until the Ritzville Terminal Divestiture Date, Respondent Agrium shall require any Persons with access to Confidential Business Information Relating To the Ritzville Terminal to enter into agreements, within ten (10) days after the date the Terra Divestiture

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Termination Date, not to disclose any Confidential Business Information Relating To the Ritzville Terminal to Respondent Agrium or to any third party except as otherwise permitted by this Hold Separate Order. Copies of such agreements shall be retained by Respondent Agrium, and provided to the Commission and the Hold Separate Trustee, if appointed.

- C. The purposes of this Paragraph IV are to: (1) preserve the Ritzville Held Separate Business as a viable, competitive, and ongoing business independent of Respondent Agrium until the divestiture required by the Decision and Order is achieved; (2) assure that no Confidential Business Information is exchanged between Respondent Agrium and the Ritzville 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 other relief; and (4) help remedy any anticompetitive effects of the proposed Agrium-CF Acquisition as alleged in the Commission's Complaint.

V.

IT IS FURTHER ORDERED that from the date Respondent Agrium signs the Consent Agreement until the Marseilles Terminal Divestiture Date:

- A. Respondent Agrium shall:
1. take such actions as are necessary to maintain the viability and marketability of the Marseilles Terminal and to prevent the destruction, removal, wasting, deterioration, or impairment of the Marseilles Terminal, except for ordinary wear and tear;
 2. maintain the operations of the Marseilles Terminal

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in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Marseilles Terminal; and

3. use its best efforts to preserve the existing relationships with suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the Marseilles Terminal.
- B. Respondent Agrium's responsibilities shall include, but are not limited to, the following:
1. Respondent Agrium shall not sell, transfer, encumber or otherwise impair the economic viability, marketability, or competitiveness of the Marseilles Terminal;
 2. Respondent Agrium shall retain all of Respondent Agrium's rights, title, and interest in the Marseilles Terminal, until the Marseilles Terminal Divestiture Date;
 3. Respondent Agrium shall maintain a work force at the equivalent or larger size, and with equivalent or better training and expertise, to what has been associated with the Marseilles Terminal as of the date Respondent Agrium signed the Consent Agreement;
 4. Respondent Agrium shall not offer employees Related To the Marseilles Terminal other positions within Respondent Agrium or terminate employees Related To the Marseilles Terminal;

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5. Respondent Agrium shall do nothing to prevent or discourage suppliers that, prior to the date on which the Consent Agreement was signed, supplied goods and services to the Marseilles Terminal from continuing to supply goods and services to the Marseilles Terminal;
6. Respondent Agrium shall provide the Marseilles Terminal with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Marseilles Terminal;
7. Respondent Agrium shall ensure that the Marseilles Terminal is supplied with Anhydrous Ammonia on an ongoing basis as necessary and appropriate to ensure that the Marseilles Terminal will build up sufficient Anhydrous Ammonia supply to meet seasonal demand for Anhydrous Ammonia;
8. Respondent Agrium shall continue, at least at their scheduled pace, any additional expenditures for the Marseilles Terminal authorized prior to the date the Consent Agreement was signed by Respondent Agrium including, but not limited to, all distribution, marketing and sales expenditures;
9. Respondent Agrium shall provide such resources as may be necessary to respond to competition against the Marseilles Terminal and/or to prevent any diminution in sales of the Marseilles Terminal after the date on which Respondent Agrium signed the Consent Agreement and prior to the Marseilles Terminal Divestiture Date;

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10. Respondent Agrium shall make available for use by the Marseilles Terminal funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business;
 11. Respondent Agrium shall provide the Marseilles Terminal with such funds as are necessary to maintain the economic viability, marketability and competitiveness of the Marseilles Terminal;
 12. Respondent Agrium shall provide such support services to the Marseilles Terminal as were being provided to the Marseilles Terminal as of the date the Consent Agreement was signed by Respondent Agrium.
 13. Respondent Agrium shall provide all the Marseilles Terminal employees with reasonable financial incentives to continue in their positions consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Marseilles Terminal pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent Agrium until the Marseilles Terminal Divestiture Date has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to prevent any diminution of the Marseilles Terminal's competitiveness.
- C. Respondent Agrium shall not interfere with the hiring or employing of the Marseilles Terminal employees as

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described in Paragraph VII of the proposed Decision and Order, and shall remove any impediments within the control of Respondent Agrium that may deter these employees from accepting employment with the Marseilles Terminal Acquirer including, but not limited to, any noncompete provisions of employment or other contracts with Respondent Agrium that would affect the ability or incentive of those individuals to be employed by the Marseilles Terminal Acquirer. In addition, Respondent Agrium shall not make any counteroffer to a Marseilles Terminal employee who receives a written offer of employment from the Marseilles Terminal Acquirer.

Provided, however, subject to the conditions of continued employment prescribed in this Hold Separate Order, this Paragraph V.C. shall not prohibit Respondent Agrium from continuing to employ any Marseilles Terminal employee under the terms of such employee's employment with Respondent Agrium prior to the date of the written offer of employment from the Marseilles Terminal Acquirer to such employee.

- D. The purposes of this Paragraph V are to: (1) preserve the Marseilles Terminal as a viable, competitive, and ongoing business until the divestiture required by the Decision and Order is achieved; (2) prevent interim harm to competition pending the relevant divestitures and other relief; and (4) help remedy any anticompetitive effects of the proposed Agrium-CF Acquisition as alleged in the Commission's Complaint.

VI.

IT IS FURTHER ORDERED that from the Agrium-CF Acquisition Date until the Marseilles Terminal Divestiture Date:

Order to Maintain Assets

- A. Respondent Agrium, and Respondent Agrium's employees operating the Marseilles Terminal, shall retain and maintain all Confidential Business Information of the Marseilles Terminal on a confidential basis, separate and apart from Respondent Agrium's other businesses. Except as is requested by Respondent Agrium for purposes of the divestiture of the Marseilles Terminal as required by the Decision and Order, in this matter, such persons shall be prohibited from providing, discussing, exchanging, circulating, or otherwise furnishing any such information to Respondent Agrium's other businesses or with Respondent Agrium's personnel at Respondent Agrium's other businesses (except to the extent such communications are for human resources, legal, or accounting purposes in the ordinary course of business for the Marseilles Terminal's employees).
- B. Respondent Agrium shall not, directly or indirectly disclose any Confidential Business Information Related To the Marseilles Terminal except to the Marseilles Terminal Acquirer or other persons specifically authorized by the Marseilles Terminal Acquirer to receive such information, or than as necessary to comply with the following:
1. the requirements of the Orders
 2. applicable laws and regulations.
- C. Respondent Agrium shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information Related To the marketing or sales of the Marseilles Terminal to Respondent Agrium's employees not otherwise associated with Respondent Agrium's Anhydrous Ammonia sales in the Illinois-Iowa Area (which shall

Order to Maintain Assets

also include the CF Anhydrous Ammonia terminals in the Illinois-Iowa Area after the Agrium-CF Acquisition).

- D. Respondent Agrium shall institute procedures and requirements to ensure that:
1. Confidential Business Information Related to the Marseilles Terminal is not provided to, or obtained by, Respondent Agrium's employees not otherwise associated with Respondent Agrium's Anhydrous Ammonia sales in the Illinois-Iowa Area;
 2. Respondent Agrium employees with access to Confidential Business Information Relating To the Marseilles Terminal do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Hold Separate Order; and
 3. Respondent Agrium's employees associated with Respondent Agrium's Anhydrous Ammonia sales in the Illinois-Iowa Area (including the CF Anhydrous Ammonia terminals after the Agrium-CF Acquisition) do not solicit, access or use any Confidential Business Information that they are prohibited under this Hold Separate Order from receiving for any reason or purpose.
- E. From the Terra Marseilles Termination Date until the Marseilles Terminal Divestiture Date, Respondent Agrium shall require any Persons with access to Confidential Business Information Relating To the Marseilles Terminal to enter into agreements, within ten (10) days after the date the Terra Marseilles Termination Date, not to disclose any Confidential Business Information Relating To the Marseilles Terminal to Respondent Agrium or to any third party

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except as otherwise permitted by this Hold Separate Order. Copies of such agreements shall be retained by Respondent Agrium, and provided to the Commission and the Monitor, if appointed.

- F. The purposes of this Paragraph VI are to: (1) preserve the Marseilles Terminal as a viable, competitive, and ongoing business until the divestiture required by the Decision and Order is achieved; (2) assure that no Confidential Business Information Relating To the Marseilles Terminal is used or disclosed by Respondent Agrium except in accordance with the provisions of this Hold Separate Order; (3) prevent interim harm to competition pending the relevant divestitures and other relief; and (4) help remedy any anticompetitive effects of the proposed Agrium-CF Acquisition as alleged in the Commission's Complaint.

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

- A. At any time after the Terra Marseilles Termination Date or the Terra Ritzville Termination Date, the Commission may appoint a Monitor to assure that Respondent Agrium expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders.
- B. The Commission shall select the Monitor, subject to the consent of Respondent Agrium, which consent shall not be unreasonably withheld. If Respondent Agrium has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within five (5) business days after notice by the staff of the Commission to Respondent Agrium of the identity of any proposed Monitor, Respondent

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Agrium shall be deemed to have consented to the selection of the proposed Monitor.

- C. Not later than five (5) business days after appointment of the Monitor, Respondent Agrium shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to perform his duties and responsibilities, pursuant to the Orders and consistent with the purposes of the Orders.
- D. Not later than ten (10) business days after appointment of the Monitor, Respondent Agrium shall, pursuant to the Monitor Agreement, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to this Hold Separate Order and consistent with the purposes of the Orders.
- E. Respondent Agrium shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
 - 1. The Monitor shall have the power and authority to monitor Respondent Agrium's compliance with the terms of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission including, but not limited to:
 - a. Assuring that Respondent Agrium expeditiously complies with all of its obligations and performs all of its responsibilities as required by the Orders; and
 - b. Monitoring any agreements between

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Respondent Agrium and either the Ritzville Terminal Acquirer or the Marseilles Terminal Acquirer.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Agrium's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Respondent Agrium's compliance with its obligations under the Orders. Respondent Agrium shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Agrium's compliance with the Orders.
4. The Monitor shall serve, without bond or other security, at the expense of Respondent Agrium on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Agrium, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
5. Respondent Agrium shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out

Order to Maintain Assets

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

6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent Agrium of its obligations under the Orders.
 7. Respondent Agrium may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- F. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- G. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:

Order to Maintain Assets

1. The Commission shall select the substitute Monitor, subject to the consent of Respondent Agrium, which consent shall not be unreasonably withheld. If Respondent Agrium has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Agrium of the identity of any proposed Monitor, Respondent Agrium shall be deemed to have consented to the selection of the proposed Monitor.
 2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent Agrium shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent Agrium's compliance with the relevant terms of the Orders in a manner consistent with the purposes of the Orders.
- H. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- I. A Monitor appointed pursuant to this Hold Separate Order may be the same person appointed as the Monitor pursuant to the Decision and Order, and as the Divestiture Trustee pursuant to the relevant provisions of this Hold Separate Order and the Decision and Order.

VIII.

Order to Maintain Assets

IT IS FURTHER ORDERED that within thirty (30) days after the date this Hold Separate Order becomes final, and every sixty (60) days thereafter until Respondent Agrium has fully complied with its obligations under Paragraphs II.A. or II.B., and Paragraphs III.A. or III.B. of the related Decision and Order in this matter, Respondent Agrium 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 Hold Separate Order and the related Decision and Order; *provided, however,* that, after the Decision and Order in this matter becomes final, the reports due under this Hold Separate Order shall be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent Agrium pursuant to Paragraph IX of the Decision and Order.

IX.

IT IS FURTHER ORDERED that Respondent Agrium shall notify the Commission at least thirty (30) days prior to any proposed:

- A. dissolution of the Respondent Agrium;
- B. acquisition, merger or consolidation of Respondent Agrium; or
- C. other change in the Respondent Agrium, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order to Maintain Assets.

X.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon

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written request and upon five (5) days notice to Respondent Agrium, Respondent Agrium shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of Respondent Agrium 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 Agrium related to compliance with this Order to Maintain Assets, which copying services shall be provided by Respondent Agrium at its expense; and
- B. to interview officers, directors, or employees of Respondent Agrium, who may have counsel present, regarding such matters.

XI.

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

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The latter of:
 - 1. the day after the Ritzville Terminal Divestiture Date; or
 - 2. the day after the Marseilles Terminal Divestiture Date; or

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3. the day after the Commission otherwise directs that this Hold Separate Order is terminated.

By the Commission.

ANALYSIS OF THE AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission (“Commission” or “FTC”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Agrium Inc. (“Agrium”), that will completely remedy the anticompetitive effects that would likely result from Agrium’s proposed acquisition of CF Industries Holdings, Inc. (“CF”). Under the terms of the Consent Agreement, Agrium is required to, among other things, divest anhydrous ammonia (“AA”) terminals in Ritzville, Washington, and Marseilles, Illinois to Terra Industries Inc. (“Terra”) or another Commission-approved purchaser. Agrium is also required to divest its rights to market and distribute the AA produced by Rentech at Rentech’s East Dubuque, Illinois manufacturing plant back to Rentech.

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

Analysis to Aid Public Comment

II. Description of the Parties and the Proposed Acquisition

Agrium, a Calgary, Alberta-based company, is a major supplier of agricultural products and services in North and South America. It is also a leading global producer, distributor, and marketer of three primary groups of fertilizers: nitrogen, phosphate, and potash, as well as control release fertilizers and micronutrients. Agrium's operations in North America include four nitrogen fertilizer manufacturing plants and ten fertilizer storage and distribution terminals. Agrium's total net sales in 2008 were approximately \$10 billion.

CF Industries Holdings, Inc. is headquartered in Deerfield, Illinois, and is the holding company for CF Industries, Inc., a major producer and distributor of nitrogen and phosphate fertilizers. CF owns two nitrogen fertilizer manufacturing plants and twenty-two fertilizer storage and distribution terminals in North America. Its customers include cooperatives and independent fertilizer retailers primarily located in the eastern and western cornbelt states. CF's total net sales in 2008 were approximately \$3.9 billion.

On February 25, 2009, Agrium publicly announced that it had submitted a proposal to CF's board of directors to acquire CF for a total consideration of approximately \$3.6 billion. Since then, Agrium has repeatedly extended its tender offer and CF's Board of Directors has consistently rejected these offers. Most recently, Agrium increased its offer to approximately \$4.95 billion. This offer will expire on January 22, 2010. If CF accepts Agrium's tender offer, Agrium will hold 100 percent of the voting securities of CF, and CF will become a wholly owned subsidiary of Agrium.

III. The Proposed Complaint

The proposed complaint alleges that Agrium's acquisition of CF, if consummated, may substantially lessen competition or tend to create a monopoly in the distribution and sale of AA in the

Analysis to Aid Public Comment

Pacific Northwest (“PNW”) and two geographic areas in Northern Illinois 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. Specifically, the acquisition would eliminate actual, direct, and substantial competition between Agrium and CF in the relevant markets; increase Agrium’s ability to exercise market power unilaterally in the relevant markets; and substantially increase the level of concentration in the relevant markets and enhance the probability of coordination in the two markets in Northern Illinois.

AA is one of the three major forms of nitrogen fertilizer with the other two being urea and urea ammonia nitrate (“UAN”). Of the three nitrogen-based fertilizers, AA has the highest nitrogen content at 82 percent, while urea and UAN have 46 percent and 28 to 32 percent nitrogen content, respectively. AA also tends to be the least expensive nitrogen fertilizer on a per pound of nitrogen basis. Thus, AA can often be the most cost effective means to deliver nitrogen to the soil.

When deciding which type of nitrogen fertilizer to use, customers consider soil and topographical characteristics, equipment, and weather. AA is the most cost effective and efficient to use in dry areas where the topsoil is relatively thin. In moist conditions, there is a danger that AA will leach into the water table, thus becoming less effective, and that the heavy machinery required to apply AA would damage the field.

AA is applied as a fertilizer directly by injecting or “knifing” it into the soil. This process requires specialized equipment to transport, store, and apply the fertilizer. Customers who use AA have already made significant investments to acquire the necessary infrastructure and application equipment. Switching away from AA thus would require customers to: (a) abandon the investments they have already made to use AA; and (b) make additional investments to obtain the necessary infrastructure and application equipment to apply other nitrogen products. These investments are costly and switching from AA to one of the other

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nitrogen-based fertilizers would be time-consuming. Thus, existing customers are not likely to shift away from using AA.

The proposed complaint alleges that the three geographic areas in which to analyze the competitive effects of the transaction are the PNW and two adjacent areas in Northern Illinois. AA is transported from its site of production or from import terminals by barge, pipeline, rail, and truck to fertilizer storage terminals or, in limited situations, directly to fertilizer retailers. From there, AA is delivered by truck to local fertilizer retailers, where it is stored in smaller scale storage tanks. The fertilizer retailers pump liquid AA from their storage tanks into smaller mobile nurse tanks. These nurse tanks are then towed to a farmer's field and hitched behind a tractor for application. Because fertilizer application seasons are highly compressed, fertilizer retailers expect a timely and reliable source of AA supply to meet customer demand during the peak of application season. As transportation costs can make it difficult for terminal owners to be price competitive and profitable, AA distributors must have adequate terminals or storage facilities within 100 to 140 miles of customer locations.

In the PNW, Agrium and CF are the only major suppliers of AA. Thus, the proposed acquisition would reduce the number of significant AA suppliers in the PNW from 2 to 1. In the two areas in Northern Illinois, Agrium and CF are two of only three significant suppliers of AA. As a result, the proposed acquisition would reduce the number of major AA suppliers in those areas from three to two.

As stated in the proposed complaint, entry would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of this acquisition. A new entrant would need: (1) sufficient AA storage capacity to supply customers; (2) a proper distribution infrastructure; and (3) a secure source of AA for the storage facility. For a new entrant to satisfy each of these steps requires significant sunk costs, onerous regulatory approvals

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and local permitting, and technical expertise. This does not take into account the cost and time it takes to achieve a significant market impact. Thus, it is unlikely that new entry or fringe expansion from another supplier would be timely, likely, or sufficient enough to thwart anticompetitive harm from the proposed acquisition.

IV. The Terms of the Agreement Containing Consent Orders

The Consent Agreement will remedy the Commission's competitive concerns about the proposed acquisition and preserve competition in each of the relevant markets. Under the terms of the Consent Agreement, Agrium would be required to divest: (1) the CF Ritzville, Washington AA terminal; (2) its Marseilles, Illinois AA terminal; and (3) its rights to market the AA produced by Rentech at Rentech's East Dubuque, Illinois, manufacturing plant. Agrium plans to divest the Ritzville and Marseilles terminals to Terra, but the proposed Decision and Order provides for a divestiture to another purchaser with a source of AA if Terra is unable to accomplish the divestitures. The Order also provides that Rentech will receive the rights to distribute and market the AA produced in its own manufacturing facility in East Dubuque. Pursuant to a settlement agreement between Agrium and the Canadian Competition Bureau, Terra will acquire a 50 percent interest in Agrium's nitrogen fertilizer production plant in Carseland, Alberta. The Carseland divestiture will give Terra an unencumbered supply of AA for the Ritzville, Washington terminal.

The Order to Hold Separate and Maintain Assets requires Agrium to maintain the assets to be divested and operate the Ritzville Terminal independently until the respective divestitures are completed.

A. Key Provisions of the Decision and Order

The proposed Decision and Order will allow for effective divestiture of the key assets that today allow CF to provide an

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independent competitive presence to Agrium in the relevant markets, and therefore will preserve the market structure. Paragraph II of the Decision and Order provides that Agrium divest the Ritzville Terminal and Carseland Facility Interest to Terra within forty-five days of Agrium's acquisition. This paragraph further states that in the event that the Ritzville Terminal divestiture cannot be made to Terra, Agrium will have one-hundred-twenty days from the date the Decision and Order becomes final to divest these assets to a Commission-approved acquirer that has a secure and stable, independent, long-term source of AA.

Paragraph III of the Decision and Order provides that Agrium divest the Marseilles Terminal to Terra within forty-five days of Agrium's acquisition of CF. If this does not occur, the Order requires that Agrium divest the Marseilles Terminal to a Commission-approved acquirer within one-hundred-twenty days from the date the Decision and Order becomes final. Paragraph IV requires Agrium to terminate its rights to distribute AA produced by Rentech pursuant to the Agrium/Rentech Distribution Agreement no later than five days after Agrium acquires CF.

The Decision and Order defines the scope of the assets to include the attributes of an ongoing business, such as necessary real property, tangible personal property, inventories, contracts, records of the business, accounts receivable permits, and all applicable regulatory registrations, permits, and applications. Pursuant to Paragraphs II.G and III.G of the proposed Decision and Order, Agrium also is required to provide necessary transition services to Terra or another Commission-approved acquirer. The purpose of this provision is to allow for a smooth transition of the terminal operations to the acquirer.

Paragraph V of the proposed Decision and Order requires that the Parties keep private, except where necessary under the agreement, confidential business information related to the

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divested terminals. Paragraph VI of the proposed Decision and Order provides for appointment of a divestiture trustee. Paragraph VII of the Decision and Order provides mechanisms for the retention of Ritzville Terminal and Marseilles Terminal employees by the Commission-approved acquirer.

Paragraph VIII of the proposed Decision and Order requires that the Parties provide the Commission with “advance written notification” of any intent to acquire assets or interests in terminals that store AA in any area affected by the proposed divestitures. Paragraphs IX-X define reporting obligations. Paragraph XI requires Agrium to provide the Commission access to company information and employees for purposes of determining or securing compliance with the Decision and Order. Paragraph XII states that the Decision and Order shall terminate ten years after the date on which the Order becomes final.

B. Key Provisions of the Order to Hold Separate and Maintain Assets

The Order to Hold Separate and Maintain Assets (“Hold Separate Order”) requires that Agrium maintain the Marseilles Terminal, Ritzville Terminal, and Carseland Facility assets until such time as the assets are divested. The Hold Separate Order requires that Agrium establish a system to maintain confidential information until the divestitures are completed. It also gives the Commission the option to appoint a Monitor to ensure that Agrium complies with all of its obligations and performs all of its responsibilities as required by the Decision and Order and the Hold Separate Order. The Hold Separate Order incorporates the traditional provisions that allow the Monitor broad oversight of the assets, and requires the Monitor to report to the Commission on a regular basis. The Hold Separate Order also requires Agrium to maintain the Ritzville Terminal assets as an independent business pending divestiture. After the acquisition, the Commission can require Agrium to appoint a Manager to run the terminal on an independent basis pending the divestiture of the assets. Finally, the Hold Separate Order allows the Commission

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to appoint a Hold Separate Trustee to operate the assets if the assets are not divested by the deadline set by the Commission.

The purpose of this analysis is to invite public comment on the proposed Consent Agreement, in order to aid the Commission in its determination of whether to make the proposed Consent Agreement final. This analysis is not intended to constitute an official interpretation of the proposed Consent Agreement nor is it intended to modify the terms of the proposed Consent Agreement in any way.

Complaint

IN THE MATTER OF

POLYPORE INTERNATIONAL, INC

COMPLAINT AND INITIAL DECISION IN REGARD TO ALLEGED
VIOLATIONS OF SEC. 5(A) OF THE FEDERAL TRADE COMMISSION
ACT AND SEC. 7 OF THE CLAYTON ACT

Docket No. 9327; File No. 081 0131
Filed, September 9, 2008 — Decision, March 1, 2010

This order addresses the acquisition by Polypore of Microporous Holding Corporation. The acquisition reduced competition for battery separators in several markets. The decision remedies the anticompetitive effects by requiring the complete divestiture of Microporous.

Participants

For the *Commission*: *Stephen Antonio, Joel Christie, Steven Dahm, Benjamin Gris, J. Robert Robertson, Priya Viswanath, and Christian Woolley.*

For the *Respondents*: *Melanie Dubis, Deborah L. Edney, Sarah Fulton Hutchins, John F. Graybeal, Katie C. Miller, William L. Rikard, Jr., Adam Shearer, Eric D. Welsh, and Brian R. Weyhrich, Parker Poe Adams & Bernstein, LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (the "Commission"), having reason to believe that respondent Polypore International, Inc. ("Daramic"), a Delaware corporation subject to the jurisdiction of the Commission having its principal place of business in North Carolina, entered into an agreement, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, pursuant to which Daramic purchased 100 percent of the stock of Microporous Holding Corporation, the parent

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company of Microporous Products L.P. (“Microporous”), headquartered in Piney Flats, Tennessee, from Industrial Growth Partners II L.P. (“IGP”) and other stockholders in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and through conduct and agreements Daramic monopolized the North American markets for deep-cycle, motive, and UPS battery separators and otherwise restrained trade significantly in the North American automotive separator market, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Daramic manufactures a broad range of high-performance battery separator membranes. Daramic today develops, markets, and supplies more than 50 percent of the world's demand for high performance polyethylene (“PE”) battery separators to the flooded lead-acid battery industry. Daramic operates 6 manufacturing facilities with a combined annual capacity of approximately 600 million square meters of battery separator products. In the United States, Daramic has manufacturing plants in Owensboro, Kentucky, and Corydon, Indiana. Daramic also has facilities in Selestat, France; Norderstedt, Germany; Potenza, Italy; a controlling interest in a joint venture with Nippon Sheet Glass located in Tianjin, China, and a newly expanded operation in Prachinburi, Thailand. With the acquisition of Microporous, Daramic also adds production lines in Piney Flats, Tennessee and Feistritz, Austria.

2. The former Microporous was headquartered in Piney Flats, Tennessee, with manufacturing facilities in both Tennessee and Austria. Microporous had 170 employees, and had \$37 million in sales in 2007. Before it was acquired by Daramic, Microporous was owned by IGP, a private equity firm. Microporous' latest products included rubber separators, PE-

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rubber separators, and PE separators. These products are still produced in a 30,000 square-foot plant in Piney Flats, TN. Microporous had completed an expansion with a new greenfield plant in Austria, consisting of two lines, one producing a PE-rubber separator and one a PE separator (though both lines can produce either product). These lines are now in full commercial production under Daramic's control.

II. JURISDICTION

3. Daramic is, and at all times relevant herein, has been, engaged in "commerce" as defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose businesses are in or affect "commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE TRANSACTION

4. On February 29, 2008, Daramic acquired, pursuant to agreement with Microporous, IGP, and other stockholders 100 percent of the stock of Microporous Holding Corporation, the parent company of Microporous Products L.P. (Microporous), from Industrial Growth Partners II L.P. and other stockholders for approximately \$76 million.

IV. RELEVANT PRODUCT MARKETS

5. The relevant product areas in which to analyze the transaction are separators for flooded lead-acid batteries in the following markets:

- a. deep-cycle;
- b. motive;
- c. automotive;
- d. uninterruptible power supply stationary ("UPS").

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6. Alternatively, another market in which the transaction violates the antitrust laws is an all PE separator market.

7. Battery separators are porous electronic insulators placed between positively and negatively charged lead plates in flooded lead-acid batteries to prevent electrical short circuits while allowing ionic current to flow through the separator.

8. Deep-cycle separators are made of either rubber or a blend of rubber and PE and are a necessary component that enables deep-cycle batteries to be frequently exhausted then recharged again. Deep-cycle separators are primarily used in golf cart and floor scrubber batteries.

9. Motive separators are made of PE, a blend of rubber and PE, or sometimes PVC, and are used primarily in forklift batteries.

10. Automotive separators are made of PE and are used in cars for starter, lighter, and ignition ("SLI") power. While Microporous has made and can make PE for this application, its CellForce, a blend of rubber and PE, is a potential substitute.

11. UPS separators are made of PE, and a blend of rubber and PE. These separators are used in batteries for the uninterruptible power supply market that supply short term power to critical data centers and buildings in the event of a power outage.

12. PE separators are made of either pure PE or a blend of PE and rubber. Manufacturers of PE separators for UPS, motive, or deep-cycle applications can easily and quickly switch production to automotive separators. Conversely, there are significant barriers to switching PE production to UPS, motive, or deep-cycle applications.

13. Battery separators manufactured for a particular

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application cannot be effectively used for other applications.

V. RELEVANT GEOGRAPHIC MARKET

14. The relevant geographic market in which to analyze the effects of this transaction is North America.

15. There are only two other manufacturers of motive and UPS separators in the world of any significance. Amer-Sil makes PVC separators in Europe and has negligible sales in North America. Nippon Sheet Glass makes PE motive separators in Japan, has no sales in North America, and has refused to sell any PE separators to North American customers.

16. Producers of battery separators for motive, UPS, and automotive applications outside of North America are at a cost disadvantage in the supply of these separators to North American customers. Producers outside of North America cannot economically compete with Daramic in North America.

17. North American battery makers have a strong preference for their nearest source of supply and do not import separators from abroad. Long supply chain logistics increase the chances that a battery factory could be shut down if separators are not on hand when needed. Consequently, even if there were an otherwise viable alternative source of supply, North American battery manufacturers would strongly prefer domestic sources for separators. Moreover, PE separator manufacturers from abroad, such as Asia, will not find it practical to compete in North America at either pre-merger or post-merger prices.

VI. COMPETITION & CONCENTRATION

18. Each of the relevant product markets is highly concentrated in North America.

19. Since the acquisition of Microporous by Daramic, there are just two battery separator companies that supply North

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America. Entek International LLC, the sole remaining competitor, operates only in the automotive market.

20. Daramic and Microporous were competitors in each relevant market. Microporous, therefore, was uniquely situated to compete with Daramic for North American customers by virtue of its location and breadth of product offerings.

21. Daramic and Microporous were direct competitors in the deep-cycle market. There are no other deep-cycle battery separator competitors in the world. Prior to the transaction, Microporous had an approximately 89 percent of the deep-cycle market, while Daramic had approximately 11 percent. Post-acquisition, Daramic has a monopoly in this market.

22. Daramic and Microporous were direct competitors in the motive market. Microporous sold PE-rubber separators, while Daramic sold PE separators. Microporous and Daramic were the only competitors in motive separators in North America. Microporous had won approximately 46 percent of the motive separator contracts for 2009 in the North American market when it was acquired.

23. Daramic and Entek are direct competitors and the only companies currently selling SLI battery separators in North America. In 2005, Microporous had produced PE separators for the automotive market. Although Microporous was not producing automotive separators at the time of the acquisition, it was preparing to compete actively in this market and was already marketing and testing its products with customers.

24. Daramic and Microporous sold separators in different segments of the UPS market. Microporous sold a rubber product to this market, while Daramic sells PE and phenolic resin separators. Microporous and Daramic were the only separator manufacturers selling into the North American UPS market. Microporous had developed a new product to compete directly

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with Daramic's PE and phenolic resin products and was testing its new product with customers at the time of the acquisition.

25. Daramic, Entek, and Microporous were the only manufacturers of PE separators in North America. While Microporous' share of this market was small, its expansion in Europe had freed up additional U.S. capacity, which had previously been exported to Europe. Microporous also had plans to expand its North American PE capacity in 2008 and 2009.

26. In the end, Daramic's fundamental purpose in acquiring Microporous was to restrain competition unreasonably. The acquisition also allows Daramic to exert market power.

VII. ACTUAL AND POTENTIAL COMPETITION

27. Microporous was entering the market for automotive separators prior to its acquisition by Daramic. Specifically, Microporous had signed a memorandum of understanding with an automotive battery manufacturer for the supply of its PE automotive separators to begin in January 2010. Microporous had already acquired the technology to make these separators, and its entry in the North American automotive separator market would have occurred but for the acquisition of Microporous by Daramic. In fact in 2005, Microporous had successfully manufactured and sold PE automotive separators in North America.

28. Alternatively, customers, competitors, and other industry participants in automotive separators perceived Microporous to be a uniquely positioned potential entrant that had a tempering, procompetitive effect in the automotive separator market.

29. The acquisition harms the market for automotive separators in North America by eliminating Microporous as a future source of separators for automotive lead-acid batteries.

30. Microporous had also developed a new separator that would directly compete with Daramic's separators for the UPS

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market in which Daramic was the predominant supplier. A major customer has been testing this new product and had contracted with Microporous for the supply of this product. Microporous had secured significant market share as a result of this contract.

31. The acquisition harms the market for UPS battery separators by eliminating this competition.

VIII. ENTRY

32. Entry into each relevant product markets would not be timely, likely, or sufficient in its magnitude, scope, or character to deter or counteract the anticompetitive effects arising from this acquisition.

33. Testing and qualification present a significant barrier to entry. The testing required by U.S. battery manufacturers is comprehensive and lengthy. Because the individual battery makers often have their own design and testing requirements, there are no one-size-fits-all separators that can be used from one customer to the next without appropriate testing. This means that even an incumbent in the battery separator market would have to submit its product to testing, lasting from a few months to more than two years, before it could be qualified by an additional battery manufacturer.

34. Reputation presents a significant barrier to entry. The original equipment manufacturers that buy batteries from the customers of Daramic and Microporous demand warranties from the battery makers. Battery manufacturers are reluctant to seek supply from an unknown separator manufacturer because the quality of the battery is largely dependent on the quality of the separators. A new entrant into the market for flooded lead-acid battery separators would have to overcome the obstacle of convincing battery makers that its product is reliable and will be available when and where promised.

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35. A new entrant into any of the relevant markets would lack Microporous' reputation for sound quality and timely delivery. Although gaining such a reputation is possible over time, it could not reasonably be obtained within two years.

36. In addition, new entry into the relevant markets is not likely due to the capital requirements and intellectual property required to do so.

37. Even the most likely future entrant would not successfully, or in a timely manner, enter any of the relevant markets within two years. Nor would any potential entrant replace the loss of Microporous' willingness, ability, and incentive to enter the automotive or UPS flooded lead-acid battery separator markets.

IX. ANTICOMPETITIVE EFFECTS

38. The acquisition and Daramic's conduct substantially lessened competition in the following ways:

- a. it has eliminated actual, actual potential, and perceived potential competition between Daramic and Microporous as well as other potential competition such as Hollingsworth & Vose ("H&V");
- b. it removes Microporous, the only alternative source of separator supply in the deep-cycle, motive, and UPS markets;
- c. it creates a monopoly in deep-cycle and motive markets and increases the level of concentration in the automotive market;
- d. it has led and will lead to increased prices for the relevant products;
- e. it increases Daramic's market power in the deep-cycle, motive, and automotive markets;

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- f. it allows Daramic to unilaterally exercise its market power in the relevant markets;
- g. it removes a rapidly expanding actual, actual potential, or perceived potential competitor in the automotive market; and
- h. it makes coordination more likely in the automotive market.

X. MONOPOLIZATION

39. Prior to the acquisition identified in Paragraph 1 above, Daramic attempted through anticompetitive means to maintain monopoly power against a challenge from Microporous in the markets for (1) deep-cycle battery separators; (2) motive battery separators; (3) automotive battery separators; and (4) UPS battery separators; or alternatively all PE separators.

40. During 2006-2007, while negotiating contractual terms with certain large customers, Daramic imposed conditions on the availability of its products that tended to exclude rivals and harm the competitive process. Daramic threatened to withhold volumes of separators requested by certain customers to pressure them to enter exclusive supply agreements with Daramic, and thereby foreclose Microporous from expanding its business with those customers.

41. In addition, Daramic has entered into an illegal agreement to prevent entry from another potential competitor, H&V, and attempted to do the same with Microporous.

42. In automotive, motive, UPS and all PE markets Daramic has historically maintained monopoly power.

43. In supplying these relevant markets, Daramic's remaining rival, Entek, is capacity constrained. Furthermore, high entry

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barriers make it unlikely that any new entrant could constrain the exercise of Daramic's monopoly power in any of the relevant products.

44. The conduct described above carried the dangerous probability that, if successful, it would give Daramic the ability to lessen or destroy competition in the North American market for PE separators. Daramic's coercive bargaining tactics posed a threat to the viability of Microporous and a significant threat to competition generally in the relevant markets.

45. Daramic has the market/monopoly power to exclude competition and/or increase prices and reduce innovation and has illegally and wrongfully maintained its market power.

46. Daramic engaged in the conduct described above to preclude or deter Microporous from expanding or otherwise achieving sufficient scale, and thereby destroy competition and increase its market dominance.

XI. UNFAIR METHOD OF COMPETITION

47. Daramic entered into a joint marketing agreement in 2001 with Hollingsworth & Vose, a firm that manufactures absorbed-glass-mat battery separators, in order to prevent them from entering the PE separator market. This agreement is, at a minimum, an overbroad agreement in restraint of trade, and may be an illegal market allocation agreement that is not justified by any legitimate business purpose.

XII. VIOLATIONS**COUNT I – ILLEGAL ACQUISITION**

48. The allegations contained in Paragraphs 1-47 are repeated and realleged as though fully set forth here.

49. The effect of the Acquisition may be substantially to

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lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

COUNT II – UNFAIR METHOD OF COMPETITION

50. The allegations contained in Paragraphs 1-47 are repeated and realleged as though fully set forth here.

51. Daramic has, through the acquisition of Microporous, and the other conduct alleged herein, engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

COUNT III – MONOPOLIZATION

52. The allegations contained in Paragraphs 1-47 are repeated and realleged as though fully set forth here.

53. Daramic has, through the acquisition of Microporous, and the other conduct alleged herein, engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

XIII. 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. § 3.1, *et seq.* 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

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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 an 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., 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 service of respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

A hearing on the complaint will begin on December 9, 2008, 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

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to show cause why a cease and desist order should not be entered against you.

XIV. NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the acquisition challenged in this proceeding violates Section 7 of the Clayton Act, as amended, or Section 5 of the Federal Trade Commission Act, as amended, the Commission may order such relief against respondents as is supported by the record and is necessary and appropriate, including, but not limited to an order intended to restore Microporous as a viable competitor, and to require divestiture of the reconstituted entity, constitution of a competitive entity that would have existed in all of the relevant markets but for Daramic's anticompetitive conduct, rescission of contracts entered into subsequent to the acquisition, assignment or licensing of all intellectual property and know-how associated with the relevant markets, or whatever the Commission deems necessary to restore competition lost as a result of Daramic's acquisition and other anticompetitive conduct, and an order that requires Daramic to cease and desist from the conduct, agreements, and attempts to enter agreements alleged in the Complaint, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of the anticompetitive practices engaged in by Daramic. The notice also contemplates that the Commission will enjoin any integration activities that have not occurred as of the date the Commission issues its order to prevent further integration of Microporous by Daramic and the possible appointment of a monitor and a divestiture trustee, as may be required to accomplish the Commission's ordered relief.

THEREFORE, the Federal Trade Commission this ninth day of September, 2008, has issued this complaint against Respondent.

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By the Commission.

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INITIAL DECISION**I. INTRODUCTION****A. Summary of the Complaint and Answer**

This case challenges a completed acquisition involving battery separator manufacturers.¹ The Complaint, issued on September 9, 2008 by the Federal Trade Commission (“FTC”) against Polypore International, Inc. (“Polypore”), challenges the purchase by Daramic Acquisition Corporation (“Daramic” or “Respondent”), a business unit of Polypore, of 100% of the stock of Microporous Holding Corporation, the parent company of Microporous Products L.P. (“Microporous”).

The Complaint charges that Daramic manufactures a broad range of high-performing battery separator membranes and that Microporous, before it was acquired by Daramic, manufactured rubber separators, polyethylene (“PE”) rubber separators, and PE separators. Complaint ¶¶ 1, 2. The Complaint defines the relevant product area in which to analyze the transaction as separators for flooded lead-acid batteries in the following markets: (a) deep-cycle; (b) motive; (c) automotive; and (d) uninterruptible power supply stationary (“UPS”). Complaint ¶ 5. Alternatively, the Complaint alleges, “another market in which the transaction violates the antitrust laws is an all PE separator market.” Complaint ¶ 6. The Complaint defines the relevant geographic area in which to analyze the effects of this transaction as North America. Complaint ¶ 14.

The Complaint charges that each of the relevant product markets is highly concentrated in North America and that the

¹ A battery separator is the component of a battery that is placed between the battery’s positive and negative plates in order to prevent electrical short circuits.

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acquisition of Microporous by Daramic (the “acquisition”) allows Daramic to exert market power. Complaint ¶¶ 18, 26. The Complaint includes three counts.

Count I, Illegal Acquisition, charges that the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45. Complaint ¶¶ 48, 49. The Complaint alleges that the acquisition and Daramic’s conduct substantially lessened competition in the following ways: it eliminates competition between Daramic and Microporous; it removes Microporous from the deep-cycle, motive, and UPS markets; it creates a monopoly in deep-cycle, and motive markets and increases the level of concentration in the automotive market; it has lead and will lead to increased prices in the relevant markets; it increases Daramic’s market power in the deep-cycle, motive, and automotive markets; it allows Daramic to unilaterally exercise its market power in the relevant markets; it removes a competitor in the automotive market; and it makes coordination more likely in the automotive market. Complaint ¶ 38.

Count II, Unfair Method of Competition, charges that Daramic has, through the acquisition, and the other conduct alleged in the Complaint, engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Complaint ¶¶ 50, 51. The Complaint alleges that Daramic entered into a joint marketing agreement in 2001 with Hollingsworth & Vose, a firm that manufactures absorbed-glass-mat battery separators, in order to prevent Hollingsworth & Vose from entering the PE separator market. Complaint ¶ 47.

Count III, Monopolization, charges that Daramic has, through the acquisition, and the other conduct alleged in the Complaint, engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Complaint ¶¶ 52, 53. The Complaint alleges that Daramic

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engaged in certain conduct to preclude or deter Microporous from expanding or otherwise achieving sufficient scale, and thereby destroy competition and increase Daramic's market dominance. Complaint ¶ 46.

In its Answer, filed on October 15, 2008, Respondent admits that on February 29, 2008, Daramic acquired 100% of the outstanding stock of Microporous for approximately \$76 million, including assumed debt. Answer ¶ 4. Respondent denies the relevant product and geographic markets and allegations in the Complaint pertaining to actual and potential competition, entry, anticompetitive effects, monopolization, and unfair methods of competition. Answer ¶¶ 5-53. As an affirmative defense, Respondent avers that the acquisition is a procompetitive response to market dynamics and will result in substantial merger-specific efficiencies in the manufacture, distribution, and sale of battery separators that far outweigh any alleged anticompetitive effects. Answer, Second Affirmative Defense at p. 14.

B. Procedural History

The trial in this matter commenced on May 12, 2009 and concluded on June 12, 2009. Closing arguments were heard on August 20, 2009. Over 2,100 exhibits were admitted, 35 witnesses testified, either live or by deposition, and there are 5,590 pages of trial transcript. The parties' proposed findings of fact, replies to proposed findings of fact, post-trial briefs, and reply briefs total 2,329 pages. The parties' post-trial briefs and proposed findings of fact were filed on July 10, 2009, and their replies thereto were filed on July 31, 2009.

On September 2, 2009, Hollingsworth & Vose ("H&V") filed a motion seeking leave to intervene in this action for the limited purpose of opposing any order or remedy affecting its rights and, in particular, its contractual rights arising under the March 23, 2001 Cross Agency Agreement between H&V and Daramic (the "Cross Agency Agreement"). Neither party filed an opposition or

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objection. By Order dated September 23, 2009, H&V was permitted to intervene for the purpose of providing a brief and proposed findings of fact on the issue of how the proposed remedy might affect H&V's rights under the March 23, 2001 Cross Agency Agreement between H&V and Daramic. H&V filed proposed findings and a brief on remedies affecting its contractual rights on October 1, 2009. Complaint Counsel and Respondent each filed their replies on October 9, 2009.

On September 25, 2009, Respondent filed a Motion to Reopen the Hearing Record that included an evidence proffer, to which Complaint Counsel filed an opposition on October 1, 2009. By Order dated October 15, 2009, the record was reopened for the limited purpose of receiving the proffered evidence, as set forth in the October 15, 2009 Order. A hearing to receive the proffered evidence was held on November 12, 2009. The November 12, 2009 hearing admitted an additional 63 exhibits to the record and added 330 transcript pages. The parties submitted post-hearing supplemental briefs, proposed findings of fact, and conclusions of law on November 17, 2009 and replies thereto on November 24, 2009.

Rule 3.51(a) of the Commission's Rules of Practice states that an Initial Decision shall be filed "within ninety (90) days after closing the hearing record pursuant to § 3.44(c) . . . or within such further time as the Commission may by order allow upon written request from the Administrative Law Judge." 16 C.F.R. § 3.51(a). The hearing record was originally closed, pursuant to Commission Rule 3.44(c), by Order dated June 22, 2009. Ninety days from the close of the record was September 21, 2009. By Order dated September 8, 2009, the Commission granted a sixty day extension, until November 20, 2009, for filing this Initial Decision. The record was then reopened and a hearing held to receive proffered evidence. The record was subsequently closed on November 23, 2009. Ninety days from that date is February 22, 2010.

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Rule 3.51(a) of the Commission's Rules of Practice also states that an Initial Decision shall be filed within one year "after the issuance of the administrative complaint, except that the Administrative Law Judge may, upon a finding of extraordinary circumstances, extend the one-year deadline for a period of up to sixty (60) days." 16 C.F.R. § 3.51(a). The Complaint in this matter was issued on September 9, 2008. One year from the issuance of the Complaint is September 9, 2009. By Order dated September 8, 2009, the one-year deadline was extended for a period of up to sixty days, until November 9, 2009. The hearing record was reopened for the reception of further evidence and good cause was found to issue an additional sixty day extension, extending the time to file the Initial Decision until January 8, 2010. By Order dated January 7, 2010, the sixty day deadline was extended to coincide with the Rule 3.51(a) ninety day deadline, February 22, 2010.

C. Evidence

This Initial Decision is based on the exhibits properly admitted into evidence, the transcripts of testimony at trial, and the briefs and proposed findings of fact and conclusions of law, and the replies thereto, submitted by the parties and Intervenor Hollingsworth & Vose. Citations to specific numbered findings of fact in this Initial Decision are designated by "F."²

² References to the record are abbreviated as follows:

PX – Complaint Counsel's Exhibit

RX – Respondent's Exhibit

JX – Joint Exhibit

DX – Demonstrative Exhibit

Tr. – Transcript of testimony before the ALJ

Dep. – Transcript of Deposition

CCB – Complaint Counsel's Post-Trial Brief

CCRB – Complaint Counsel's Post-Trial Reply Brief

CCFF – Complaint Counsel's Proposed Findings of Fact

CCBROH - Complaint Counsel's Post-Trial Brief on Reopened Hearing

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This Initial Decision is also based on a consideration of the whole record relevant to the issues and addresses the 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.*, No. 9018, 102 F.T.C. 1362, 1670, 1983 FTC LEXIS 17, *566-67 (Nov. 2, 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). *Accord Stauffer Labs., Inc. v. FTC*, 343 F.2d 75, 89 (9th Cir. 1965). *See also Borek Motor Sales, Inc. v. National Labor Relations Bd.*, 425 F.2d 677, 681 (7th Cir. 1970) (holding that it is adequate for the Board to indicate that it had considered each of the company’s exceptions, even if only some of the exceptions were discussed, and stating that “[m]ore than that is not demanded by the [Administrative Procedure Act] and would place a severe burden upon the agency”).

Under Commission Rule 3.51(c)(1), “[a]n initial decision shall be based on a consideration of the whole record relevant to the

CCFFROH - Complaint Counsel’s Proposed Findings of Fact on Reopened Hearing

CCRBROH – Complaint Counsel’s Post-Trial Reply Brief on Reopened Hearing

RB – Respondent’s Post-Trial Brief

RRB – Respondent’s Reply Brief

RFF – Respondent’s Proposed Findings of Fact

RBROH – Respondent’s Post-Trial Brief on Reopened Hearing

RRBROH – Respondent’s Reply Brief on Reopened Hearing

RFFROH – Respondent’s Proposed Findings of Fact on Reopened Hearing

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issues decided, and shall be supported by reliable and probative evidence.” 16 C.F.R. § 3.51(c)(1); *see In re Chicago Bridge & Iron Co.*, No. 9300, 138 F.T.C. 1024, 1027 n.4, 2005 FTC LEXIS 215, at *3 n.4 (Jan. 6, 2005). Under the Administrative Procedure Act (“APA”), 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.” 5 U.S.C. § 556(d). All findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence.

Under the Commission’s Rules of Practice, a party or a non-party may file a motion seeking *in camera* treatment for material, or portions thereof, offered into evidence. 16 C.F.R. § 3.45(b). The Administrative Law Judge may order that such material be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the entity requesting *in camera* treatment. 16 C.F.R. § 3.45(b). Pursuant to Commission Rule 3.45(b), several orders were issued granting *in camera* treatment to material that met the Commission’s standards. In addition, when the parties sought to elicit testimony at trial that revealed information that had been granted *in camera* treatment, the hearing went into an *in camera* session.

Commission Rule 3.45(a) allows for the Administrative Law Judge “to grant *in camera* treatment for information at the time it is offered into evidence subject to a later determination by the [administrative] law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions.” *In re Bristol-Myers Co.*, Nos. 8917-19, 90 F.T.C. 455, 457, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). As the Commission later reaffirmed in another leading case on *in camera* treatment, since “in some instances the ALJ or Commission cannot know that a certain piece of information may be critical to the public understanding of agency action until the Initial Decision or the Opinion of the Commission is issued, the Commission and the ALJs retain the

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power to reassess prior *in camera* rulings at the time of publication of decisions.” *In re General Foods Corp.*, No. 9085, 95 F.T.C. 352, 356 n.7; 1980 FTC LEXIS 99, at *12 n.7 (March 10, 1980). Thus, in instances where a document or trial testimony had been given *in camera* treatment, but the portion of the material cited to in this Initial Decision does not require *in camera* treatment, such material is disclosed in the public version of this Initial Decision, pursuant to Commission Rule 3.45(a) (the ALJ “may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding”). Where *in camera* information is used in this Initial Decision, it is indicated in bold font and braces (“{ }”) in the *in camera* version and is redacted from the public version of the Initial Decision, in accordance with 16 C.F.R. § 3.45(f).

D. Summary of Initial Decision**1. Merger claim (Count I)**

Count I of the Complaint is supported by the record. Complaint Counsel has proved by a preponderance of the evidence that there is a reasonable probability that Respondent’s acquisition of Microporous will substantially lessen competition in the deep-cycle, motive, UPS and SLI battery separator markets in North America. The statistical evidence presented demonstrates that the acquisition has significantly increased concentration in the already highly-concentrated deep-cycle, motive, and SLI markets. In the motive and deep-cycle markets, the acquisition amounts to a merger to monopoly. In the SLI market, the acquisition removed Microporous as a competitor, preserving a powerful duopoly. In the UPS market, the acquisition removed Microporous as a competitive constraint, thereby cementing Daramic’s monopoly in that market.

Complaint Counsel has further demonstrated actual and reasonably probable unilateral and coordinated anticompetitive effects, reinforcing the statistical evidence. Evidence of post-acquisition price increases add to the strong presumption that a

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merger to monopoly in three markets, and from three to two competitors in the SLI market, will lead to anticompetitive effects. Moreover, Respondent's intent in acquiring Microporous, to eliminate a competitor and protect its market shares in the relevant markets, is further persuasive evidence that the probable effects of Daramic's acquisition are harmful to competition.

The evidence in support of Respondent's asserted defenses of entry, power buyers, efficiencies, and Microporous' financial condition prior to the merger, does not offset the preponderance of the evidence of reasonably likely anticompetitive effects, as proved by Complaint Counsel. Accordingly, Complaint Counsel has met its burden of proving that the effect of Daramic's acquisition of Microporous may be substantially to lessen competition in the deep-cycle, motive, UPS, and SLI separator markets in North America, in violation of Section 7 of the Clayton Act.

Section 11 of the Clayton Act directs the FTC to issue orders requiring a violator of Section 7 to divest itself of the assets acquired. Divestiture is the usual and proper remedy where a violation of Section 7 has been found. Respondent has failed to demonstrate that unusual circumstances exist to override the presumption that total divestiture of the acquired assets is the best means of restoring competition. Accordingly, the Order entered in this case requires total divestiture, as well as necessary ancillary relief.

2. Unfair method of competition claim (Count II)

Complaint Counsel has proved the charge in Count II of the Complaint that Respondent engaged in an unfair method of competition in violation of Section 5 of the FTC Act. The evidence demonstrates that the non-compete provisions of Respondent's Cross Agency Agreement with H&V, pursuant to which Daramic promised not to sell AGM battery separators, and H&V promised not to sell PE battery separators, do constitute an

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unlawful market allocation in restraint of trade. Contrary to H&V's assertion, however, it is the mutual agreement embodied by both provisions that has been demonstrated to be unlawful, not just H&V's promise to refrain from competing in the PE market. Accordingly, the appropriate remedy is to preclude any continued performance of the non-compete agreement.

3. Monopolization claim (Count III)

Complaint Counsel has failed to prove the charge in Count III of the Complaint that Respondent engaged in monopolistic conduct, in violation of Section 5 of the FTC Act. Complaint Counsel has not demonstrated that Respondent had monopoly power or a dangerous probability of achieving monopoly power in the North American SLI battery separator market. In the North American deep-cycle, motive and UPS battery separator markets, Complaint Counsel did demonstrate that Respondent had monopoly power or a dangerous probability of achieving monopoly power. However, the conduct challenged by Complaint Counsel, including Daramic's contract negotiations with EnerSys; Daramic's "MP Plan"; Daramic's failure to submit a bid to supply 50% of Exide's separator requirements in response to Exide's 2007 RFP; and, Daramic's 2007 contract extension negotiations with Fiamm, a European automotive battery manufacturer, was not proved to constitute unlawful exclusionary conduct. Accordingly, Count III is dismissed.

II. FINDINGS OF FACT**A. Background****1. Polypore**

1. Respondent Polypore International, Inc. ("Polypore") is a Delaware corporation headquartered in North Carolina. (PX2160 at 006, 024).

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2. Polypore develops, manufactures, and markets specialized microporous membranes used in separation and filtration processes. Its products and technologies are used in two primary segments, energy storage and separation media. The energy storage business accounted for approximately 74% of Polypore's \$610.5 million 2008 fiscal net sales. (PX2160 at 006, 028).
3. Polypore's separation media segment and its lithium ion electronics business segments are not at issue in this matter. (*See* Complaint ¶¶ 5, 6).
4. Daramic is the name of the business unit of Polypore that manufactures and sells separators for flooded lead-acid batteries. Daramic contributes about half of Polypore's revenue. (Hauswald, Tr. 661, 1159; Toth, Tr. 1386).

2. Microporous

5. At the time of the acquisition, defined in F. 9, Microporous Holding Corporation, the parent of Microporous L.P. ("Microporous") was a Delaware corporation. (PX0162 at 005, *in camera*).
6. The acquisition of Microporous included the acquisition of Microporous Products, GmbH, an Austrian registered company, which was a solely owned subsidiary of Microporous. (PX0162 at 005, 019-20, 062, *in camera*; PX0611 at 003; RX1227 at 089-91, *in camera*).
7. At the time of the acquisition, Microporous was a developer, manufacturer, and marketer of specialized rubber and polyethylene battery separators for use in flooded lead-acid batteries. (PX0131 at 008).

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8. Microporous previously had done business in the battery separator industry under the company name Amerace.³ (Gilchrist, Tr. 314).

3. Jurisdiction

9. On February 29, 2008, Daramic Acquisition Corporation, a subsidiary of Polypore, acquired 100% of the outstanding stock of Microporous Holdings Corporation, and the parent of Microporous, from Industrial Growth Partners II L.P. (“IGP”) and other stockholders. (RX1589 at 003; PX0162 (Stock Purchase Agreement, *in camera*)) (the “acquisition”).
10. With the acquisition, Respondent has three manufacturing facilities in the United States: Owensboro, Kentucky; Corydon, Indiana; and Piney Flats, Tennessee. In addition, Respondent owns PE separator manufacturing facilities in Feistritz, Austria; Prachinburi, Thailand; Tianjin, China; Bangalore, India; Selestat, France; and Potenza, Italy. (Hauswald, Tr. 711-13; PX0582 at 018).
11. Respondent is, and all times relevant herein has been, engaged in “commerce” as 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 defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44. (Complaint ¶ 3; Answer ¶ 3; RX1589 at 003).

4. The witnesses

12. Set forth below are the identities of the witnesses that testified in person at the hearing:

³ The name “Amerace” is occasionally used in documents cited by the parties. In this Initial Decision, the name “Microporous” is substituted in brackets for “Amerace” for findings containing quotes from such documents.

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Witnesses Related to Polypore/Daramic/Microporous

- George Brilmyer, former Director of Research & Development of Microporous
- Hans-Peter Gaugl, Managing Director Austrian Facility for Daramic Austria GmbH (also former Manager of Austrian facility for Microporous)
- Michael Gilchrist, former CEO and President of Microporous
- Michael Graff, Managing Director of Warburg Pincus (also Chairman of the Board of Directors of Polypore)
- Pierre Hauswald, General Manager and Vice President of Daramic
- Steven McDonald, Sales Manager, North America of Daramic (also former Director of Sales of Microporous)
- Tim Riney, Vice President of Finance of Daramic
- Sterling Tucker Roe, Vice President of Worldwide Sales and Marketing of Daramic
- Harry Seibert, Vice President and Business Director of Daramic
- Christopher Thuet, Business Director Asia-Pacific of Daramic
- Robert Toth, CEO and President of Polypore
- Larry Trevathan, Vice President Operations of Daramic (also former Vice President Operations of Microporous)
- John Kevin Whear, Vice President of Technology of Daramic

Witnesses Related to Battery or Battery Separator Manufacturers

- Larry Axt, Vice President of Global Procurement of EnerSys

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- Arthur Balcerzak, Director of Purchasing for Crown Battery (as consultant)
- Norman Benjamin, President of Bulldog Battery Corporation
- Mitchell Bregman, Exide Technologies (former procurement council)
- Larry Burkert, Senior Procurement Manager of EnerSys
- John Craig, Chairman, CEO and President of EnerSys
- James Douglas, Executive Vice President of Douglas Battery Mfg. Co.
- John Gagge, Jr., Sr. Director Engineering and Quality Assurance for EnerSys
- Melvin Gillespie, Jr., Vice President of Global Procurement for Exide Technologies
- Richard Godber, CEO and President of Trojan Battery
- Rodger Hall, Global Vice President of Procurement for Johnson Controls Battery
- Dale Leister, Director Procurement Strategy & Supplier Dev., East Penn Battery Mfg. Co.
- Nawaz Qureshi, Vice President of Engineering and Technology of U.S. Battery Mfg. Co.
- Donald Wallace, Executive Vice President of Sales and Marketing of U.S. Battery Mfg. Co.
- Daniel Weerts, Vice President of Sales and Marketing of Entek Holding Company

Expert Witnesses

- Henry J. Kahwaty, Ph.D., Director of LECG (Respondent's expert witness)
- John Simpson, Ph.D., FTC Economist (FTC's expert witness)

5. Terminology

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13. **AGM** – initials which refer to “absorbed glass mat” battery separators. The liquid in the battery is absorbed like a sponge into the glass mat part of the separator and there is no free liquid electrolyte. AGM batteries are sealed and do not need maintenance. (Godber, Tr. 147; Hauswald, Tr. 994-95; Qureshi, Tr. 2055-56).
14. **Aftermarket** – refers to the market for replacement batteries for products (in contrast to original equipment batteries). (Godber, Tr. 143-44; Gillespie, Tr. 2932).
15. **Antimony** – refers to an antimony alloy that is typically included in the composition of the positive plate of a battery used for deep-cycle applications. Antimony is what makes the battery deep-cycle; if you do not have enough antimony, the cycle loses capacity. Flooded deep-cycle batteries use a high-antimony lead alloy grid and use high-density active material that takes longer to fall apart. The migration of antimony from the positive plate to the negative is called antimony poisoning. It is referred to as poisoning because antimony transfer will cause the premature death of the battery. The separator plays an important role in scavenging or tying up the antimony in the electrolyte, preventing it from going to the negative plate. The addition of rubber to a battery separator reduces the rate of antimony transfer. (Godber, Tr. 137-39, 149-50; Qureshi, Tr. 1995, 2001-02, 2004; PX1791 at 001; PX1124 at 001).
16. **Backweb Thickness** – a primary measurement of a battery separator that is the thickness of the substrate in space between membranes of a rib. Simply put, it is the thickness of the separator that is measured between the ribs. The backweb thickness serves to create a wall of insulation in the battery between plates. (Hauswald, Tr.

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966-67, 979; Leister, Tr. 4044; Whear, Tr. 4685, 4688; PX0669, *in camera*).

17. **Battery Separators** – products of various composition that are placed between positively and negatively charged plates in batteries to prevent electrical short circuits while allowing ionic current to flow through the separators. (Gilchrist, Tr. 314; Hauswald, Tr. 968-69; Benjamin, Tr. 3504; Whear, Tr. 4665-66). Battery separators insulate the two plates from each other to prevent electrical shorts. (Gilchrist, Tr. 304-05; *see* Benjamin, Tr. 3504; *see also* PX0078 at 003, *in camera* (providing a diagram)). The separator material is microporous (*i.e.*, it contains very small holes) to allow the passage of electrical current. (Gilchrist, Tr. 304-05; *see* Benjamin, Tr. 3504).
18. **Black Scum** – refers to a dark-colored residue that can gather on the liquid surface inside a flooded lead-acid battery during usage. The black scum can result from the interaction of various chemicals and the oil component of a separator through a process of oxidation. (Hauswald, Tr. 1096-98; Brilmyer, Tr. 1834-35; Whear, Tr. 4708-09).
19. **Deep-cycle** – refers to certain end use applications for batteries where the batteries are placed in products having a lower amperage draw over a longer duration of time. These batteries are repeatedly discharged deeply to a low state of charge prior to recharging. Example applications include golf carts, floor scrubbers, scissor lifts, utilities, and marine boat applications. (Godber, Tr. 137-38; Gillespie, Tr. 2931; Whear, Tr. 4682, 4694; PX0319 at 007-08).
20. **Flooded Lead-Acid Battery** – a battery that contains an electrolyte liquid acid inside it up to a level above the positive and negative lead plates. Due to repeated charging and discharging, especially in deep-cycle applications, gas bubbles are formed and the liquid will

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tend to evaporate. The battery can be damaged if the water level is permitted to fall below the top of the battery plates. Therefore, the battery will need to be watered at certain intervals (except in a sealed, no maintenance automotive battery). (Godber, Tr. 147; Brilmyer, Tr. 1841, 1854-55; Qureshi, Tr. 2053-54; Douglas, Tr. 4053; Whear, Tr. 4682).

21. **Enveloping** – instead of having the battery separator material cut into separate smaller “leaf” pieces, the battery manufacturer can purchase the material in roll form and itself fold the separator material around the plates of the batteries and seal it on the side (thus “enveloping” the plate like it is in a pouch). (Roe, Tr. 1748-49; Qureshi, Tr. 2036; PX1791 at 002). This process also can be referred to by a battery manufacturer as “sleeving.” (Benjamin, Tr. 3508).
22. **Gel (Non-Flooded) Battery** – A type of sealed battery which, instead of having liquid lead-acid, like flooded batteries, these batteries have a silica gel that interacts with the positive and negative plates of the battery to allow for ionic transfer. Also called VRLA (valve-regulated lead-acid) or a recombination battery. (Godber, Tr. 147; Gaugl, Tr. 4557; Whear, Tr. 4681).
23. **Industrial Separators** – refers to separators for all industrial applications for batteries, including industrial motive power or industrial stationary batteries. (Roe, Tr. 1815; Whear, Tr. 4682-83).
24. **Leaf Separator** – refers to battery separator material that has been cut into pieces (*i.e.*, “leafs”), and many of these pieces will be stacked together in between plates and used in a single battery. (Roe, Tr. 1748-49; PX1791 at 002).

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25. **Motive Power** – refers to an end use application of batteries for certain industrial products that move, such as forklifts and mine equipment. (Gilchrist, Tr. 306; Roe, Tr. 1197; Balcerzak, Tr. 4092; Whear, Tr. 4694).
26. **OE/OEM** – generally synonymous terms for original equipment or original equipment manufacturer. These types of batteries are installed as original equipment on a product (in contrast to batteries for the “aftermarket,” which are replacement batteries). (Roe, Tr. 1762-63; Gillespie, Tr. 2932).
27. **Overall Thickness** – a primary measurement of a battery separator that measures the overall thickness of the product including the ribs (*e.g.*, thickness of substrate and height of ribs together). Overall thickness serves to provide the space between electrodes and makes a reservoir for the liquid. (Hauswald, Tr. 966-67, 979; Leister, Tr. 4044; Whear, Tr. 4688-89).
28. **PE Separators** – abbreviation for a polyethylene battery separator. Daramic’s polyethylene battery separators are formulated from ultra high molecular weight polyethylene, as well as other ingredients such as silica and oil. (Toth, Tr. 1501, 1549; PX0582 at 041, 043). Certain PE separators include additional additives as well. (PX0582 at 043-50; PX0949 at 003-04, *in camera*).
29. **Profile** – profile refers to the specifications of a separator and includes the thickness of the backweb as well as the shape of the ribs, *i.e.*, whether they are vertical, diagonal, or S-shaped, along with the height and density of the ribs. Daramic offers a choice of approximately 80 profiles with its battery separators. (Whear, Tr. 4675-76).
30. **Reserve Power** – an end use application for batteries where the batteries are used to provide backup or reserve

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power to a system. (Gilchrist, Tr. 306; Axt. Tr. 2099; Douglas Tr. 4052-53).

31. **Ribs** – protrusions on the separator. The ribs, which vary in height, thickness or shape from separator to separator, help fix the physical spacing in the battery to make sure there is an appropriate amount of acid between the plates. The shapes and sizes of these ribs make up part of the “profile” of the separator. (Hauswald, Tr. 966-67; Whear, Tr. 4665-67, 4675-76; PX1791 at 002).
32. **SLI** – abbreviation refers to an end use application for batteries known as “starter, lighting, and ignition,” which is generally synonymous with an automotive-type application for batteries. Examples of SLI batteries include those placed in automobiles, trucks, buses, boats, snowmobiles, jet skis, and recreational vehicles. (Brilmyer, Tr. 1831-32; Gillespie, Tr. 2930; Leister, Tr. 3976-77).
33. **Stationary** – refers to an end use application for a battery where the product is stationary, such as large backup batteries for telecommunications, emergency lighting, UPS, or other reserve power application. (Roe, Tr. 1736, 1816-17; Whear, Tr. 4692).
34. **Traction** – refers to an end use application for batteries in certain industrial products (*e.g.*, electric forklifts). The term is generally synonymous with “motive power” applications. “Motive power” is typically referred to in the United States, while “traction” is typically referred to globally. (Roe, Tr. 1250; Balcerzak, Tr. 4092).
35. **UPS** – refers to an end use application for batteries known as “uninterruptible power supply” or “uninterruptible power source” products. These are batteries for emergency power use in case of a power outage/stoppage.

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Examples include backup stationary batteries for computer systems, telecommunications systems, and cell phone towers. UPS batteries are generally considered to be a type of reserve power batteries. (Gilchrist, Tr. 306; Roe, Tr. 1736-37; Brilmyer, Tr. 1832-33; Douglas Tr. 4052-53).

36. **VRLA** – abbreviation refers to valve-regulated lead-acid battery. VRLA batteries are different from flooded lead-acid batteries because in VRLA batteries, an absorbed glass mat (AGM) absorbs the acid so that there is no free acid in the battery, while in a flooded lead-acid battery, the electrolyte of the liquid acid flows freely. (Douglas, Tr. 4053-54; Gilchrist, Tr. 366). A gel or recombination battery is also a VRLA battery. (Gilchrist, Tr. 366; Douglas, Tr. 4052; Whear, Tr. 4681).

6. Daramic's products

37. Daramic, one of the four Polypore divisions, manufactures lead-acid battery separators for a variety of applications. (Hauswald, Tr. 965-66).
38. Prior to the acquisition of Microporous, Daramic had two manufacturing facilities in the United States and five manufacturing facilities abroad. (RX0814 at 003, *in camera*; Hauswald, Tr. 990). In the United States, Daramic's manufacturing facilities were located in Owensboro, Kentucky and Corydon, Indiana. (RX0814 at 010, *in camera*).
39. Prior to the acquisition, Daramic's five foreign manufacturing facilities were located in Selestat, France; Norderstadt, Germany; Potenza, Italy; Prachinburi, Thailand; and Tianjin, China. (RX0814 at 003, *in camera*; Hauswald, Tr. 990).

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40. Prior to the acquisition, Daramic's facilities provided a production capacity of approximately { **redacted** } (RX0814 at 003, *in camera*). In 2007, { **redacted** } of this capacity was located in the United States at the Owensboro facility, and { **redacted** } of this capacity was located in the United States at the Corydon facility. (Hauswald, Tr. 918, *in camera*; RX0814 at 003, *in camera*).
41. Prior to the acquisition, Daramic's product line included the following:
- PE separators: Daramic Standard, Daramic HP, Daramic V, Daramic HD, Daramic HPR, Daramic HP-S, Daramic HPO, Daramic Duralife, Daramic W and Daramic CL. (PX0582 at 043-50; PX0949 at 003-04, *in camera*). Daramic HD ("HD") is a polyethylene battery separator made with a liquid latex additive for deep-cycle applications. (Hauswald, Tr. 671-72; PX0949 at 004, *in camera*; PX0319 at 007).
- Darak: a non-PE Daramic battery separator made with cross-linked phenolic resin for more porosity. The separator is made only in Germany and is typically used in gel-type batteries. (Hauswald, Tr. 989-90; Whear, Tr. 4681; PX0582 at 051).
42. Daramic's worldwide separator sales – including Darak – in 2007 were approximately { **redacted** } (RX1119, *in camera*). The total sales of Daramic's PE separators in 2007 for automotive applications were { **redacted** } (RX1119, *in camera*; RX1418, *in camera*). In 2007, sales of HD were { **redacted** } (RX1119, *in camera*; RX1418, *in camera*). Daramic's sales of PE separators for industrial applications during the same time period totaled { **redacted** } and sales of PE separators for specialty applications were { **redacted** } (RX1119, *in camera*;

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RX1418, *in camera*). Daramic does not track sales information specifically for golf-cart applications. (RX1119, *in camera*).

7. Microporous' products

43. Prior to the acquisition, Microporous manufactured battery separators at its facility in Piney Flats, Tennessee. (Gilchrist, Tr. 311; McDonald, Tr. 3791; PX1788 at 004).
44. At the time of the acquisition, Microporous also owned a facility in Feistritz, Austria, which housed two manufacturing lines. (Gilchrist, Tr. 332, 558; Gaugl, Tr. 4551; PX0078 at 012, *in camera*).
45. Microporous' product line included the following:

Ace-Sil – a hard rubber battery separator developed by Microporous (and now sold by Daramic) that is made from rubber silicon. This pure rubber product is very stiff and typically used in very high-end stationary applications such as telecommunications, backup power for nuclear plants, and military products. (Gilchrist, Tr. 300; Hauswald, Tr. 992; Roe, Tr. 1748; McDonald, Tr. 3786; RX1638 (physical product sample)).

Flex-Sil – a battery separator product developed by Microporous (and now sold by Daramic) that is made of pure rubber (no polyethylene) for use in deep-cycle applications such as golf carts, floor scrubbers and aerial lifts. The Flex-Sil product is sold only in “leaf” cut-piece form. (Roe, Tr. 1737, 1749; Hauswald, Tr. 992-93; McDonald, Tr. 3787; RX1639 (physical product sample)).

CellForce – a polyethylene battery separator developed by Microporous (and now sold by Daramic) that

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includes ground-up Ace-Sil rubber product as an additive in the polyethylene matrix of the separator to improve performance. (Gilchrist, Tr. 337-38, 340; Hauswald, Tr. 672-73, 993; RX1640 (physical product sample)).

46. Historical worldwide sales of Microporous' Ace-Sil, Flex-Sil, and CellForce products from 2003 until 2007 are provided in the following chart:

	2003	2004	2005	2006	2007
Ace-Sil	{redacted}	{redacted}	{redacted}	{redacted}	{redacted}
Flex-Sil	{redacted}	{redacted}	{redacted}	{redacted}	{redacted}
CellForce	{redacted}	{redacted}	{redacted}	{redacted}	{redacted}

(RX1120, *in camera*; McDonald, Tr. 3855-57, *in camera*).

8. Entek

47. Entek International LLC, and its sister company Entek International Ltd., (hereafter "Entek") are owned and operated by Entek Holding Company (collectively, "Entek"). Entek sells battery separators from facilities in Lebanon, Oregon and from facilities in the United Kingdom. (Weerts, Tr. 4450-51; 4465-67, *in camera*).
48. Entek is principally a manufacturer of PE battery separators for SLI applications. (PX0088 at 001; Weerts, Tr. 4492, *in camera*).

9. The customers: battery manufacturers

a. Johnson Controls

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49. Johnson Controls (“JCI”) is the largest automotive battery manufacturing company in the world. (Hall, Tr. 2662-63; RX0034 at 012). JCI produced more than 120 million lead-acid batteries in 2008. (Hall, Tr. 2793; RX0034 at 004; RX1187 at 003). JCI has 36% of the global market share in the lead-acid automotive battery market. (RX0034 at 013).
50. JCI manufactures a small amount of golf cart batteries, which account for only 2 to 3% of its production. (Hall, Tr. 2665).
51. JCI is headquartered in Milwaukee, Wisconsin with plant locations worldwide, including North America, Europe, and China. (PX0965 at 11, *in camera*; Hauswald, Tr. 1086; Hall, Tr. 2665; PX0614).

b. Exide Technologies, Inc.

52. Exide Technologies, Inc. (“Exide”) is a global battery manufacturer with facilities in North America, Europe and Asia. (Gillespie, Tr. 2957, 3093).
53. Exide ranks as either the largest or second largest battery manufacturer in the world, and its Salinas, Kansas facility is the largest battery plant in North America, making between 30,000 and 40,000 batteries per day. (Gillespie, Tr. 2930, 3052, *in camera*).
54. Exide’s business is segmented into “Industrial” and “Transportation” units. The transportation unit is the majority of its business, and includes SLI batteries for cars, trucks, motorcycles, recreational vehicles, boats and other applications. The transportation division also includes batteries for deep-cycle applications, such as golf carts. Exide’s industrial division is subdivided into motive

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power and network backup system batteries. (RX1186 at 006-07; Gillespie, Tr. 2930).

55. Exide sold almost \$3.7 billion worth of batteries in fiscal 2008 and buys approximately \$70 million worth of battery separators per year. (RX1186 at 027, 057; Gillespie, Tr. 2929).

c. EnerSys

56. EnerSys is a global manufacturer of industrial batteries, including motive power batteries, used mainly for forklifts, and reserve power batteries, for UPS battery backup, specialty battery backup, telecom and utilities. (Axt, Tr. 2097). EnerSys is the world's largest manufacturer of industrial batteries. (Axt, Tr. 2228).
57. EnerSys has manufacturing plants in the United States, Mexico, China and Europe. (Axt, Tr. 2227; RX1185 at 021). EnerSys manufactures motive power batteries in North America at facilities in Richmond, Kentucky; Ooltewah, Tennessee; and Monterrey, Mexico. It makes UPS batteries in North America at the Monterrey, Mexico plant and its facility in Hays, Kansas. (Axt, Tr. 2099-2100).
58. EnerSys has approximately a 38-40% share of the world's motive power battery sales. (Axt, Tr. 2227).
59. On January 14, 2010, EnerSys issued a press release announcing the purchase of certain assets and assumption of certain liabilities of the Douglas Battery Manufacturing Company. (January 27, 2010 Order on Respondent's Motion for Official Notice).

d. Trojan Battery Company

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60. Trojan Battery Company (“Trojan Battery”) manufactures and sells deep-cycle batteries primarily for golf carts, but also for marine, floor scrubber and aerial work platform applications. Trojan Battery is the largest manufacturer of golf cart batteries in the world. (Godber, Tr. 133-34, 274).
61. In 2007, Trojan Battery had annualized sales of **{redacted}**. In 2008, those sales were **{redacted}** (Godber, Tr. 252-53, *in camera*).
62. Trojan Battery sells approximately 40% of its batteries to original equipment (“OE”) manufacturers and sellers of new equipment and 60% to the aftermarket. Trojan Battery’s OE sales are mostly domestic, which Trojan Battery defines as North America, with roughly 4% being sold internationally. In aftermarket sales, 35 to 38% of Trojan Battery’s sales are domestic, with the remainder being international. (Godber, Tr. 144.)
63. Trojan Battery manufactures in two plants, one in California, and one in Georgia. (Godber, Tr. 253, *in camera*).
64. The largest percentage of Microporous’ sales in 2003-2007 was to Trojan Battery. (RX1120, *in camera*; McDonald, Tr. 3854-57, *in camera*). In 2008, approximately **{redacted}** of sales of all Microporous products were to Trojan Battery, and **{redacted}** of all sales of its Flex-Sil product were to Trojan Battery. (RX1120, *in camera*; McDonald, Tr. 3854-57, *in camera*).

e. East Penn Battery Manufacturing Company

65. East Penn Battery Manufacturing Company (“East Penn Battery”) is a lead-acid battery and wire and cable manufacturing company, with battery manufacturing facilities in Lyon Station, Pennsylvania, where the company is headquartered, and in Corydon, Iowa. East

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Penn Battery also has a battery assembly plant in China. East Penn's Battery annual sales revenue is approximately \$1.25 billion. (Leister, Tr. 3968-69, 4030).

66. East Penn's Battery business is segmented into "Wire and Cable," "Automotive," and "Industrial" divisions. East Penn Battery includes in its automotive division both SLI batteries and deep-cycle batteries. East Penn Battery sells batteries for cars, trucks, boats, recreational vehicles, power sports vehicles (*e.g.*, "four-wheelers") and golf carts. The industrial division is separated into motive power batteries used in forklifts and other equipment, and stationary batteries used for backup power systems. (Leister, Tr. 3968-69, 3976-77).

f. Crown Battery Manufacturing Company

67. Crown Battery Manufacturing Company ("Crown Battery") manufactures SLI batteries for the automobile replacement market, trucks, and busses. It also manufactures deep-cycle batteries for sweeper/scrubbers, golf carts, and marine vehicles. Crown Battery includes these batteries in its SLI division, which comprises 50% of Crown Battery's business. The other 50% of Crown Battery's product line is what it calls motive power industrial, for forklifts and mine equipment. (Balcerzak, Tr. 4092).
68. Each year, Crown Battery manufactures between 800,000 and 1 million automotive batteries. (Balcerzak, Tr. 4092-93).
69. For its industrial division, Crown Battery does not measure output by batteries, but by plates. The industrial division averages approximately 120,000 plates per week, which converts into approximately 7,000 to 8,000 cells per week. (Balcerzak, Tr. 4093).

g. Douglas Battery Manufacturing Company

70. Douglas Battery Manufacturing Company (“Douglas Battery”) is a battery manufacturer headquartered in Winston-Salem, North Carolina. It is family-owned and managed. (Douglas, Tr. 4048).
71. Douglas Battery produces material-handling batteries generally for forklifts; coal mining batteries, which are deep-cycle; and valve-regulated lead-acid (“VRLA”) UPS batteries for telecom. (Douglas, Tr. 4047-48, 4052-54).
72. Until 2005, Douglas Battery also produced automotive batteries. (Douglas, Tr. 4048).
73. Douglas Battery purchases separators for both flooded lead-acid batteries and VRLA batteries. Douglas Battery uses AGM separators in its VRLA batteries. (Douglas, Tr. 4053-54).

h. U.S. Battery Manufacturing Company

74. U.S. Battery Manufacturing Company (“U.S. Battery”) is headquartered in Corona, California. It has a manufacturing facility in Corona and one in South Augusta, Georgia. (Wallace, Tr. 1927, 1957).
75. U.S. Battery manufactures batteries predominantly for deep-cycle applications. U.S. Battery also manufactures specialty batteries and batteries used in military SLI applications. Approximately 80% of U.S. Battery’s revenues are attributable to the sale of deep-cycle products. It manufactures between one and one-half million to two million deep-cycle units per year. (Wallace, Tr. 1927, 1930; Qureshi, Tr. 2075-76).

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76. U.S. Battery's batteries are used in golf carts, floor scrubbers, aerial lifts, marine applications, long-haul trucks, recreational vehicles, wind and solar power applications, and reserve power applications. (Wallace, Tr. 1955-56; Qureshi, Tr. 2076-77).
77. U.S. Battery's 2008 revenues were in excess of \$160 million. (Wallace, Tr. 1929-30).

i. Bulldog Battery Corporation

78. Bulldog Battery Corporation ("Bulldog Battery") manufactures flooded lead-acid batteries for motive power industrial applications. The batteries manufactured by Bulldog Battery are used primarily in forktruck (forklift) applications. (Benjamin, Tr. 3504).
79. Bulldog Battery has its sole manufacturing facility in Wabash, Indiana. (Benjamin, Tr. 3533).
80. Bulldog Battery is one of approximately five domestic motive power battery manufacturers. (Benjamin, Tr. 3537). Bulldog Battery comprises approximately 10% of the North American motive power market and considers its competition to be EnerSys, Douglas Battery, East Penn Battery and Battery Builders. (Benjamin, Tr. 3507).

B. The Relevant Product Markets**1. Background: the separator industry for flooded lead-acid batteries as a whole****a. Flooded lead-acid battery separators in general**

81. Battery separators are placed between each positive and negative plate in a battery, insulating the two plates from each other to prevent electrical shorts. (Gilchrist, Tr. 304-

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05; *see* Benjamin, Tr. 3504; *see also* PX0078 at 003, *in camera*) (providing a diagram). The separator material is microporous (*i.e.*, it contains very small holes) to allow the passage of electrical current. (Gilchrist, Tr. 304-05; *see* Benjamin, Tr. 3504).

82. A flooded lead-acid battery (or “flooded battery”) contains an electrolyte of liquid acid. (Godber, Tr. 147; Douglas, Tr. 4053). When the battery is charged and discharged, gas bubbles are formed and the liquid tends to evaporate and then additional water must be added. (Godber, Tr. 147). Flooded batteries lose water continuously through such “gassing,” and the battery can be damaged if the water level is permitted to fall below the top of the battery plates. (Brilmyer, Tr. 1854-55).
83. Flooded lead-acid batteries are different from valve-regulated lead-acid (“VRLA”) batteries, which use an absorbed (or absorptive) glass mat (“AGM”) separator. VRLA batteries are also referred to as AGM batteries. (Douglas, Tr. 4053-54; Godber, Tr. 366; *see* Wallace, Tr. 1978). In flooded batteries, the electrolyte of liquid acid flows freely. By contrast, in valve-regulated or AGM batteries, the glass mat absorbs the acid so there is no free acid in the battery. (Douglas, Tr. 4053-54; Godber, Tr. 466).
84. AGM or VRLA separators are more expensive than flooded lead-acid battery separators. (Gillespie, Tr. 2982).

b. Physical distinctions among flooded lead-acid battery separators

85. Battery separators are differentiated by various characteristics, including their base material (*e.g.*, polyethylene or rubber), rib spacing, backweb thickness, overall thickness, border areas, and finishing (delivered in rolls or cut into smaller flat sheets). (Gilchrist, Tr. 352,

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- 365). Respondent's expert concedes that battery separators are, from an economist's perspective, "highly differentiated products." (Kahwaty, Tr. 5132-33).
86. Additives to the separator's base material, including surfactants, rubber, lignans, and various organic chemicals, serve functions such as improving oxidation resistance and reducing water loss. (Whear, Tr. 4667-68). Different types of battery separators may require different packages of additives. (Whear, Tr. 4667).
87. The properties that are desired in a separator are important determinants of the type of separator that is used in a specific application. (Leister, Tr. 4023-24). Electrical resistance and puncture resistance – certain properties of the separators – require greater or lesser emphasis, depending upon the specific application in which the separator is to be used. (Whear, Tr. 4782). The formula of the separator is set to meet the needs of the customer. (Whear, Tr. 4782).
88. Backweb thickness affects the separator's and the battery's performance. A separator with a thicker backweb tends to perform differently than a separator with a thinner backweb. (Leister, Tr. 4041-42). "[T]he thicker that backweb, the longer it's going to last, but you give a tradeoff to the performance on, say, the cranking capabilities of that battery. So you almost can't have that happen, you can't have a thinner backweb and a thicker backweb and have it perform exactly the same." (Leister, Tr. 4041-42). Backweb thickness also affects the separator's price. (Leister, Tr. 4043). A reduction in the separator's backweb thickness tends to reduce the price of the separator material and the cost of the battery. (Leister, Tr. 4043).

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89. It is possible, but atypical, to use separators with the same backweb thickness in different applications. East Penn Battery, for example, does not use separators with the same backweb thickness in both motive and deep-cycle batteries. (Leister, Tr. 3982). There is also no overlap between the backweb thicknesses of the separators that East Penn Battery purchases for its industrial (motive and stationary) batteries and those that it purchases for its starter, lighter, and ignition (“SLI” or “automotive”) batteries. (Leister, Tr. 3977, 4021).
90. If separators of the same backweb thickness were swapped from one application into another, the battery’s performance, including its life, would probably be affected, because separators vary in electrochemical properties and other respects besides thickness. (Leister, Tr. 4023).
91. East Penn Battery might, for instance, have a very limited overlap in the backweb thicknesses of the separators for one of its deep-cycle batteries and for its SLI battery for an eighteen-wheeler truck. (Leister, Tr. 4022). Yet, if East Penn Battery were to take the separator for its eighteen-wheeler battery and place it instead in its deep-cycle battery, it would de-value the deep-cycle battery by shortening its life. (Leister, Tr. 4022-23; *see also* Whear, Tr. 4682-83 (discussing in general terms the impact on battery functionality of interchanging different types of polyethylene separators)).

c. End use applications for flooded lead-acid battery separators

92. A particular type of battery, made for a particular application in accordance with particular specifications for performance, often requires unique features or properties for the separator. Battery separator manufacturers, thus, make different separator products, each of which may be

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especially suited to a specific application or end use. (Gilchrist, Tr. 350-51; *see* Brilmyer, Tr. 1829, 1831).

93. Daramic categorizes its separator sales by broad categories of end uses or applications, such as automotive, industrial, and specialty. (Hauswald, Tr. 676-77; *see* PX0582 at 031 (noting “two primary business segments” of motive, including automotive and specialty, and industrial, including traction and stationary, applications)).
94. Daramic’s different separator types are tailored to provide the particular functionality that is sought for particular applications. (*See* Whear, Tr. 4681-85).
95. Although there are some exceptions or overlaps, the following applications for flooded lead-acid batteries as a rule use different types of separators: deep-cycle, SLI or automotive, motive, and UPS applications. (*See* Gilchrist, Tr. 351-52).
96. Trojan Battery has never considered using motive power construction in its deep-cycle batteries. (Godber, Tr. 146). Deep-cycle batteries are much smaller than, and lack the space for all of the insulation in, motive batteries. (Godber, Tr. 146). Furthermore, the cost of all of that insulation would be too great, and the applications in which deep-cycle batteries are used do not require as long a battery life. (Godber, Tr. 146).
97. Interchanging one type of separator product for another might change the way the battery works and change the life of the battery. (Whear, Tr. 4683).

d. Sales and pricing by application for flooded lead-acid battery separators

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98. PE separator manufacturers typically know the end use applications for the separators that they sell. (F. 99-113).
99. Entek generally knows the end use applications for the separators (predominantly SLI) that it sells. (Weerts, Tr. 4504, *in camera*).
100. Sales at Microporous were broken down by product and by application. (RX01120 at 001-03, *in camera*; McDonald, Tr. 3895-96, *in camera*).
101. Daramic keeps track of the sales of its separators by general categories, such as automotive, industrial, and specialty. It also keeps track of whether its separators are sold in the United States or abroad. (Hauswald, Tr. 676-77).
102. Daramic breaks down its sales by “market segments” that include deep-cycle, motive power, reserve power, and SLI. (PX0395 at 019, *in camera*; *see also* Burkert, Tr. 2336-37 (stating, based on his experience as a procurement manager, that Daramic “know[s] exactly where [its] battery separators are going)).
103. Daramic is aware of the end use applications for its separators. (F. 101-02). For example, prior to the acquisition, Daramic entered into an agreement with East Penn Battery under which East Penn Battery is required to buy {redacted} of its automotive separators and 90% of its industrial separators from Daramic. (Roe, Tr. 1354-55, *in camera*). To ensure that East Penn Battery is fulfilling its end of the agreement, Daramic has to be able to distinguish between the automotive and the motive separators that it sells to East Penn Battery. (Roe, Tr. 1355, *in camera*). Daramic could also in all likelihood determine whether its sales to East Penn Battery were for automotive or motive applications simply on the basis of the separators’ backweb thickness. Its sales to East Penn

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Battery of motive separators specified a backweb thickness of 0.020 (200 microns, or .200 millimeters). (Leister, Tr. 3996).

104. Daramic's response to a bid request by Exide indicated product codes, product specifications, the plants from and to which the products would be shipped, and several of the specific applications in which Daramic's separators would be used. (Gillespie, Tr. 3013-16, *in camera*; PX1028 at, e.g., 004, 009, 024, *in camera*).
105. Daramic is aware that certain backweb thicknesses are typically used in particular types of end use applications. (Roe, Tr. 1308). Customers often request a specific backweb thickness when they order separators from Daramic. (Roe, Tr. 1308-09). Daramic has data on the precise backweb thicknesses for all of its separator sales in its Advanced Forecasting System ("AFS") database. (Roe, Tr. 1309-10).
106. When EnerSys provides technical specifications to a separator manufacturer, those specifications convey the type of battery and may even specify the name of the battery. For instance, when EnerSys provided its specifications to **{redacted}** its drawings noted that it was requesting a DX separator with certain attributes. (Gagge, Tr. 2523, *in camera*).
107. Mr. Gagge at EnerSys is not aware of a single instance in which a separator supplier was unaware of the application in which its separator would be used. (Gagge, Tr. 2524, *in camera*). EnerSys indicates to its separator supplier the intended battery application so that the supplier can assist EnerSys in finding the right product for that application. (Gagge, Tr. 2524, *in camera*).

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108. Daramic can determine the end use of the separators that it sells to EnerSys because EnerSys produces specific batteries at specific facilities. In Richmond, Kentucky, EnerSys manufactures a tubular-plate motive power battery. (Axt, Tr. 2099). In Ooltewah, Tennessee, it manufactures a flat-plate motive power battery. (Axt, Tr. 2099-100). In Monterrey, Mexico, it produces a flat-plate motive power battery, along with flooded telecom batteries for the Mexican market; and in Hays, Kansas, it produces flooded batteries for the telecom and UPS industries, in addition to battery backup for utilities. (Axt, Tr. 2099-100).
109. Separator suppliers work with their battery customers to try to ensure that the separator will work well with the other components of the battery and meet the needs of the end use application. (Gillespie, Tr. 2932).
110. In developing a new separator product, it is important to know the application for which the battery is intended. As Director of R&D at Microporous, Brilmyer insisted upon knowing the need that any new separator would fill and the application that it would serve before a separator project could become active. (Brilmyer, Tr. 1828). He explained that “you’re trying to invent something to solve some problem and you have to know” the end use for the separator to do that. (Brilmyer, Tr. 1829).
111. Daramic tries to ascertain what its customer wants and to provide its customer with the appropriate separator for the specified application. (Whear, Tr. 4779).
112. Daramic actually suggests specific separators for specific applications, especially when its customers are transitioning from one type of material to another. (PX0913 (Whear, Dep. at 6), *in camera*). “[A]s we come up with new products, then we’ll go in and we’ll tell [the

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customer] where these products might best fit and how to utilize them.” (PX0913 (Whear, Dep. at 6), *in camera*).

113. Most of Daramic’s production is “order-based.” (Gaugl, Tr. 4623). In other words, Daramic usually knows the customer for which it is producing a product. (Gaugl, Tr. 4623-24). Daramic rarely builds any inventory absent the name of a customer for that production. (Gaugl, Tr. 4624).
114. The average price of Daramic’s SLI separators is \$0.70 per square meter. (Roe, Tr. 1313). Daramic does not sell any stationary (such as a UPS) separator for less than \$1.00 per square meter, even if the separator is supplied without a glass mat; most of its stationary separators are sold for more than \$2.00 per square meter. (Roe, Tr. 1315-16). Daramic HD separators, for deep-cycle applications, range in price from \$1.50 up to \$2.90 per square meter, depending on their configuration (*e.g.*, with or without glass mat, and whether in cut pieces or in a roll). (Roe, Tr. 1314-15). Daramic’s motive power separators range in price from \$1.90 to \$3.00 per square meter. (Roe, Tr. 1315).
115. Separators for different end use applications return different gross margins for Daramic. (*See* RRF No. 48). Daramic was, for example, in 2006, selling both motive power and stationary separators to C&D Battery (“C&D”) an industrial battery manufacturer for motive and UPS batteries, with plants in the United States. (Roe, Tr. 1325-26, 1667, Seibert, Tr. 4147; PX0806 at 002-03). Daramic knew at that time the breakdown in its sales, by dollar value and square meters, of motive power versus stationary separators to C&D. (PX0806 at 003). Daramic was earning a {redacted} gross margin on its sales of stationary separators, and a {redacted} gross margin on its

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sales of motive power separators, to that customer. (PX0806 at 003).

116. In April 2008, Daramic compared its average selling price, for both golf and industrial battery separators, for CellForce, a former Microporous product, and Daramic HD. (PX0395 at 040-41, *in camera*). Both CellForce and Daramic HD had a higher average selling price, and a higher apparent contribution margin (as measured by the percentage difference between the average selling price and the direct manufacturing cost), for golf than for industrial battery separators. (PX0395 at 040-41, *in camera*; Hauswald, Tr. 793-95, *in camera*). However, at least some of the higher apparent contribution margin, for both CellForce and Daramic HD, for golf than for industrial separators may reflect the cost of the glass mat that is typically added to the separator for golf cart, but not for industrial applications. (*See* Hauswald, Tr. 793-95, *in camera*).
117. Arbitrage of separators – in the sense of resale by customers charged lower prices to customers charged higher prices – is unlikely, because separators are for the most part differentiated products, manufactured with customer-specific designs. (F. 85, 92).
118. According to EnerSys, UPS separators that it purchased could not be resold to other battery manufacturers because those separators are “made for [EnerSys’] design” and “there is no other market for them.” (Burkert, Tr. 2326). When EnerSys asked Daramic to take back some separators and resell them, EnerSys was informed that no other customer used that material, so it could not be resold. (PX1257 at 001; Burkert, Tr. 2328-30). When EnerSys tried to return motive separators to Daramic in 2004, Daramic responded, “If we had a place to sell them we would help. Every industrial motive power customer wants their specific size. For one reason or another

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company X believes they need a separator ½ [inch] taller than [the separator for] EnerSys.” (PX1275 at 001).

119. During the 2008 strike at Daramic’s Owensboro plant, EnerSys was able to find only one satisfactory alternative source for the separators it needed to keep its own plants running. (Burkert, Tr. 2330-33). EnerSys found these separators at the Feistritz plant that Microporous had built in Austria, but discovered that separators of that profile could only be used at EnerSys’ Monterrey plant in Mexico. (Burkert, Tr. 2333). EnerSys also learned that the separators from Feistritz would cost approximately 20% more, given duties, freight, and other costs, than the separators from Owensboro. (Burkert, Tr. 2333-34).

e. Product markets in general for flooded lead-acid battery separators

120. Daramic recognizes separate markets or “market segments” for deep-cycle, motive power, reserve power, and SLI separators. In April 2008, following its acquisition of Microporous, Daramic held a “Strategic Planning Session: Products and Markets,” which Messrs. Hauswald, Roe, and Gilchrist, among others, attended. (Gilchrist, Tr. 458-59, *in camera*; PX0395 at 002, *in camera*). The attendees analyzed Daramic’s product offerings, competition, and product positioning in the following “market segments”: deep-cycle, motive power, reserve power, and SLI separators. (Gilchrist Tr. 458-62, *in camera*; PX0395 at 019, *in camera*; *see, e.g.*, PX0395 at 023, 025-27, *in camera*, for further detail). Deep-cycle separators were considered part of a broader “specialty” market; motive and reserve power separators were considered part of a broader “industrial” market. (PX0395 at 019, *in camera*).

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121. Complaint Counsel proffered Dr. John Simpson, an FTC employee for nineteen years, as an expert in antitrust economics and industrial organization. (Simpson, Tr. 3162-63). Dr. Simpson opined, correctly, that deep-cycle, motive, UPS, and SLI battery separators are each relevant product markets. (Simpson, Tr. 3170-71; PX0033 (Expert Report of John Simpson) at 007, *in camera* (“Simpson Report”)).
122. Battery separators are for the most part differentiated products, made with customer-specific designs; this product differentiation limits the ability of battery manufacturers to switch to different battery separator products. (See F.117-19; *see also* Kahwaty, Tr. 5133-34, *in camera* (Respondent’s expert conceding that with such “highly differentiated” products as battery separators, there are “potentially very complicated substitution patterns that could result” in response to a separator manufacturer’s small but significant price increase)).
123. Dr. Simpson, based largely on “statements by the [separator] buyers that they had very little options to substitute,” correctly concluded that the demand for the battery separators at issue was in general “very inelastic.” (Simpson, Tr. 3414, *in camera*). Dr. Kahwaty, Respondent’s expert, agreed that demand for one type of separator – those used in deep-cycle batteries – is “inelastic.” (Kahwaty, Tr. 5317, *in camera*).
124. The demand for battery separators is inelastic. Thus, a price increase by the separator manufacturer would be profitable even if the manufacturer has a high contribution or profit margin. (Simpson, Tr. 3414, *in camera*). The manufacturer’s higher price on the units it would continue to sell would more than offset the profit that it would lose from those relatively few customers who would not, at that higher price, buy the product. (PX033 (Simpson Report) at 006, *in camera*).

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2. Separators for deep-cycle flooded lead-acid batteries are a relevant product market

125. Complaint Counsel alleges that separators for deep-cycle flooded lead-acid batteries (“deep-cycle battery separators” or “deep-cycle separators”) are a relevant product market. (Complaint ¶ 5(a)).
126. Respondent denies that deep-cycle separators are a relevant product market. (Answer ¶ 5).
127. Based on the findings below, deep-cycle separators constitute a relevant product market. (F. 128-89).

a. Product characteristics**(i) General characteristics**

128. In its business operations, Daramic uses the term “deep-cycle” to denote certain types of batteries that deeply discharge, such as those intended for golf carts, floor scrubbers, and scissor lifts. (Whear, Tr. 4764).
129. Important traits of a deep-cycle battery are its capacity and its life. (Godber, Tr. 138). A deep-cycle battery for an original equipment golf cart should last at least four years. (Godber, Tr. 138).
130. Both deep-cycle and motive batteries are cycling batteries. (Roe, Tr. 1197). One basis for differentiating deep-cycle batteries from motive power batteries is that deep-cycle batteries are typically more deeply discharged. (Roe, Tr. 1197).
131. Deep-cycle batteries are distinct from automotive SLI batteries. SLI batteries are used to start an engine,

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whereas deep-cycle batteries, for products like golf carts and floor-sweeping machines, are designed to run at lower amperage or current draw for a longer period of time. (Qureshi, Tr. 1994; Godber, Tr. 137-38).

132. The construction of a deep-cycle battery generally differs from that of other types of batteries, particularly automotive batteries. (Godber, Tr. 138). Deep-cycle batteries are made with thicker and more durable plates or grids, which can better withstand deep discharges and corrosion. (Godber, Tr. 138; Qureshi, Tr. 1997-98). The active material for the positive plate is also made with a different formula in a deep-cycle battery. (Godber, Tr. 138). It is high-density active material that takes longer to fall apart. (Qureshi, Tr. 1995).
133. Deep-cycle batteries typically use a lead alloy grid with relatively high antimony content. (Godber, Tr. 138-39; Qureshi, Tr. 1995). At U.S. Battery, the positive grid for a deep-cycle battery has an antimony content of 5%; the negative grid has an antimony content of 2.75%. (Qureshi, Tr. 1998). The grid for an SLI battery generally has much lower antimony content than the grid for a deep-cycle battery, or no antimony content at all. (Qureshi, Tr. 1995-96).
134. U.S. Battery uses “leaf” separators, assembling the plates and the separators by hand, for all of its deep-cycle batteries. (Qureshi, Tr. 2035-36). U.S. Battery does have an “enveloping” machine that it could use to automatically assemble “envelope” separators, which come in a roll and are normally made of polyethylene, and plates. (Qureshi, Tr. 2036). U.S. Battery has, however, determined through testing and experimentation that enveloped separators do not work well in deep-cycle batteries, “[b]ecause the shed material falls to the bottom and creates punctures and the shed material rises to the top and prematurely creates internal shorts against the strap.” (Qureshi, Tr. 2035).

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135. In a deep-cycle battery, lead and lead oxide are the most expensive components. (Qureshi, Tr. 1993). The separator is the next most expensive component. (Qureshi, Tr. 1993).

(ii) Antimony's functions and "antimony poisoning"

136. Antimony plays important functions in deep-cycle batteries. (Quershi, Tr. 2001). Antimony hardens and strengthens the lead or lead alloy to make it easier to handle and assemble. (Qureshi, Tr. 2001). Antimony also helps in casting the plate or grid. (Godber, Tr. 139). Antimony enlarges the grid by increasing the flow of the molten lead that is poured into the mold for the grid. (Godber, Tr. 139).
137. Importantly, antimony enables better adhesion to the grid of the battery's active material or paste, which enhances conductivity and battery performance. (Godber, Tr. 139; PX1791 at 001). Antimony is what makes a battery a deep-cycle battery; with insufficient antimony, the battery's cycle of charges and discharges would lose capacity. (Qureshi, Tr. 2001-02, 2006).
138. Traces of antimony are released when the lead alloy grid of a deep-cycle battery corrodes. (Qureshi, Tr. 2002; PX1791 at 001). If the antimony migrates from the positive to the negative plate, and "plates" or deposits onto the negative plate, "antimony poison" or "antimony poisoning" occurs. (Godber, Tr. 139; Qureshi, Tr. 2002).
139. Antimony poisoning causes the voltage of the battery to drop. (Godber, Tr. 139-40). The charger must, accordingly, charge longer, creating more gas and more heat, and, thus, greater water loss and corrosion. (Godber,

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Tr. 139-40). Excessive gassing as a result of antimony on the negative plate weakens the battery and shortens its life. (Qureshi, Tr. 2002-03). The water loss that excessive gassing causes also requires the battery user to water the battery more often. (Qureshi, Tr. 2002-03).

140. Battery separators that are made of rubber, or that contain a rubber additive, reduce antimony poisoning in deep-cycle batteries. (PX1791 at 001; PX0798 at 001, 004; Godber, Tr. 140, 149-50; *see* PX0913 (Whear, Dep. at 052), *in camera*). Rubber-based separators work best at protecting against antimony transfer and antimony poisoning. (Godber, Tr. 149-50).
141. Daramic offers multiple separator products – Flex-Sil, HD, and CellForce – that are designed for deep-cycle applications such as golf carts and that have the “rubber effect” to combat antimony transfer. (PX1791 at 001; Hauswald, Tr. 663-64).
142. To reduce antimony transfer, East Penn Battery uses Daramic HD separators in its golf cart and floor scrubber batteries. (Leister, Tr. 4038-39). East Penn Battery also uses straight PE separators for these and other deep-cycle applications. (Leister, Tr. 3978-79). Another customer, JCI, is also aware that golf cart batteries require a separator with a low antimony transfer formulation. (PX1514, *in camera*).

**(iii) Pure rubber (Flex-Sil), hybrid rubber /
polyethylene (CellForce and Daramic HD),
and pure polyethylene separators**

143. In products like Flex-Sil, the separator is made of natural rubber. (Hauswald, Tr. 664; PX1791 at 001). Flex-Sil includes rubber in a solid form, which makes up about 40% of the separator’s content. (Hauswald, Tr. 672-73).

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144. Microporous developed another separator product, CellForce, in the late 1990's for motive power, golf cart, and other applications. (PX0920 (Gilchrist, IHT at 38-39), *in camera*).
145. Daramic introduced its first deep-cycle separator, Daramic DC ("Daramic DC" or "DC"), in 2002. "DC was specifically targeted as an alternative to the rubber separator (Flex-Sil) [that was] being used [in] golf cart and floor scrubber batteries." (PX0319 at 003). Daramic introduced Daramic HD ("Daramic HD" or "HD"), a separator that it considered to be an improvement on DC, in 2005. (PX0319 at 003). HD was targeted at the same market as Microporous' Flex-Sil, for deep-cycle applications. (PX0316 at 002).
146. In Daramic HD and in CellForce, the separator is made from PE for increased strength and incorporates a rubber additive. (Hauswald, Tr. 664; PX1791 at 001).
147. Daramic HD includes rubber in the form of latex, which is added in a liquid form. (Hauswald, Tr. 671-72). Because Daramic HD contains uncrosslinked rubber material, all of the material is available to retard antimony poisoning. (PX0675 at 013). Daramic HD performs comparably in life-cycle testing to a rubber separator, in a way that a straight PE separator cannot. (Whear, Tr. 4805-06; PX0582 at 046; PX0798 at 003-04; *see* PX1744 at 004, *in camera*).
148. The CellForce separator includes rubber in the form of ground-up Ace-Sil, which is added in a powder form. (Gilchrist, Tr. 312; Hauswald, Tr. 672).
149. Daramic HD is available for deep-cycle applications in backweb thicknesses of 13 and 15 mils, and, as of 2009,

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- 12 mils. (Whear, Tr. 4805-06; PX0582 at 046; Roe, Tr. 1311-12).
150. Separators that are made of pure polyethylene are not able to suppress antimony poisoning. (Gilchrist, Tr. 365; Qureshi, Tr. 2005; *see* Qureshi, Tr. 2003-05). Pure PE separators do not perform as well as separators that are made of rubber, or that incorporate a rubber additive, in deep-cycle applications. (Hauswald, Tr. 666; *see also* PX1124 at 001 (noting two to three times more cycles for rubber than for PE separators)).
151. In deep-cycle batteries, the grid of the separator expands and contracts when the battery cycles through charges and discharges. (Gilchrist, Tr. 365). Because antimony, which aids in this process of expanding and contracting, is used in the grid in deep-cycle batteries, the separator should inhibit antimony poisoning. (Gilchrist, Tr. 365). Rubber-based separators inhibit antimony poisoning quite well. (Gilchrist, Tr. 365).
152. While it is physically possible to use a typical car battery separator in a deep-cycle application, the battery life would be extremely short. (Godber, Tr. 151). Use of a PE separator in a deep-cycle product would drastically reduce the life of the battery to about 20% of its life when Trojan Battery's rubber-based separators are used. (Godber, Tr. 151-52). Trojan Battery has tested straight PE separators in its deep-cycle products "off and on, and they just don't last." (Godber, Tr. 151).
153. A pure polyethylene separator provides substantially fewer cycles, less than half of what U.S. Battery expects from its separators, than a deep-cycle separator. (Qureshi, Tr. 2005). U.S. Battery expects a deep-cycle battery for a typical golf cart use to go at least 600 or more cycles, with each cycle defined as a charge/discharge. (Qureshi, Tr.

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2005-06). A pure polyethylene separator “would last perhaps 150 to 300 cycles.” (Qureshi, Tr. 2005).

154. Exide does not use straight PE separators in deep-cycle batteries because straight PE separators do not meet its performance criteria. (Gillespie, Tr. 2933). In negotiations with Daramic and Microporous, Exide never indicated that it would switch to a straight PE separator for golf cart or floor scrubber batteries. (Gillespie, Tr. 2933). A straight PE separator in a deep-cycle battery would reduce the battery’s quality and reliability and harm Exide’s reputation. (Gillespie, Tr. 2933-34).
155. Trojan Battery has never stated an intent to purchase straight polyethylene separators in an effort to constrain the prices that it pays for deep-cycle separators. (Godber, Tr. 155). Mr. Godber, of Trojan Battery, cannot recall any instance in which Trojan Battery successfully used the possibility of purchasing PE separators as leverage in its price negotiations with Microporous. (Godber, Tr. 223).
156. All of Daramic’s separator products for golf cart and other deep-cycle applications function in a similar way, and offer performance that is different than, and superior to, the performance of pure PE separators in those applications. (Hauswald, Tr. 664, 666; PX1791 at 001).

(iv) Alternative technologies

157. A separator made of PVC or silica poses “[n]o serious [competitive] threat in the flooded deep-cycle battery market” because it does not suppress antimony poisoning. (PX0319 at 007-08; *see also* Gagge, Tr. 2520-21, *in camera*) (noting “issues” or risks with PVC separators, particularly at elevated temperatures).

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158. Exide will not use PVC in its deep-cycle golf cart or floor scrubber batteries. PVC separators do not work well in those applications because PVC is very brittle and may leach chlorine. (Gillespie, Tr. 3042, *in camera*).
159. Sealed batteries using AGM separators do not perform well in golf cart or floor scrubber applications. (Roe, Tr. 1208; Gilchrist, Tr. 366). AGM does not work well in deep-cycle batteries, where its use can cause the shedding of lead particles that could penetrate an AGM separator. (PX0433 at 002; PX0911 (Roe, Dep. at 118-20), *in camera*). H&V does not foresee wide-scale use of AGM in golf cart applications for many, many years. (PX0433 at 002).
160. Sealed batteries, with separators composed of silica gel or AGM, last only about 50 to 75% as long as good flooded lead-acid batteries in a deep-cycle application. (Godber, Tr. 147-48). In other words, flooded deep-cycle batteries have 25 to 50% longer life than sealed deep-cycle batteries. (Godber, Tr. 149). Sealed batteries are also more expensive than flooded batteries. AGM batteries cost around 30% more, and gel batteries cost around 50% more, than flooded batteries in a similar application. (Godber, Tr. 149).
161. Sealed batteries may be used for a deep-cycle application in a location, such as an airport or a hospital, where the use of a flooded battery may be prohibited. (Godber, Tr. 148). Trojan Battery does not produce sealed batteries, but buys some for resale. (Godber, Tr. 148). Approximately 1% of the batteries Trojan Battery sells are sealed. (Godber, Tr. 148).

b. End use applications

162. The primary end use application for deep-cycle batteries is in golf carts, but deep-cycle batteries also are used in floor

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scrubbers and other applications. (Gilchrist, Tr. 305; Godber, Tr. 143; Gillespie, Tr. 2931; Wallace, Tr. 1955-56). The biggest end use applications for Trojan Battery are in golf carts, floor scrubbers, and then scissor lifts and boom lifts. (Godber, Tr. 143).

163. Daramic markets Flex-Sil, CellForce, and Daramic HD for golf cart batteries. (PX1791 at 001).
164. Even though Exide does not currently use Daramic HD in its original equipment (“OE”) deep-cycle batteries, Exide expects to qualify Daramic HD for use in all of its deep-cycle batteries, including those that go into original equipment. (Gillespie, Tr. 3091).
165. An estimated 14 to 15% of deep-cycle batteries are sold to OE manufacturers; the balance is sold in the aftermarket. (Gilchrist, Tr. 357-58, 608-09). Trojan Battery, the largest manufacturer of golf cart batteries in the world, sells 40% of those batteries in the OE market and 60% in the aftermarket. (Godber, Tr. 274, 278).
166. Exide sells golf cart batteries in both the OE and the aftermarket. (Gillespie, Tr. 2932). Approximately 90% of the golf cart batteries that Exide sells are sold in the aftermarket, with the remainder going to the OE market. (Gillespie, Tr. 2932).

c. Responsiveness of demand and supply to changes in price and product availability

- (i) No switching to separators that do not include rubber in response to post-acquisition price increases on deep-cycle separators**

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167. Since Daramic's acquisition of Microporous, U.S. Battery has "nowhere to go but to the single source," Daramic, for its deep-cycle flooded battery separators. (Wallace, Tr. 1951).
168. U.S. Battery has over the years sought out alternative suppliers for its deep-cycle separator needs, but has found no alternative supplier for flooded deep-cycle batteries. (Wallace, Tr. 1943-44). At one point within the past three years, U.S. Battery sought to persuade Entek to supply these separators, but Entek has not entered the deep-cycle separator market. (Wallace, Tr. 1943-44, 1950-51). U.S. Battery does intend, however, to soon import to its plants in North America an AGM deep-cycle separator that is made in China. (Wallace, Tr. 1975-76).
169. Over the past year, U.S. Battery designed two new product lines, US 27DC and US 31DC, for which it planned to use Daramic HD separators. (Wallace, Tr. 1948-49). Daramic did not then indicate that it would not be able to supply the HD separators U.S. Battery specified. (Wallace, Tr. 1949-50). U.S. Battery later received word from Daramic that neither Daramic HD nor CellForce was available in the specified size. (Wallace, Tr. 1948-49). Daramic found that it did not have the tooling to make such a thin separator for its HD or its CellForce product. (McDonald, Tr. 3823-24). Daramic informed U.S. Battery that it could only supply its Flex-Sil separator, which costs around twice as much as its HD separator, for the two new battery lines. (Wallace, Tr. 1948-50).
170. Following the acquisition, Daramic increased prices on Flex-Sil, CellForce, and HD. (Roe, Tr. 1218). Despite these price increases, Daramic has not lost any deep-cycle business to any competitor anywhere in the world. (Roe, Tr. 1217-18). In addition, Daramic's post-acquisition price increases on deep-cycle separators have not caused any customer to switch from a rubber or hybrid rubber/PE

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separator to a straight PE separator for use in a deep-cycle battery. (Roe, Tr. 1218).

171. East Penn Battery purchases HD from Daramic for use in its golf cart batteries under a contract entered into in late 2007 or early 2008. (Roe, Tr. 1220-21; RX01519, *in camera*). East Penn Battery continued to purchase HD for its golf cart batteries, and did not switch to a straight PE product, despite the 5% price increase on Daramic HD separators in 2009. (Roe, Tr. 1222-23).

(ii) No switching to separators that do not include rubber in response to the limited supply of Daramic HD due to a strike

172. HD supply was limited during the 2008 strike at Daramic's Owensboro plant. (Roe, Tr. 1219). Despite the limited availability of HD during that strike, no customers switched from HD to a straight PE product for use in a deep-cycle application. (Roe, Tr. 1219).
173. The Owensboro strike limited the availability of Daramic HD to Exide. (Roe, Tr. 1223). The HD shortage forced Exide to purchase Flex-Sil as the only available alternative for its deep-cycle battery application. (Roe, Tr. 1223). Only by purchasing Flex-Sil was Exide able to avoid a supply interruption during the strike. (RX01260). In purchasing Flex-Sil in place of HD during the strike, Exide not only paid a premium for Flex-Sil, but also had to forego a credit that it was otherwise due under its contract with Daramic. (Roe, Tr. 1223-24; RX01260).

d. Expert analysis

174. Dr. Simpson, Complaint Counsel's expert economist, correctly concluded that deep-cycle battery separators are a relevant product market. (Simpson, Tr. 3170-71;

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PX0033 (Simpson Report) at 012, *in camera*). In reaching this conclusion, Dr. Simpson observed: (1) “both producers and customers note that rubber or PE/rubber deep-cycle battery separators meet a unique need that other battery separators cannot meet”; (2) “customers indicate that they would not switch to other battery separators” in response to a 5% price increase for deep-cycle separators; and (3) “company documents analyze competition in the context of a market for deep-cycle battery separators.” (PX0033 (Simpson Report) at 012, *in camera*).

175. Respondent’s economic expert, Dr. Henry J. Kahwaty, describes demand for separators in the golf cart and floor scrubber market as “inelastic.” (Kahwaty, Tr. 5317, *in camera*).
176. Dr. Simpson estimated the “critical loss” for each of the following types of battery separators: deep-cycle, motive, UPS, and SLI. (PX0033 (Simpson Report) at 005-06 & nn.6-8, *in camera*). He defined the critical loss as the largest amount of sales that a hypothetical monopolist of each type of separator could lose before a price increase of 5 to 10% would become unprofitable. (PX0033 (Simpson Report) at 006, *in camera*).
177. The contribution margin for deep-cycle, motive, UPS, and SLI battery separators “does not appear to be higher than roughly {redacted} (PX0033 (Simpson Report) at 006 & nn.6-7, *in camera*). At a contribution margin of {redacted} or less, a hypothetical monopolist of each of these types of battery separators could profitably impose a 5% price increase, as long as it would then lose less than {redacted} of its sales; it could profitably impose a 10% price increase, as long as it would then lose less than {redacted} of its sales. (PX0033 (Simpson Report) at 006 & n. 8, 007, *in camera*).

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178. A hypothetical monopolist of each type of battery separator – deep-cycle, motive, UPS, and SLI – would “lose essentially no sales” to other products if it raised its price by 5 to 10%. (PX0033 (Simpson Report) at 006-07, *in camera*).
179. In support of his conclusion that deep-cycle battery separators are a relevant product market, Dr. Simpson correctly determined, for the deep-cycle batteries that are used in golf carts and floor scrubbers, battery manufacturers would not switch to products other than Flex-Sil, CellForce, or Daramic HD, even with a 5% increase in their price, because there are no close substitutes for those three products. (PX0033 (Simpson Report) at 012, *in camera*; Simpson, Tr. 3172. *See generally* Simpson, Tr. 3169-72 (describing market definition as a process of identifying close substitutes)).
- e. “Practical indicia”: distinctive characteristics and uses, as well as industry recognition of a separate market**
180. Deep-cycle batteries, and deep-cycle battery separators, have distinctive characteristics and distinctive uses or functions. (F. 128-156, 162-166).
181. A Daramic document refers to a “[d]eep-cycle battery market” consisting of golf cart, floor scrubber, and some marine batteries. (PX0263 at 004, *in camera*). Daramic’s head of sales and marketing defines deep-cycle as “the golf cart/floor scrubber type” of battery. (PX0922 (Roe, IHT at 54), *in camera*).
182. A Microporous management presentation refers to a “deep-cycle electric golf car and scrubber market.” (PX0131 at 040). It also refers to “a golf car and scrubber market segment” or “golf and scrubber market” within a

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broader specialty battery separator market. (PX0131 at 029). Mr. Gilchrist, the former CEO and President of Microporous, states that “[t]he way Microporous characterized deep-cycle, it was predominantly golf car and scrubber, sweeper/scrubber.” (Gilchrist, Tr. 305).

183. Daramic recognizes a market, or a “market segment” or sub-segment that is part of a broader “specialty” market, for deep-cycle battery separators. (PX0395 at 019, *in camera*). Daramic considered “[m]arket segment offerings and competition” in specialty separators at its “Strategic Planning Session: Products and Markets” in April 2008. (PX0395 at 027, *in camera*). It separately analyzed “[m]arket segments and current [product] positioning,” listing no product overlap, in the “Deep Cycle / Golf Car (including scrubber and marine),” “Marine – Starting: part of SLI?,” and “Military” market segments or sub-segments. (PX0395 at 033, *in camera*).
184. In a document entitled “Heavy Duty (Deep-Cycle) Strategy - 2006,” Daramic recognized only Microporous as a competitor. (PX0319 at 007). This document noted that Entek had left that market, and that the standard PE separator that Entek had supplied for golf carts would “either switch to HDDC, Rubber or Cellforce.” (PX0319 at 007). Amer-Sil’s PVC separator was deemed “[n]o serious threat in the flooded deep-cycle battery market as it does not [provide] antimony suppression.” (PX0319 at 007).
185. Daramic “aggressively pursue[d]” the “golf cart/deep cycle battery market.” (PX1071 at 001-02; *see also* PX0736 at 002 (indicating as a “Goal and Objective” greatly increased sales for deep-cycle batteries of Daramic HD)).
186. As President of Microporous, Mr. Gilchrist calculated deep-cycle market shares of 96% for Microporous and 4%

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for Daramic. (PX0078 at 007, *in camera*). Mr. Gilchrist identified Daramic HD and its precursor, Daramic DC, as the only products that competed with Microporous' Flex-Sil and CellForce in golf cart and floor scrubber applications. (PX0920 (Gilchrist, IHT at 35, 39), *in camera*).

187. A Microporous document, which describes a “golf, scrubber separator market,” calculates the market shares in 2006 of the two competitors that it identifies in this market: Microporous, with a 98% share, and Daramic, with a 2% share. (PX0506 at 001-02, *in camera*). To quote another Microporous document, Microporous “dominate[s] the golf . . . market[.]” (PX1124 at 001).
188. U.S. Battery presents itself as the leading manufacturer worldwide of deep-cycle batteries. (Wallace, Tr. 1955). U.S. Battery has purchased the separators for its deep-cycle batteries only from Microporous and Daramic. (Wallace, Tr. 1958).
189. Prior to the acquisition, Exide sent out a request for proposal (or “RFP”) for all of its polyethylene requirements to the top separator manufacturers around the globe. (Gillespie, Tr. 2962-63, 2967). Only Daramic and Microporous bid in response to this RFP to sell separators to Exide for golf cart batteries. (Gillespie, Tr. 2967).

3. Separators for motive flooded lead-acid batteries are a relevant product market

190. Complaint Counsel alleges that separators for motive flooded lead-acid batteries (“motive battery separators” or “motive separators”) are a relevant product market. (Complaint ¶ 5(b)). Motive batteries and their separators are also referred to as “traction” or “industrial traction” batteries and separators. (*See* Godber, Tr. 141-42).

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191. Respondent denies that motive separators are a relevant product market. (Answer ¶ 5).
192. Based on the findings below, motive separators constitute a relevant product market. (F. 193-220).

a. Product characteristics**(i) Size and construction**

193. Motive batteries are typically very large; they can, thus, serve as counterweights in industrial vehicles (especially material-handling equipment) to help to make those vehicles stable. (PX2110 at 034-35). Motive batteries are, as a rule, much larger than deep-cycle batteries and their construction is much more robust. Motive batteries use a steel tray rather than plastic and glass mat is wrapped around the plate. (Godber, Tr. 142).
194. Motive batteries must be able to withstand at least five years of use, as that is the typical warranty on a forklift battery. (Godber, Tr. 142). Motive batteries, like deep-cycle batteries, tend to corrode, but motive batteries take longer to corrode because their grids are much thicker. (Godber, Tr. 142). In addition, the positive plates in these batteries are surrounded with a great deal of insulation to keep the active material from seeping out and creating an electrical short. (Godber, Tr. 142). The insulation that is used in motive batteries is very expensive and is not a cost-effective option for deep-cycle batteries. (Godber, Tr. 142-43).
195. Motive separators generally have thicker backwebs than other separators, particularly SLI separators. (Hauswald, Tr. 708-09). Daramic has, for this reason, allocated a particular part of its plant capacity to motive separators. (Hauswald, Tr. 708-09).

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196. A Daramic marketing flyer distinguishes motive from SLI (“starter”) separators as follows:

[T]he requirements for traction batteries in respect of mechanical properties and chemical stability are considerably higher than for starter battery separators. This is due to the fact that a fork lift battery is typically operated for about 40,000-50,000 hours in charge-discharge service whereas a starter battery only for 2,000 hours. The requirements as to electrical resistance are lower because of the typically low current densities for traction batteries. These differences are reflected in the design of the modern traction battery separator material.

(PX1790 at 001).

(ii) Formulations

197. For traction (motive) batteries, Daramic sells a product called Daramic Industrial CL. (Hauswald, Tr. 681). While Daramic CL was specifically designed for motive applications, it is also used in stationary applications. (Roe, Tr. 1327; Whear, Tr. 4784-85). Daramic CL is a standard PE separator. The CL stands for clean oil and signifies the use of clean oil as an ingredient. (Roe, Tr. 1327).
198. CellForce is a PE-based separator that includes rubber in the form of ground-up Ace-Sil. (Gilchrist, Tr. 312; Hauswald, Tr. 672). Prior to the acquisition, Microporous sold its CellForce product in the motive market. (Gilchrist, Tr. 300-01, 385).

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199. Daramic HD was sold to certain traction customers, “pri[m]arily as a defensive move against [Microporous’] CellForce.” (PX0316 at 002).

(iii)PVC as an alternative technology

200. Battery manufacturers in North America have shied away from using PVC separators due to certain disadvantages of PVC as compared to PE. (*See* PX1790 at 001-02; *see also* PX0916 (Dauwe, Dep. at 22), *in camera*) (comparing PVC to PE separators). While PVC has greater resistance to oxidation, it has lower electrical resistance, **{redacted}** than PE. (PX0916 (Dauwe, Dep. at 22), *in camera*). Due to its stiffness and brittleness, PVC, unlike PE, cannot be used in industrial applications in which the separator is sleeved or enveloped. (PX0916 (Dauwe, Dep. at 22-23), *in camera*).
201. The use of PVC separators is also associated **{redacted}** (PX0916 (Dauwe, Dep. at 125-28), *in camera*). **{redacted}** (PX0916 (Dauwe, Dep. at 125-28), *in camera*). One battery manufacturer, **{redacted}** (PX0916 (Dauwe, Dep. at 88, 122), *in camera*). **{redacted}** (PX0916 (Dauwe, Dep. at 158), *in camera*).
202. A Daramic document details the problems with microporous (extruded) and sintered (formed into a mass by heating) PVC separators. (PX1790 at 002). It states that microporous PVC lacks the flexibility and strength of a PE separator, is harder to form into envelopes or sleeves, generates harmful substances (chloride ions), and is generally very expensive, and that “sintered PVC separators will not meet the demanding performance and cycle life applications” of motive power. (PX1790 at 002).
203. The vast majority of demand for motive power is limited to two regions: North America and Europe. (Gilchrist, Tr.

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399). EnerSys uses some PVC separators, manufactured by Amer-Sil, for certain light-duty motive applications (of 115 amperes per hour and below) in Europe; EnerSys does not use, or approve the use of, PVC separators for its batteries in North America, where the applications are more heavy-duty. (Axt, Tr. 2307, *in camera*). “[I]n Europe there are certain applications where [EnerSys] would allow the use of PVC; however, [EnerSys has] not used it as a backup or as a replacement” for PE in North America. (Gagge, Tr. 2512, *in camera*).

b. End use applications

204. Motive batteries are used primarily in forklift trucks. (Gilchrist, Tr. 306-307; Axt, Tr. 2097; Hauswald, Tr. 708; Godber Tr. 142). Motive batteries must provide low, steady power over a much longer period of time than lighter duty deep-cycle batteries. (PX0319 at 008).

c. Responsiveness of demand and supply to changes in price and product availability

205. Daramic is currently seeking a price increase “in the vicinity” of **{redacted}** from EnerSys. (Craig, Tr. 2552, *in camera*). For EnerSys’ motive purchases, Daramic is, more specifically, seeking a **{redacted}** price increase on PE and a **{redacted}** price increase on CellForce separators. (See Axt, Tr. 2212, *in camera*; RX0564 at 001).
206. EnerSys indicated that Daramic threatened to cut EnerSys off if EnerSys did not pay a **{redacted}** higher price for its motive separators, EnerSys would have no choice but to pay the higher price, because it has no alternative source to Daramic for industrial PE or PE-based separators. (Craig, Tr. 2567, *in camera*).

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207. After Daramic declared force majeure in 2006, EnerSys established a team to search worldwide for an alternative source of supply for industrial PE separators. (Axt, Tr. 2216, *in camera*). EnerSys was unable to find an alternative supplier that currently makes motive separators anywhere in the world. (Axt, Tr. 2216-18, 2220, *in camera*).
208. EnerSys stated that if it had to pay **{redacted}** more for its UPS separators, neither it nor its customers would switch to alternative technologies for motive batteries. (*See* Craig, Tr. 2552-53, *in camera*). There is no alternative separator technology to which EnerSys could switch. (Axt, Tr. 2220, *in camera*. *See generally* Axt, Tr. 2216-20, *in camera* (noting only two suppliers, both in China, as possible alternatives to Daramic for PE industrial separators in the future)).
209. When EnerSys used Amer-Sil's PVC separators in Europe during Daramic's declared force majeure in 2006, the PVC separators from Amer-Sil were approximately 20% more expensive than the PE separators from Daramic. (Axt, Tr. 2101-02).
210. Prior to the acquisition, Exide searched worldwide for alternative suppliers to Daramic for industrial or motive separators. (Gillespie, Tr. 2966-67). For the United States market, Exide received responses to its RFP with respect to motive separators only from Daramic and Microporous. (*See* Gillespie, Tr. 2967-68). Exide did receive a response to its RFP from Amer-Sil, but Amer-Sil had limited capacity, did not quote for the United States market, and appeared to be "a small player only for Europe[an] application[s]." (Gillespie, Tr. 2967).
211. EnerSys reports that a **{redacted}** price increase for motive separators "would not change the dynamics of the market." (Craig, Tr. 2552-53, *in camera*). It would

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decrease the battery manufacturer's margins, but it would have very little to no impact on the price of the motive battery itself. (Craig, Tr. 2552-53, *in camera*).

212. It costs EnerSys about {redacted} to make a UPS battery like the one depicted in demonstrative exhibit PX3002. (Craig, Tr. 2553-54, *in camera*). The cost of the separator is {redacted} of the cost of the battery. (Craig, Tr. 2553, *in camera*). EnerSys might sell this battery for {redacted} (Craig, Tr. 2553, *in camera*). For ease of calculation, taking a separator cost of {redacted} of the battery's total cost, the cost of the separator in the {redacted} battery would be {redacted}; a {redacted} increase in the separator cost would add {redacted} (Craig, Tr. 2554, *in camera*). If EnerSys were to pass this cost increase on to its customers for a {redacted} battery, the price of the battery would increase by only {redacted} (Craig, Tr. 2554, *in camera*). The numbers for a motive battery like the one depicted in PX3003 are different, but the impact of a {redacted} increase in motive separator prices on motive battery prices would be the same. (Craig, Tr. 2554, *in camera*).
213. In the face of a {redacted} price increase for motive separators, EnerSys would simply reduce its own profit margin rather than pass along the increase to its customers, which would hurt customer relations by giving them the impression that EnerSys was "nickel-and-diming" them. (Craig, Tr. 2553-54, *in camera*).

d. Expert analysis

214. Dr. Simpson correctly concluded that motive battery separators are a relevant product market. (Simpson, Tr. 3170-71; PX0033 (Simpson Report) at 014-15, *in camera*). In support of this conclusion, Dr. Simpson observed: (1) motive separators have different

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characteristics than deep-cycle and automotive separators, with both customers and producers noting that motive separators fill a unique need; (2) a 5 to 10% price increase by a hypothetical monopolist of motive separators “would prompt very little shifting, at most, to other products”; and (3) a motive separator market is a context in which Daramic and Microporous documents analyze competition. (PX0033 (Simpson Report) at 014-15, *in camera*).

e. “Practical indicia”: distinctive characteristics and uses, as well as industry recognition of a separate market

215. Motive batteries, and motive battery separators, have distinctive characteristics and distinctive uses or functions. (F. 193-96, 204).
216. Daramic’s documents analyze a “market,” or a “market segment” as part of a broader “industrial” market, for motive battery separators. (PX0072 at 020; PX0185 at 006; PX0131 at 030-31, 035, 062-65; PX0395 at 025, *in camera*; PX0506 at 001-02, 004-05, *in camera*; *see also* PX0080 at 021, *in camera*) (referring to “industrial markets”). Daramic evaluated “[m]arket segment offerings and competition” and “[m]arket segments and current [product] positioning” in motive power at its “Strategic Planning Session: Products and Markets” in April 2008. (PX0395 at 025, 032, *in camera*).
217. At Microporous’ January 11, 2006 Board of Directors’ meeting, a sales and marketing presentation referred to motive, deep-cycle, and SLI markets, among others. (PX0402 at 012, *in camera*).
218. Microporous’ former owners wrote: “CellForce product is being quickly adopted . . . by the motive power market.” (PX1124 at 002).

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219. As President of Microporous, Mr. Gilchrist calculated global motive power market shares of 74% for Daramic, 20% for Microporous, and 6% for Amer-Sil. (PX0078 at 007, *in camera*). As Mr. Gilchrist later put it, “Within motive power, the primary competitor [to Microporous] was Daramic” (PX0920 (Gilchrist, IHT at 39), *in camera*).
220. According to another Microporous document, Microporous accounted for 9% of sales volume in the “U.S. Motive Power Market,” and 33% of sales volume in the “European Motive Power Market,” in 2005. (PX0072 at 024). The latter document identified only Daramic, with a market share of 91%, as a competitor to Microporous in the United States motive power market. (PX0072 at 024). In the European motive power market, this document identified only two competitors to Microporous: Daramic, with a market share of 58%, and Amer-Sil, with a market share of 9%. (PX0072 at 024).

4. Separators for UPS flooded lead-acid batteries are a relevant product market

221. Complaint Counsel alleges that separators for uninterruptable power supply (“UPS”) flooded lead-acid batteries (“UPS battery separators” or “UPS separators”) are a relevant product market. (Complaint ¶ 5(d)).
222. Respondent denies that flooded UPS separators are a relevant product market. (Answer ¶ 5).
223. Based on the findings below, separators for flooded UPS batteries constitute a relevant product market. (F. 224-45).

a. Product characteristics

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224. UPS batteries are a type of reserve power battery for stationary products. (Gilchrist, Tr. 306). Classic reserve power batteries generate a lower current over a longer period of time than UPS batteries, which generate a higher current over a shorter period of time. (Gilchrist, Tr. 306).
225. UPS batteries provide standby power in the event of a power shortage or failure. (Brilmyer, Tr. 1832; Roe, Tr. 1736). UPS batteries are designed to provide a short burst of power, typically of between five to thirty minutes in duration. (Brilmyer, Tr. 1832-33). These batteries need to be very dependable and generally last between fifteen and twenty years. (Brilmyer, Tr. 1832-33).
226. UPS batteries have thick plates. (Brilmyer, Tr. 1832-33). They also tend to be built with a clear case, which facilitates inspection by maintenance personnel of the battery's acid level. (Brilmyer, Tr. 1832-33).
227. UPS battery separators are typically made of microporous polyethylene. (Brilmyer, Tr. 1833). Separators for these stationary, including UPS, battery applications have lower residual oil content as a rule than separators for other applications to reduce the problem of "black scum." (Whear, Tr. 4713-14).
228. Black scum is more than a cosmetic problem. It interferes with the maintenance of a flooded UPS battery, in which the case of the battery is clear, by obscuring the indicators for the acid level in the battery and by making it harder to detect the formation of lead sulfate on the surface of the plates. (Brilmyer, Tr. 1852-55).
229. Black scum is a problem in UPS and other battery applications in which an automatic watering system is used. (Brilmyer, Tr. 1852). In the presence of black scum, a valve for the watering system could get stuck; the

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battery could then overflow “and make a mess, get[ting] acid all over the floor.” (Brilmyer, Tr. 1852-53).

230. Daramic has sought to understand and remedy the black scum problem since the early 1990’s. (Whear, Tr. 4710-14). During its early test work, Daramic discovered and obtained a patent on a type of oil, which it called “clean oil,” that reduced the black scum problem. (Whear, Tr. 4710-11). Daramic later took steps to optimize the ratio of virgin oil to recycled oil, and to leave more residual oil in its stationary separators; these steps, too, helped to reduce the black scum problem. (Whear, Tr. 4711-14). None of these steps has, however, succeeded in eliminating black scum. (See Whear, Tr. 4714).
231. Not all PE separator products are well-suited for UPS battery applications. For instance, “HP is a PE product made by Daramic, not for UPS products. It’s a high puncture resistance product made for the automotive industry.” (Brilmyer, Tr. 1915).
232. Use of the Daramic HP separator in a flooded UPS battery would lead to a greater black scum issue than the use of Daramic CL. (Brilmyer, Tr. 1922). Daramic CL was specifically designed for industrial applications where black scum is a problem. (See Brilmyer, Tr. 1834).
233. Daramic’s (and formerly Microporous’) CellForce, which includes rubber in the form of ground-up Ace-Sil, can be used in flooded UPS batteries. (Gilchrist, Tr. 307-08, 312, 397-98; Hauswald, Tr. 672). In an April 2008 “Strategic Planning Session” document, Daramic lists CellForce under a motive power “[m]arket segment,” but cites “broad applicability” for CellForce’s end uses, including UPS applications. (PX0395 at 032, *in camera*).

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234. Daramic's Darak separator is made from cross-linked phenolic resin. (Whear, Tr. 4679-80). It is a unique product, inasmuch as it is not PE-based and contains no oil; it is stiff and very chemically stable, with low electrical resistance. (Brilmyer, Tr. 1911-12). Darak is produced in Germany and around 75% of its production is used in gel, as opposed to flooded, batteries. (Hauswald, Tr. 990). Darak can be used in flooded UPS batteries and might solve the black scum problem, but it is at least twice as expensive as the PE-based material used today. (Axt, Tr. 2102-04).

b. End use applications

235. UPS batteries provide backup power for products or facilities that include computers, computer systems, telecommunications networks, and data centers. (Brilmyer, Tr. 1832; Roe, Tr. 1736-37; Axt, Tr. 2099).

c. Responsiveness of demand and supply to changes in price and product availability

236. Daramic is seeking price increases from EnerSys of {redacted} on PE, {redacted} on CellForce, and {redacted} on Darak separators. (Axt, Tr. 2212, *in camera*; RX0564 at 001).
237. If Daramic threatened to cut EnerSys off if it did not pay a {redacted} higher price for its UPS separators, EnerSys would have no choice but to pay the higher price because it has no alternative source to Daramic. (Craig, Tr. 2567, *in camera*).
238. After Daramic declared force majeure in 2006, EnerSys established a team to search worldwide for an alternative source of supply for industrial PE separators. (Axt, Tr. 2216, *in camera*). EnerSys was unable to find an

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alternative supplier that currently makes UPS separators anywhere in the world. (Axt, Tr. 2216-18, 2220, *in camera*).

239. If EnerSys has to pay **{redacted}** more for its UPS separators, neither it nor its customers would switch to alternative technologies for UPS batteries, because there is no alternative separator technology to which it could switch. (Craig, Tr. 2552-53, *in camera*; Axt, Tr. 2219-20, *in camera*).
240. A **{redacted}** price increase for UPS separators “would not change the dynamics of the market.” (Craig, Tr. 2552-53, *in camera*). It would decrease the battery manufacturer’s margins, but it would have very little to no impact on the price of the UPS battery itself. (Craig, Tr. 2552-53, *in camera*).
241. A **{redacted}** increase in the price of a UPS battery separator would yield only a slight increase in the price of the battery as a whole. EnerSys would simply absorb such a separator price increase rather than pass it along to its customers, and thereby risk harm to customer relations. (Craig, Tr. 2553-54, *in camera*).

d. Expert analysis

242. Dr. Simpson correctly concluded that UPS battery separators are a relevant product market. (Simpson, Tr. 3170-71; PX0033 (Simpson Report) at 016, *in camera*). He adduced the following in support of this conclusion: (1) statements by market participants that UPS separators meet a unique need, (2) EnerSys’ indication that it would not switch to other types of separators in response to a **{redacted}** price increase for UPS separators, and (3) Microporous documents that analyzed competition in the

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context of a UPS separator market. (PX0033 (Simpson Report) at 016, *in camera*).

e. “Practical indicia”: distinctive characteristics and uses, as well as industry recognition of a separate market

243. UPS batteries and UPS separators have distinctive characteristics and properties. (F. 224-30, 235, 243).
244. Microporous had a “strategic plan” to enter the “UPS market.” (PX0402 at 022, *in camera*; *see also* PX0135 at 002, *in camera* (discussing “Project LENO – Darak Replacement”; PX0140, *in camera*) (also discussing “Project LENO”). Microporous identified only Daramic as its competition in the “reserve power” market, and saw better growth opportunities for itself, by taking sales away from Daramic, in the UPS market than in the broader reserve power “market” into which UPS fit. (*See* PX0078 at 016, 028, *in camera*).
245. Daramic recognizes a “market segment” in “reserve power.” (PX0395 at 019, *in camera*). Daramic assessed “[m]arket segment offerings and competition” in reserve power at its “Strategic Planning Session: Products and Markets” in April 2008. (PX0395 at 026, *in camera*).

5. Separators for SLI flooded lead-acid batteries are a relevant product market

246. Automotive flooded lead-acid batteries provide starter, lighter, and ignition (“SLI”) power. (Complaint ¶ 10; Answer ¶ 10). Complaint Counsel alleges that the separators for these batteries (“automotive separators” or “SLI separators”) are a relevant product market. (Complaint ¶ 5(c)).

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247. Respondent denies that SLI separators are a relevant product market. (Answer ¶ 5).
248. Based on the findings below, SLI separators constitute a relevant product market. (F. 249-70).

a. Product characteristics

249. SLI separators must have relatively low electrical resistance to allow for the surge in current that is needed to, for example, start a car. (PX0913 (Whear, Dep. at 13, 16), *in camera*); *see* Whear, Tr. 4682).
250. SLI separators must also be very thin. (Brilmyer, Tr. 1831). A very high percentage – perhaps 90% – of the automotive separators that are produced in North America, and virtually all – by one measure, over 99% – of the automotive separators that Daramic sells, have a backweb thickness of between six and ten mils (150 to 250 microns, or .150 to .250 millimeters). (Whear, Tr. 4762; Hauswald, Tr. 678-79; Roe, Tr. 1310-13). The typical backweb thickness of the automotive separators that are used in the United States is .15 millimeter. (PX0907 (Kung, Dep. at 75), *in camera*).
251. The backweb thickness of SLI separators has been reduced in recent years to lower the separators' cost. (Leister, Tr. 4024).
252. Puncture resistance and mechanical strength are particularly important properties for SLI separators. (Brilmyer, Tr. 1829). The battery would soon fail if the thin membrane of an SLI separator were punctured during automotive assembly or other processes. (PX0913 (Whear, Dep. at 14-16), *in camera*).

(i) Formulations

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253. Daramic HP represents the majority of Daramic's sales of automotive separators. (Whear, Tr. 4805). Daramic HP is made from polyethylene, amorphous silica, and specially formulated oil. (PX0582 at 044). The typical backweb thickness of this separator is from 150 to 200 microns, or from .150 to .200 millimeters. (Whear, Tr. 4805; PX0582 at 044).
254. Daramic HP replaced, for the most part, Daramic Standard. (Whear, Tr. 4805). Daramic Standard is formulated from polyethylene, silica, and oil. (PX0582 at 043). Daramic Standard's typical backweb thickness is from 200 to 250 microns. (PX0582 at 043). Daramic Standard might be sold at a backweb thickness of 150 microns, but that would be atypical. (Whear, Tr. 4803-04).
255. Daramic Standard is not normally advertised to the SLI market, due in part to a concern that at the separator thickness that prevails in that market, Daramic Standard would have inadequate puncture resistance. (Whear, Tr. 4803-04).
256. The goal in developing Daramic HP was to provide a product with substantially greater puncture and oxidation resistance than Daramic Standard. (PX0913 (Whear, Dep. at 26), *in camera*). With HP, Daramic could offer the thinner and less expensive product that competitors were seeking to bring to market and that customers wanted, while maintaining the puncture and oxidation resistance of a thicker separator like Daramic Standard. (PX0913 (Whear, Dep. at 29-30), *in camera*). Daramic HP also yields better electrical performance (greater electrical capacity) in the battery than Daramic Standard, because the amount of electrolyte in Daramic HP is higher and its electrical resistance is normally lower. (PX0913 (Whear, Dep. at 29), *in camera*).

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(ii) Alternative technologies

257. CellForce, which includes rubber in the form of ground-up Ace-Sil, could potentially be used in SLI batteries, and was tested by JCI in Europe for this application. (Hauswald, Tr. 672; Gilchrist, Tr. 312, 440-41, *in camera*). CellForce would have certain advantages in SLI batteries because it inhibits acid stratification and may permit the battery manufacturer to remove some lead from the battery, and thereby reduce cost. (Gilchrist, Tr. 440-41, *in camera*).
258. Daramic's Strategy Audit states as part of its "industry summary" of the flooded lead-acid battery separator business that there are "[n]o substitutes for PE separators on the horizon." (PX0265 at 004, *in camera*).

b. End use applications

259. The term "SLI" is basically synonymous with "automotive." (Brilmyer, Tr. 1831; Gilchrist, Tr. 307).
260. SLI batteries are not only used in automobiles, but are also used in other motorized vehicles. (Leister, Tr. 3976-77).
261. SLI represents the largest segment of the battery separator market, accounting for approximately three-quarters of battery separator sales in 2005. (PX0131 at 032).

c. Responsiveness of supply to changes in demand or price

262. Mr. Kung of BFR, who has considerable technical and managerial experience in battery separator production, (*see* PX0907 (Kung, Dep. at 13-24, 26-27, 36-37, 42, 54, 59-61), *in camera*), knows of only three companies in the

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world – Daramic, Entek, and BFR in China – that produce automotive PE separators as thin as the .15 millimeter that is standard in the United States industry. (PX0907 (Kung, Dep. at 75, 79-80), *in camera*).

263. A manufacturer that has not been producing an automotive PE separator as thin as .15 millimeter would find it very difficult to decrease the thickness of its separator. (PX0907 (Kung, Dep. at 78-79), *in camera*). A reduction in the thickness of an automotive PE separator from .25 or .2 to .15 millimeter would involve a “different technology, different process condition[s and] different equipment,” as well as greater engineering capability. (PX0907 (Kung, Dep. at 78-79), *in camera*).
264. Prior to the acquisition, Exide conducted an extensive global search for alternative suppliers to Daramic for automotive separators. (Gillespie, Tr. 2962). As part of this search, Exide sent out an RFP to Daramic, Entek, Nippon Sheet Glass (or “NSG”), Amer-Sil, and Microporous. (Gillespie, Tr. 2962-63). Exide received bids for its automotive separator requirements only from Daramic, Entek, and Microporous. (*See* Gillespie, Tr. 2962-68).

d. Expert analysis

265. Dr. Simpson correctly concluded that SLI battery separators are a relevant product market. (Simpson, Tr. 3170-71; PX0033 (Simpson Report) at 017-18, *in camera*). In reaching this conclusion, Dr. Simpson noted the following: (1) both customers and producers indicate that PE SLI separators, for which there are no foreseeable substitutes, “meet a unique need”; (2) customers state that they would not switch to other separators in response to a 5% price increase for SLI separators; and (3) company documents analyze competition in the context of an SLI

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separator market. (PX0033 (Simpson Report) at 017-18, *in camera*).

e. “Practical indicia”: distinctive characteristics and uses, as well as industry recognition of a separate market

266. SLI batteries, and SLI battery separators, have distinctive characteristics and distinctive uses or functions. (F. 114, 131-33, 152-54, 195-96, 231-32, 250-53, 257, 262-64).
267. SLI separators have distinct and relatively low prices. (*See* F. 114). Their low prices relative to other types of separators reflect, in part, their relative thinness and, as a result, their use of less raw material. (*See* F. 250-51).
268. Daramic’s documents analyze a “market,” or a “market segment” of the battery separator market, for SLI battery separators. (PX0080 at 060, *in camera*; PX0088 at 001; PX0131 at 031-32; PX0395 at 019, *in camera* (referring to both “[a]utomotive SLI” and SLI); PX0402 at 012, *in camera*; PX0506 at 001-02, 006-08, *in camera*). Daramic analyzed “[m]arket segment offerings and competition” in SLI and “[m]arket segments and current [product] positioning” in “[a]utomotive SLI” at its “Strategic Planning Session: Products and Markets” in April 2008. (PX0395 at 023, 031, *in camera*).
269. Mr. Whear, Daramic’s Vice President of Technology, acknowledged that at the time Daramic HP was developed, in the mid-1990’s, Daramic’s “competitors [in SLI] at the time were two, Entek and a company called Evanite.” (PX0913 (Whear, Dep. at 32), *in camera*).
270. As President of Microporous, Mr. Gilchrist identified “[t]hree primary market segments in [the] lead-acid battery

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industry”: automotive, specialty, and industrial. (PX0078 at 005, *in camera*).

C. The Relevant Geographic Market**1. Price discrimination based on geography**

271. Dr. Simpson correctly concluded that North America is the relevant geographic market within which the acquisition should be analyzed. (Simpson, Tr. 3183; PX0033 (Simpson Report) at 005 & n.5, 006-07, *in camera*).
272. The bases for Dr. Simpson’s conclusion with respect to the geographic market include the ability of manufacturers of deep-cycle, motive, UPS, and SLI battery separators to set different prices for different geographic regions around the world and, in this sense, to price discriminate based on geography. (Simpson, Tr. 3183; PX0033 (Simpson Report) at 005 n.5, *in camera*; PX2251 (Rebuttal Expert Report of John Simpson) (hereinafter “Simpson Rebuttal”) at 005, *in camera*).
273. Dr. Simpson considered, as the Merger Guidelines suggest, geographic markets that consist of particular locations of buyers for which a hypothetical monopolist could profitably and separately (through price discrimination based on geography) impose a small but significant and nontransitory increase in price. (Simpson, Tr. 3183; PX0033 (Simpson Report) at 005 n.5, *in camera*; Simpson Rebuttal at 005, *in camera*); Merger Guidelines § 1.22). A hypothetical monopolist could impose such a price increase on buyers of deep-cycle, motive, UPS, and SLI separators in North America. (Simpson, Tr. 3183; PX0033 (Simpson Report) at 005 & n.5, 006-07, *in camera*; Simpson Rebuttal at 005, *in camera*).

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274. Arbitrage, which might defeat any price discrimination, is discouraged by a number of factors, including manufacturers' direct shipments to customers' plants; freight and other costs of importation; and the preference of some customers for local supply. (PX0920 (Gilchrist IHT at 64-65), *in camera*; Simpson Rebuttal at 005, *in camera*; PX0033 (Simpson Report) at 005 n.5 & 006-07, *in camera*; F. 284, 286-310). Arbitrage is also less likely because separators are, for the most part, differentiated products, made with customer-specific designs. (F. 117; *see generally* F. 85, 92.).

2. Different prices for Daramic in different geographic regions

275. Daramic's pricing of separators typically differs from one customer to another and from one geographic region to another. (Roe, Tr. 1317). Daramic charges different prices in North America than it does in Europe or Asia. (Riney, Tr. 4958, *in camera*). The different prices that Daramic charges in different regions reflect, in part, costs of production that vary from region to region. (Riney, Tr. 4958-59, *in camera*; Roe, Tr. 1317).

276. Daramic's market price in each region is based, in part, on the competitive landscape in that region. (PX0922 (Roe, IHT at 26-28), *in camera*; Roe, Tr. 1317-18).

277. EnerSys has negotiated, and has been charged, different prices by Daramic in different parts of the world. In late 2005, Daramic and EnerSys negotiated an energy surcharge that would **{redacted}** (Axt, Tr. 2137-38, *in camera*; RX0582 at 001-02, *in camera*; RX0584 at 001-02, *in camera*).

278. Exide pays Daramic different prices for the same separator that it buys in different parts of the world. (Gillespie, Tr.

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2998, 3060-62, *in camera*). “There are three different price structures,” for Asia Pacific, Europe, and North America. “Each of those prices [is] set independently.” (Gillespie, Tr. 3061, *in camera*).

279. In negotiations with Exide in April 2009, Daramic proposed different prices in North America than in Europe and Asia for its polyethylene separators. (PX2296 at 002, 005-06, 019, *in camera*). Its prices for those regions, “based on individual part numbers purchased by each Exide Technologies plant location(s),” are difficult to compare because of unspecified or unique part numbers, different currencies, different delivery terms, and consigned inventory for the European manufacturing plants only. (PX2296 at 003-06, *in camera*).
280. The average price per square meter of Daramic’s SLI separators is around \$.70 in North America, compared to around \$1.00 in Europe at present exchange rates. (Roe, Tr. 1313-14). This price differential is, in part, explained, by the typically thicker backweb of SLI separators used in Europe. (Roe, Tr. 1313).

3. The attributes of a “world-class” separator supplier

281. Only a few “world-class” separator manufacturers are capable of supplying the separators that Exide needs. (Gillespie, Tr. 2955-58).
282. A separator manufacturer must have the following attributes to be a viable option for Exide: (a) the ability to provide a quality product that meets Exide’s specifications on a consistent, reliable basis; (b) the technology to be able to provide for Exide’s current and future needs; (c) the requisite infrastructure, management team, and wherewithal; (d) sufficient capital to invest in equipment and R&D; (e) the logistical ability to supply Exide’s facilities on a global basis; (f) pricing to meet Exide’s

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commercial needs and to yield year-over-year reductions in Exide's total costs; (g) the ability to improve its own processes and methodologies, and to realize efficiencies, to provide mutual gains to both Exide and itself; and (h) the engineering and technological knowledge to supply the right separator, to develop an improved separator, and to communicate this knowledge to the customer. (Gillespie, Tr. 2956-58).

4. Supply from North American plants to North American customers

283. At present, all of the polyethylene SLI separators for Exide's North American plants come from Daramic's United States plants. The sole Daramic product that Exide imports to the United States is Darak, which is manufactured only in Germany. (Gillespie, Tr. 3036-37, *in camera*).
284. All of the battery manufacturers in North America that purchase polyethylene SLI separators from Daramic receive those separators from Daramic's plants in the United States. (Hauswald, Tr. 716-17).
285. Exide is considering Entek as an alternative source of supply to Daramic for SLI separators. The communications between Exide and Entek on this subject have centered around supply for Exide's North American battery plants from Entek's plant in the United States, and supply for Exide's European plants from Entek's plant in the United Kingdom. (Gillespie, Tr. 3037, *in camera*).

5. The advantages of local supply

286. It is advantageous for a separator manufacturer to offer its customers a local source of supply. (RX1498 at 001, *in camera*; PX0582 at 018).

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287. One advantage of local separator supply is a reduced risk to the customer of supply chain disruption. (Hauswald, Tr. 724-25).
288. The shipment of separators to a customer overseas entails greater freight, warehousing, inventory, and other costs than less distant supply. (Gilchrist, Tr. 595-96, 599). Microporous exported 75% of the CellForce separators that it produced at Piney Flats to Hawker/EnerSys facilities in Europe. (Gilchrist, Tr. 345). Microporous shipped these separators to Hawker/EnerSys in containers, at a freight cost of several thousand dollars per container. (Gilchrist, Tr. 599). It typically took from eighteen to twenty-one days for these shipments to reach Europe. (Gilchrist, Tr. 595). With such a long supply chain, the customer had to hold and warehouse additional inventories as reserve stock. (Gilchrist, Tr. 595, 599).
289. Ocean transport is the most economical mode for shipping separators across the ocean. (Hauswald, Tr. 723). It would take six to eight weeks for separators from China to arrive in the United States by ship. (Hauswald, Tr. 722-23).
290. With a shorter supply chain, the battery manufacturer has increased flexibility in ordering separators for its production lines. The battery manufacturer could, for instance, order separators several days, rather than one month, before using them on its production lines. (Gilchrist, Tr. 595-96).
291. A local supplier can also respond more quickly to any technical and quality issues that the battery manufacturer may have with its separators. (Gilchrist, Tr. 595; PX0919 (Riney, IHT at 429), *in camera*).

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292. Local or regional supply, from multiple plant locations around the world, is a factor that Daramic uses as a selling point. (Roe, Tr. 1318-19). For example, in a letter in 2003 to JCI, Daramic raised the possibility of building a new plant in Brazil that could supply JCI's Brazilian battery manufacturing plant on a local basis. (RX1188 at 001; Roe, Tr. 1321). According to Daramic, the new separator plant that it proposed offered several advantages to JCI. These included a reduction in the then-high import duties that JCI had to pay in Brazil, as well as, in its Brazilian plant's lead-times for product and need-to-carry inventory. (Roe, Tr. 1321-22; RX1188 at 003).
293. Local separator supply, as opposed to supply from a more distant location, might yield not only tangible cost savings for a battery manufacturer, but benefits from readier access to, and more frequent interactions with, Daramic's sales and technical support personnel. (Roe, Tr. 1322-24; RX1188 at 003).
294. JCI's Brazilian affiliate, Enertec, recognized the advantage of local separator supply. (PX0652 at 001; PX0653 at 001). In 2003, Enertec offered to sell land near its Sorocaba, Brazil facility to Daramic at a price that represented, in Daramic's view, a deep discount from the land's market value. (PX0652 at 001; PX0653 at 001). "Enertec is not selling us land for the money; they are looking for a Brazil supplier." (PX0652 at 001). "[T]hey understand the advantage of a lower landed cost by having a battery separator plant near." (PX0653 at 001).
295. During the time period of 2004 through 2007, JCI sought to develop new suppliers in Asia that were capable of PE SLI manufacturing. (Hall, Tr. 2702). JCI's goal was "to introduce some competition in the region," and to "provide[] regional competitiveness." (Hall, Tr. 2702;

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PX1509 at 009, *in camera*; Hall, Tr. 2878, *in camera*).
{redacted} (Hall, Tr. 2856, *in camera*).

296. JCI's global separator strategy describes local supply in certain cases as an "[a]dvantage for both service and cost." (PX1522 at 004, *in camera*). At the same time, JCI saw that "[c]onsolidation and scale of [separator] manufacturing facilities" enabled "maximum leverage of tooling" and other efficiencies. (PX1522 at 003, *in camera*). JCI recognized that "Entek has global economic range through its production facilities in the US and UK." (PX1522 at 003, *in camera*; Hall, Tr. 2816-19, *in camera*; Hauswald, Tr. 1044-45 (acknowledging that Entek, with only two plants (one in Oregon and one in England), supplies not only JCI and East Penn Battery in the Eastern United States, but several different customers in Asia)).
297. EnerSys prefers to have its suppliers close to, or at least in the same geographic region as, its largest battery manufacturing plants. (Axt, Tr. 2108). As a large battery manufacturer in both North America and Europe, EnerSys would like to have both a North American and a "pan-European" "local supply base." (Axt, Tr. 2108). As part of its supply base, EnerSys would prefer to have a separator supplier with plants in both North America and Europe. (Burkert, Tr. 2385; RX0224). A separator supplier with two plants in North America and none in Europe would be less desirable to EnerSys. (Burkert, Tr. 2386).
298. With suppliers that are closer to its plants, EnerSys can lower its costs and worry less about supply interruptions. (Burkert, Tr. 2467). Local supply, as compared to supply from overseas, would reduce EnerSys' shipping costs, freight forwarding fees, import duties, and inventory-carrying and logistical costs. (Axt, Tr. 2109, 2130). It would ensure more timely supply and dramatically shorten lead-times for delivery by eliminating, in the case of

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shipments across the Atlantic, three weeks on the ocean. (Axt, Tr. 2130).

299. Prior to the opening of Microporous' plant in Austria, EnerSys purchased CellForce separators for its **{redacted}** as well as its **{redacted}** from Microporous' plant in Tennessee. (PX1200 at 002, *in camera*; Axt, Tr. 2141-42, *in camera*). Supplying these affiliates by ocean freight was "a big concern" to EnerSys because of the time that it took and the added inventory that EnerSys thus had to carry at its factories. (Axt, Tr. 2142, *in camera*).
300. Microporous and EnerSys signed a Memorandum of Understanding ("MOU") on February 10, 2006. (PX1200 at 001, *in camera*). EnerSys stresses in this document the importance of less distant separator supply for **{redacted}** (PX1200 at 002, *in camera*). The MOU states:
- {redacted}**
- (PX1200 at 002-03, *in camera*).
301. The "primary intent" of Microporous' expansion into Europe (*see generally* 769-86) was to supply customers with European manufacturing plants from Microporous' plant in Europe. (Trevathan, Tr. 3709). Reduced shipping and logistical costs, shortened lead-times, and customers' preference for less distant supply were factors in Microporous' decision to expand into Europe. (Trevathan, Tr. 3709).
302. After Microporous opened its Feistritz facility, Hawker/EnerSys no longer had to pay ocean shipping costs of several thousand dollars per container to import CellForce separators from Piney Flats. (Gilchrist, Tr. 599). EnerSys could then economize on warehouse space

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in Europe, and Microporous could economize on consigned stock. (Gilchrist, Tr. 599).

303. East Penn Battery suggested on multiple occasions that Entek operate a plant on the East Coast that could provide local (or less distant) separator supply to East Penn Battery. (Leister, Tr. 4020-21). East Penn Battery was told that Entek would take its suggestions under advisement. (Leister, Tr. 4020-21). East Penn Battery understood this to mean that Entek was not going to move forward with establishing a manufacturing operation on the East Coast. (Leister, Tr. 4020-21).
304. With Entek out of the picture for local supply, East Penn Battery turned towards Microporous. (Leister, Tr. 4021). East Penn Battery initiated conversations with Microporous about supplying it with PE SLI separators. (Leister, Tr. 4006-07; PX0141). East Penn Battery was looking for an alternate source of supply, on the East Coast, with the aim of obtaining better service and reducing the lead-times, freight charges, and inventory carrying costs that were associated with the shipment of SLI separators from Entek's West Coast facility to East Penn's Battery plant in Lyon Station, Pennsylvania. (Leister, Tr. 4007-09).
305. Local (or less distant) supply would also have facilitated meetings on a regular basis with the separator supplier's sales representatives and engineers. (Leister, Tr. 4026). Such meetings and communications are important to East Penn Battery, and are a factor in its evaluations and rankings of suppliers. (Leister, Tr. 3986-87, 4026).
306. East Penn Battery is not currently considering PE separator purchases from Anpei or any other Asian supplier. (Leister, Tr. 4035-36). Separator supply from Asia would, in East Penn's Battery view, pose an even

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greater logistical challenge than separator supply from Entek in Oregon. (Leister, Tr. 4035).

307. Entek changed the location at which it produced industrial PE separators from Oregon to the United Kingdom in the early 2000's. (Balcerzak, Tr. 4097, 4128). The quality of its product deteriorated such that Crown Battery disqualified Entek's separators for use in Crown Battery's industrial batteries. (Balcerzak, Tr. 4097).
308. Crown Battery "like[s] to run [its] inventories very lean" and seeks just-in-time delivery of its separator supplies. (Balcerzak, Tr. 4129-30). Shipment of material from overseas would make it more difficult to maintain just-in-time production methods. (Balcerzak, Tr. 4130).
309. Douglas Battery has a preference for local supply because it saves time, reduces travel, facilitates just-in-time production, and enables the supplier to respond more quickly to any concerns with its separators. (Douglas, Tr. 4080). If the domestic price of motive separators were to increase by 5%, Douglas Battery would still not look for offshore separator supply. (Douglas, Tr. 4082). "[T]here would have to be compelling reasons to do that" in view of that battery manufacturer's preference for local supply. (Douglas, Tr. 4082).
310. One of the explicit rationales for Daramic's Rama III project – a new PE separator production line in 2007 to 2008 at its Prachin Buri, Thailand plant – was "Asia market growth." (PX0640 at 001, 003). The only other locations that Daramic appears to have considered for this expansion of capacity to serve the growing Asian market were also in Asia, and specifically in China. (PX0924 (Jensen, Dep. at 72), *in camera*).

6. International trade in battery separators

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a. Shipments by Daramic

311. Daramic has not shipped separators from either of its Asian manufacturing plants to its customers in North America. (Roe, Tr. 1233-34). Daramic did not even ship separators from its Asian plants to its North American customers during the 2008 strike at its Owensboro plant. (Roe, Tr. 1234).
312. In March 2008, Daramic calculated a freight cost ranging **{redacted}** per square meter, on top of a total direct manufacturing cost of **{redacted}** per square meter, to ship the largest size of CellForce from the Piney Flats plant in Tennessee, to EnerSys in Europe. (PX0782 at 002, *in camera*; PX0912 (Riney, Dep. at 240), *in camera*).
313. During the strike at Daramic's Owensboro plant in 2008, EnerSys was able to obtain from Daramic's Feistritz, Austria facility separators that EnerSys' plant in Monterrey, Mexico could use. (PX1285; Burkert, Tr. 2333). EnerSys projected it would cost around \$25,000 by air or \$2,000 by ship to deliver 100,000 feet, of separators from Feistritz to Monterrey. (PX1285). Delivery by ship was estimated to take about 25 days. (PX1285). EnerSys' costs for its manufacturing operation in Monterrey, factoring in duties, freight, and currency conversion charges, were approximately 20% more to replace separators from Daramic's Owensboro plant during the 2008 strike, with separators from Daramic's Feistritz plant. (Burkert, Tr. 2333-34).

b. International shipments, and potential shipments, by BFR**(i) Barriers to separator exports from China**

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314. Freight charges and, in a number of countries, import duties, add to the price of separators that are sold abroad. (Hall, Tr. 2721-22).
315. BFR, like other producers in China, faces other barriers to the export of its separators. (PX1522 at 005, *in camera*; F. 320-23).
316. Lead-acid battery separators that are exported from China incur a value-added tax (“VAT”). (Thuet, Tr. 4352-53, *in camera*, 4404-05). While this VAT could be repealed or modified, it has been in place for years. (Thuet, Tr. 4353, 4405). The Chinese VAT on separator exports, including Daramic’s from its Tianjin facility as well as BFR’s, is a non-recoverable charge of 12%. (Thuet, Tr. 4404-05; Hall, Tr. 2717).
317. The Chinese VAT raises the costs of separators that are exported relative to separators that are sold in China. (Thuet, Tr. 4405; Hall, Tr. 2717). The Chinese VAT, thus, discourages the production in China of separators for export. (PX0871 at 002, *in camera* (with Daramic’s Mr. Thuet cautioning, “We should really consider twice when speaking about exporting [material from our Tianjin plant in China] until we have found a solution to overpass this issue [of the VAT].”). The Chinese VAT erects an “economic export barrier,” that reduces the competitiveness of separators produced in China relative to separators produced in countries without a VAT, or without so high a VAT. (PX1522 at 005, *in camera*). The non-recoverable VAT would have added the equivalent of **{redacted}** (PX1522 at 005, *in camera*; Hall, Tr. 2723-27, *in camera*).
318. The 12% Chinese VAT could, however, be reduced by up to one-third, to an effective rate of 8%, if “bonded manufacturing” facilities were set up and the applicable

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regulations followed. (Hall, Tr. 2846-47, 2894, *in camera*). With bonded manufacturing, “a very defined, separated and controlled manufacturing space and material storage space” would have to be set up; “all the material in and out of that part of the plant” would have to be tracked; and a “duty book” would have to be maintained. (Hall, Tr. 2846-47, *in camera*).

319. The foreign exchange value of the Chinese currency, the renminbi (“RMB”), represents a barrier to BFR’s exports from China. (PX1522 at 005, *in camera*; Hall, Tr. 2717-18). The RMB strengthened against the United States dollar and other currencies after China ceased to maintain a fixed “peg” to the dollar. (Hall, Tr. 2718-19). That strengthening of the foreign exchange value of the Chinese currency made BFR’s separators more expensive to purchasers outside of China than they would have been before the RMB was “unpegged” from the United States dollar in 2005. (Hall, Tr. 2718-19; PX1522 at 005, *in camera* (**{redacted}**)).

(ii) Higher overall costs for BFR than for Daramic and Entek

320. BFR appears to have higher overall costs than Daramic and Entek. (Hall, Tr. 2734-35, *in camera*; PX1522 at 005, *in camera*; F. 324-31).
321. It is the view of Mr. Kung, a principal of BFR with considerable experience in separator production, that economies of scale are the major source of Daramic’s cost advantage vis-à-vis BFR. (F. 262, 445, PX0907 (Kung, Dep. at 189), *in camera*). Daramic’s larger production lines are more efficient than BFR’s smaller lines. (PX0907 (Kung, Dep. at 187, 189), *in camera*). In Mr. Kung’s words: “The major issue [in comparative cost] is per unit time. Daramic is mass production. They can produce a lot of material per hour or per day. Their

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machine is very big.” (PX0907 (Kung, Dep. at 189), *in camera*).

322. Entek, as well as Daramic, has cost advantages in the United States relative to BFR in China, not only as a result of economies of larger-scale production but also as a result of less distant sources of raw material and better prices for the greater volumes of raw material that Entek and Daramic buy. (PX0907 (Kung, Dep. at 172-73), *in camera*).
323. Mr. Hall, {redacted} performed a benchmarking analysis that compared Daramic’s, Entek’s, and BFR’s costs of producing a battery separator. (Hall, Tr. 2716, 2724, *in camera*). {redacted} (Hall, Tr. 2716, 2724, *in camera*). The analysis did not purport to provide “definitive number[s]” but rather “guidelines” in conducting business. (Hall, Tr. 2732, *in camera*).
324. In Mr. Hall’s benchmarking analysis, one square meter of a single size of separator was used as the standard or benchmark: {redacted} (Hall, Tr. 2725, *in camera*). This is the predominant size of separator that JCI uses in its batteries on a global basis. (Hall, Tr. 2725, *in camera*). Mr. Hall used cost data from 2007, because that was the year for which he had the best information for all three suppliers. (Hall, Tr. 2725-26, *in camera*). The cost data that he used were costs “across the business” for each of the three separator suppliers, rather than costs on a per product basis. (Hall, Tr. 2847-48, *in camera*).
325. Mr. Hall’s benchmarking analysis examined “material” costs – the costs of the separator’s component raw materials (chiefly polyethylene, oil, and silica) – as well as “conversion,” sales, general, and administrative costs. (Hall, Tr. 2726, *in camera*; PX1522 at 005, *in camera*). The “conversion” costs are the manufacturing (including

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“fixed overhead,” energy, and labor) costs. (Hall, Tr. 2726, *in camera*). Because so much of the manufacturing process is automated, labor is not a large component of separator manufacturing or conversion costs. (Hall, Tr. 2727-28, *in camera*).

326. Mr. Hall obtained data for his benchmarking analysis from multiple sources, including discussions with all three suppliers regarding their costs for the materials in a separator. (Hall, Tr. 2724-25, *in camera*). **{redacted}** (Hall, Tr. 2847, *in camera*). Provisions in JCI’s contract with Daramic from 2004 through 2008 gave Mr. Hall “a window into” the prices that Daramic was paying for specific materials. (Hall, Tr. 2730, *in camera*). Since Entek uses the same, or mostly the same, suppliers as Daramic, but buys in smaller volumes than Daramic, Mr. Hall assumed that Entek’s prices for materials were close to, but not quite as good as, Daramic’s. (Hall, Tr. 2730-31, *in camera*).
327. In determining Entek’s conversion or manufacturing costs, Mr. Hall used information from **{redacted}** (Hall, Tr. 2731, *in camera*). That information specified the total or overall costs of Entek’s separators and not simply the prices that Entek **{redacted}** (Hall, Tr. 2731, *in camera*). Mr. Hall subtracted Entek’s estimated costs for materials from its overall costs to arrive at its conversion or manufacturing costs. (Hall, Tr. 2731, *in camera*). Since Daramic has greater “scale” than Entek – as illustrated by Daramic’s multiple, versus Entek’s only two, manufacturing plants – Mr. Hall projected slightly higher manufacturing costs for Daramic than for Entek. (Hall, Tr. 2732, *in camera*).
328. Mr. Hall’s benchmarking analysis yielded the following costs for the materials that Daramic, Entek, and BFR each needed to produce one square meter of **{redacted}** backweb separator in 2007: **{redacted}** for Daramic,

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{redacted} for Entek, and {redacted} for BFR. (PX1522 at 005, *in camera*). The somewhat higher costs that BFR pays for materials than Daramic and Entek may, in part, reflect the smaller volume that BFR purchases and the lesser leverage that it has with its suppliers. (Hall, Tr. 2727).

329. Mr. Hall's benchmarking analysis derived, for the same three companies (Daramic, Entek, and BFR), the following manufacturing or conversion costs, plus sales, general, and administrative costs, for one square meter of {redacted} backweb separator in 2007: {redacted} for Daramic, {redacted} for Entek, and {redacted} for BFR. (PX1522 at 005, *in camera*). The significantly higher manufacturing costs, plus sales, general, and administrative costs, for BFR than for Daramic and Entek are ascribed by Mr. Hall primarily to the latter two companies' greater economies of scale – in other words, to the efficiencies that they can realize from their higher volumes of production. (Hall, Tr. 2733-34, *in camera*).
330. Mr. Hall's benchmarking analysis arrived at the following total costs to produce one square meter of a {redacted} backweb separator in 2007: {redacted} for Daramic, {redacted} for Entek, and {redacted} for BFR. (PX1522 at 005, *in camera*; Hall, Tr. 2734-35, *in camera*). As these data indicate, "BFR is disadvantaged" on a cost basis versus its "competitors due to [its] current scale." (PX1522 at 005, *in camera*). For any exports to North America, BFR would be further disadvantaged by freight charges and by the non-recoverable VAT. (PX1522 at 005, *in camera*; F. 316, 318-20).
331. {redacted} (Hall, Tr. 2844-45, *in camera*; PX1522 at 005, *in camera*). {redacted} (PX1522 at 005, *in camera*) (emphasis added). {redacted} (PX1522 at 005, *in camera*).

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(iii)BFR's competitiveness in North America

332. BFR cannot, at present, sell separators in North America at competitive prices, because it has higher costs than its competitors. (Hall, Tr. 2746-47, *in camera*).
333. Daramic has never competed with BFR for business in North America. (Roe, Tr. 1807). Daramic competes with BFR only in China. (PX0907 (Kung, Dep. at 296-98), *in camera*).
334. Mr. Hall of JCI is not aware of any customers of BFR in North America. (Hall, Tr. 2745, *in camera*).
335. BFR cannot compete on price with Daramic and Entek in selling PE separators to customers in the United States. (PX0907 (Kung, Dep. at 172), *in camera*). In this country, the delivered price of a separator from BFR would be significantly higher, and might be **{redacted}** more, than the price of a separator from Daramic or Entek. (PX0907 (Kung, Dep. at 172), *in camera*). In Mr. Kung's words, "[D]efinitely I know one thing for sure, we [BFR] cannot compete against local producer[s] here." (PX0907 (Kung, Dep. at 172), *in camera*).
336. There are three additional explanations for BFR's lack of separator sales to customers in North America. (PX0907 (Kung, Dep. at 176-77), *in camera*). First, BFR can sell at higher prices in Asia than in North America, where there is greater competition. It is, thus, more profitable, at constant manufacturing costs, for BFR to sell in Asia. (PX0907 (Kung, Dep. at 176-77), *in camera*). Second, BFR does not have enough English-speaking staff to service the North American market. (PX0907 (Kung, Dep. at 176-77), *in camera*). Third, **{redacted}** (PX0907 (Kung, Dep. at 186-87), *in camera*).

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337. The average price at which BFR sells its separators in China is **{redacted}** per square meter in 2009. (Hall, Tr. 2745, *in camera*). By comparison, the global average price at which Entek sells its separators to JCI is **{redacted}** per square meter. (Hall, Tr. 2745, *in camera*).
338. BFR and the other Asian separator manufacturers are smaller in size and higher in cost than Entek or Daramic. It is, accordingly, more feasible for the Asian separator manufacturers, including BFR, to supply product to Asia, where there is less competition, than to North America. (Hall, Tr. 2746, *in camera*).
339. **{redacted}** (Hall, Tr. 2745, *in camera*). **{redacted}** (Hall, Tr. 2745-46, *in camera*). **{redacted}** (Hall, Tr. 2746, *in camera*).
340. In its search for alternative sources of PE industrial – specifically, motive and UPS – separators, EnerSys identified two companies in Asia, **{redacted}** which both make only automotive separators at present. (Axt, Tr. 2216-17, *in camera*). EnerSys is starting to work with these companies with the hope that one of them might someday serve as a second source to Daramic for PE industrial separators. (Axt, Tr. 2217-19, *in camera*).
341. According to EnerSys, the “pricing out of Asia would still be higher than the proposed Daramic increase that’s on the table today.” (Axt, Tr. 2220, *in camera*). **{redacted}** (Axt, Tr. 2217, *in camera*; Burkert, Tr. 2365, *in camera*). **{redacted}** (Axt, Tr. 2217, *in camera*; Burkert, Tr. 2365, *in camera*). **{redacted}** (Axt, Tr. 2217-18, *in camera*).
342. **{redacted}** price quote to EnerSys for PE separator samples in October 2007 was “substantially higher,” even excluding freight costs, than Daramic’s price for that separator profile at that time. (PX1248 at 001, *in camera*).

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343. BFR has no intention of selling PE separators in North America. (PX0907 (Kung, Dep. at 186-87), *in camera*).
344. {redacted} (Hall, Tr. 2879, *in camera*).

c. Other foreign separator suppliers' competitiveness in North America

345. Separator manufacturers other than Daramic and Entek, including Amer-Sil in Luxembourg and firms in China and India, are predominantly local or regional, rather than global, suppliers. (Gilchrist, Tr. 307-08).
346. As Vice President of Sales and Marketing at Daramic, Mr. Roe is responsible for competitive intelligence – knowledge of the competitive landscape in which Daramic operates. (Roe, Tr. 1193-94). Mr. Roe is not aware of any instance, either before or after Daramic's acquisition of Microporous, in which an Asian producer has supplied a North American battery manufacturer with a PE, PE-rubber hybrid, or a pure rubber separator for a flooded lead-acid application. (Roe, Tr. 1236-37). Mr. Thuet, the business director for the Asia Pacific region at Daramic, is also not aware of any instance in which Daramic has faced competition in North America for PE separators for automotive, motive, stationary, or deep-cycle applications. (Thuet, Tr. 4319, 4381-82). Daramic, which collects information and compiles data on its competitors' sales, has not to date recorded sales for Asian separator suppliers in North America. (Seibert, Tr. 4266-67, *in camera*).
347. Daramic acknowledges competition with Asian separator suppliers outside of North America, not only in Asia, but also in Europe, with {redacted} and in South America with {redacted} (Seibert, Tr. 4165, *in camera*). According to Polypore's CEO, the Asian separator suppliers are not making sales in North America because

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their profit margins would not be high enough here. (Toth, Tr. 1404).

348. Microporous did not regard the Asian separator suppliers as competitive threats in the automotive separator business in North America. (Gilchrist, Tr. 308).
349. Mr. Weerts, of Entek, is aware of no separator imports from Asia into North America. (Weerts, Tr. 4500, *in camera*). Transportation costs and customs duties make it more difficult for Asian separator suppliers to be cost-competitive in North America. (Weerts, Tr. 4502-03, *in camera*). Entek has not had to adjust its prices in North America in response to any competition from separator suppliers in Asia. (Weerts, Tr. 4501, *in camera*).
350. Amer-Sil does not currently have any separator customers in North America. (PX0916 (Dauwe, Dep. at 40), *in camera*). During 2008, Amer-Sil made no sales to customers in North America as of mid-November. (PX0916 (Dauwe, Dep. at 35), *in camera*). Prior to 2008, Amer-Sil had some sales of separators in North America. (PX0916 (Dauwe, Dep. at 29-34), *in camera*). **{redacted}** (RX1606 at 001; RX1607 at 001; RX1608 at 001, 004; PX0916 (Dauwe, Dep. at 29-34), *in camera*).
351. The decline in Amer-Sil's separator sales in North America reflects in part North American customers' reluctance to use PVC in their batteries. (See F. 157-58, 200-03). **{redacted}** (Gagge, Tr. 2512, 2520-21, *in camera*).
352. Amer-Sil's sales in North America from 2005 through 2007 were, moreover, separators for gel, rather than flooded lead-acid, batteries. (PX0916 (Dauwe, Dep. at 152), *in camera*).

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353. Amer-Sil has no current plans to sell separators for flooded lead-acid batteries in North America. (PX0916 (Dauwe, Dep. at 152), *in camera*).
354. Daramic is seeking a separator price increase of approximately **{redacted}** from EnerSys. (Craig, Tr. 2552, *in camera*). Any such price increase for separators would not prompt EnerSys to switch to a different battery technology and would have “very little to no impact on the price to [EnerSys’] customers.” (Craig, Tr. 2552-53, *in camera*). Separator costs are only a small proportion of total battery costs, and EnerSys would absorb such a small price increase, rather than pass it along, to maintain good customer relations. (Craig, Tr. 2553-54, *in camera*).
355. EnerSys would not respond to a hypothetical **{redacted}** price increase by Daramic in North America by importing motive or UPS separators from another supplier in another region, as “[t]here’s only one source available to [EnerSys].” (Craig, Tr. 2567, *in camera*). EnerSys does not import motive or UPS flooded lead-acid batteries into North America, because it would not be cost-effective to pay for the freight, duty, and handling costs on such larger batteries and would not begin to import motive or UPS flooded batteries in response to a hypothetical **{redacted}** increase in Daramic’s separator prices in North America alone. (Craig, Tr. 2549-53).

7. Respondent’s expert analysis

356. Respondent’s economic expert, Dr. Henry J. Kahwaty, a director of LECG, (Kahwaty, Tr. 5062), concluded that the relevant geographic market in which the acquisition should be analyzed is global. (Kahwaty, Tr. 5158, 5172-73, *in camera*; RX0945 (Expert Report of Henry J. Kahwaty, Ph.D) at 49-58, *in camera* (“Kahwaty Report”)).

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357. Among the bases for Dr. Kahwaty's conclusion that the geographic market is global is the substantial international trade that takes place in battery separators. (Kahwaty, Tr. 5161-63, *in camera*). Dr. Kahwaty states that Daramic exports around {redacted} while Entek exports around {redacted} of its North American production. (Kahwaty Report at 51, *in camera*). However, the export data to which Dr. Kahwaty alludes cannot be confirmed by the documents cited by Dr. Kahwaty and Respondent.
358. Dr. Kahwaty found an average contribution margin of {redacted} on the PE separators that Daramic produces at its four plants in North America. (Kahwaty Report at 51, *in camera*). At this contribution margin, the critical loss is {redacted} (Kahwaty Report at 51, *in camera*). Absent an ability to price discriminate, a hypothetical monopolist in North America could, based on these data, profitably impose a 5% price increase, only if it would then lose less than {redacted} of its sales to producers in other regions. (Kahwaty Report at 50-51, *in camera*). Dr. Kahawaty concluded that "given the extent of exports, which are substantial and in particular substantially larger than the critical loss, that price increase [of 5%] would not be profitable," (Kahwaty, Tr. 5160, *in camera*), and that a geographic market confined to North America would be too narrow. (Kahwaty Report at 52, *in camera*).
359. Dr. Kahwaty considered Asian producers as the "next best substitute" for North American producers. (Kahwaty, Tr. 5161, *in camera*; Kahwaty Report at 52, *in camera*).
360. Dr. Kahwaty disagreed with Dr. Simpson's evaluation that battery separator manufacturers can price discriminate based on geography, and maintain different prices in North America than in other parts of the world. (Kahwaty, Tr. 5163-65, *in camera*). According to Dr. Kahwaty, international price discrimination in separator sales would be defeated by arbitrage. (Kahwaty, Tr. 5165-68, *in*

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camera). Dr. Kahwaty was not able, however, to cite to any specific examples of international arbitrage in separator sales other than an intracorporate Daramic transaction. (Kahwaty, Tr. 5363-64, *in camera*). His conclusion with respect to arbitrage was based, rather, on his expectations of what would happen in response to a hypothetical price increase of 5% by separator suppliers in North America, given his assumptions about costs and prices in, and transportation costs between, different markets. (Kahwaty, Tr. 5164-70, *in camera*).

361. In analyzing the relevant geographic market and reaching the conclusion that arbitrage would defeat any international price discrimination, Dr. Kahwaty compared Daramic's estimated marginal or variable production costs, for automotive separators with an eight mil backweb, at its North American plants with its comparable costs at its Prachinburi plant in Thailand and its Tianjin plant in China. (Kahwaty, Tr. 5168-70, *in camera*; Kahwaty Report at 55 & nn.188-89, 177, *in camera*). Dr. Kahwaty calculated higher variable production costs for Daramic of **{redacted}** in North America versus **{redacted}** in Thailand. (Kahwaty Report at 55, 177 & n.189, *in camera*); Kahwaty, Tr. 5168-69, *in camera*). The comparable costs for Daramic in China, at its Tianjin plant, were, he stated, **{redacted}** (Kahwaty Report at 177, *in camera*; Kahwaty, Tr. 5168, *in camera*).
362. Dr. Kahwaty added transportation costs of **{redacted}** per square meter from Thailand to North America. (Kahwaty, Tr. 5166, 5169-70, *in camera*). These added costs, according to his report, were based on Daramic's shipping quotes and duties from its Prachinburi to its Owensboro, Kentucky plant. (Kahwaty Report at 177, *in camera*). Dr. Kahwaty estimated higher delivered costs from China to North America, based on Daramic's shipping quotes and duties of **{redacted}** along with a VAT of **{redacted}**

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from Tianjin to Owensboro. (Kahwaty Report at 177, *in camera*).

363. Dr. Kahwaty compared, for automotive separators with an eight mil backweb, the “realistic” delivered costs in North America from Daramic’s larger-scale Asian plant, in Prachinburi, Thailand, **{redacted}** to Daramic’s average prices in North America, plus a hypothetical 5% increase **{redacted}** (Kahwaty Report at 177, *in camera*; Kahwaty, Tr. 5168-70, *in camera*). He concluded, based on these data, that there is “a substantial margin to enable product to be produced in Asia and shipped into North America” to defeat a price increase of 5%, and a fortiori of 10%, by a hypothetical monopolist in North America. (Kahwaty, Tr. 5168-70, *in camera*).
364. Dr. Kahwaty pointed to testimony by Mr. Thuet of Daramic as further support for his conclusions that international price discrimination would be defeated by arbitrage and that the relevant geographic market is global. (Kahwaty, Tr. 5165-68, *in camera*). Mr. Thuet had testified that the cost of producing separators was lower at Daramic’s plant in Thailand, and even at Daramic’s plant in China, than at its plant in Corydon, Indiana. (Thuet, Tr. 4422-23, *in camera*). SLI separators in roll form would, according to Mr. Thuet, cost **{redacted}** more to produce at Daramic’s plant in Corydon, Iowa than at its plant in Tianjin. (Thuet, Tr. 4434-35, *in camera*; *see also* Thuet, Tr. 4423-24, 4433-34, *in camera* (attributing the higher average prices of SLI separators in Tianjin than in Corydon to the different product mix, with most of the product sold in envelopes and cut pieces, in China)).
365. Dr. Kahwaty did not attempt to reconcile the finding in his report that variable production costs are **{redacted}** higher for Daramic in China than in North America, (*see* F. 361), with Mr. Thuet’s statement that production costs are

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instead **{redacted}** higher for Daramic in North America than in China. (See F. 364).

366. Dr. Kahwaty concluded: “It’s very difficult looking at the data to understand how it is that cost in Asia could be so high that [Asian producers] can’t profitably compete in North America.” (Kahwaty, Tr. 5170, *in camera*). Dr. Kahwaty admitted, however, that he did not analyze cost or price information for any separator producer in Asia other than Daramic. (Kahwaty, Tr. 5364-65, 5368, *in camera*). He also indicated that he was not aware of any shipments, other than certain Daramic shipments from its plant in China to its plant in Kentucky, from any Asian separator plant to any battery manufacturer in North America. (Kahwaty, Tr. 5369-70, *in camera*).
367. Dr. Kahwaty acknowledges that “there would be benefits of local supply,” such as “reduced logistics concerns, . . . avoidance of potential supply disruption from longer logistics lines and things like that.” (Kahwaty, Tr. 5171, *in camera*). Warehousing of a one to three month stock of goods from abroad can, he argues, “provide the same benefits” as local supply. (Kahwaty, Tr. 5171, *in camera*). Warehousing would, however, impose additional costs – including handling, storage, and the opportunity cost of allocating resources to purchase or supply the warehoused stock itself – on the supplier, the customer, or both. (Kahwaty, Tr. 5171-72, 5377-80, *in camera*).
368. Types of costs that the warehousing of separators entails include: incremental freight, from double-handling the material in and out of the warehouse; warehousing fees; scrap and damage from things sitting around; and cash tied up in inventory. (Gillespie, Tr. 5830-31, *in camera*).
369. Dr. Kahwaty observed that Asia has historically been “capacity-poor” in separator production but is now so

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“capacity-rich” that it actually has excess capacity. (Kahwaty, Tr. 5372, 5545, *in camera*). The expansion in Asian capacity could, he opined, have “a general effect” on separator prices in North America. (Kahwaty, Tr. 5377, *in camera*). Dr. Kahwaty has, though, seen nothing to date showing any effect on separator prices in North America from expansions of productive capacity in Asia. (Kahwaty, Tr. 5377, *in camera*).

370. Dr. Kahwaty indicated that he was not aware of any tariff or nontariff barriers to battery separator imports into North America. (Kahwaty, Tr. 5544, *in camera*). There are, however, such trade barriers. EnerSys paid a duty of around 6.5% in 2008, when it had to import separators from Austria into Mexico. (Burkert, Tr. 2402). There is a duty of 3%, Mr. Weerts thought, on separator imports into the United States. (Weerts, Tr. 4503, *in camera*). Mexico imposes a duty, Mr. Hall believed, on separator imports from China. (Hall, Tr. 2722).

D. Market participants and market shares**1. Deep-cycle separator market****a. Market participants**

371. Prior to the acquisition, Daramic and Microporous were the only participants in the deep-cycle battery separator market in North America. (F. 372-83, 442).
372. Prior to the acquisition, Microporous participated in the North American deep-cycle market with its CellForce and Flex-Sil products. (Gilchrist, Tr. 300-01).
373. Prior to the acquisition, Daramic participated in the North American deep-cycle market with its HD product. (Gilchrist, Tr. 343; Leister, Tr. 3978-79; Godber, Tr. 271-

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72; Gillespie, Tr. 2932; Wallace, Tr. 1938, 1946; PX0319 at 007).

374. Prior to the acquisition, the only competitors in the world for the sale of battery separators for deep-cycle applications were Daramic and Microporous. (Godber, Tr. 153-54; Gilchrist, Tr. 305, 343; Wallace, Tr. 1931, 1943; Hauswald, Tr. 674-75; McDonald, Tr. 3948).
375. Prior to the acquisition, Daramic and Microporous competed for the sale of separators that went into golf cart batteries. (Hauswald, Tr. 653-54).
376. U.S. Battery, which primarily manufactures deep-cycle batteries, bought separators for its deep-cycle flooded batteries from only Daramic and Microporous prior to the acquisition. U.S. Battery is not aware of any other suppliers of separators for deep-cycle flooded batteries. (Wallace, Tr. 1942-43, 1945).
377. Crown Battery uses PE separators with a fiberglass mat for its deep-cycle batteries made for floor scrubbers and did use Microporous' Flex-Sil for its golf cart batteries. (Balcerzak, Tr. 4093-95).
378. East Penn Battery does not know whether Entek currently sells deep-cycle separators. East Penn Battery did purchase some deep-cycle separators from Entek in the past, but stopped buying those separators at least three years ago. At that time, East Penn Battery was paying Entek higher prices for deep-cycle separators than East Penn Battery is currently paying to Daramic for HD separators. (Leister, Tr. 3985, 4041).
379. JCI is not aware of any separator manufacturer other than Daramic that can supply a deep-cycle battery separator that will work in JCI's batteries. (Hall, Tr. 2705).

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380. Trojan Battery used only Flex-Sil and CellForce prior to the acquisition and considers Daramic and Microporous to be the only competitors in the deep-cycle market. (Godber, Tr. 153). Trojan Battery is not aware of any separator manufacturer other than Daramic that can supply a deep-cycle battery separator. (Godber, Tr. 289).
381. Trojan Battery did not approach Entek as a potential supplier of deep-cycle battery separators because Trojan Battery had previously tested Entek separators for golf applications in the mid-1990's and was not satisfied with the performance. The technology that Entek had available then is the same as what Entek has today. Since the mid-1990's, Entek has not approached Trojan Battery for its deep-cycle business. (Godber, Tr. 289-90).
382. Entek's sales are almost entirely of SLI separators, with less than one percent of Entek's sales made up of non-SLI separators. (PX1833 at 004, *in camera*; Weerts, Tr. 4504, *in camera*).
383. Entek is not a participant in the deep-cycle market because it has no sales and is not an uncommitted entrant under the Merger Guidelines. (Simpson, Tr. 3461-62, *in camera*).

b. Market shares and HHI

384. Daramic's acquisition of Microporous increased the HHI by 1,891 points to 10,000 in the deep-cycle market. The 2007 data understates the competition between Microporous and Daramic in this market because the firm with the smaller share, Daramic, was in the process of gaining market share, as demonstrated by the chart set forth in F. 385. (Simpson, Tr. 3184-85; 3438, *in camera*; PX0033 (Simpson Report) at 040, 042, *in camera*).

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385. Market shares and HHI calculations for the deep-cycle battery separators in North America from 2005 to 2007 are:

		Sales	Share		
2007	Microporous	{redacted}	89.4	change in HHI	1891
	Daramic	{redacted}	10.6	post-merger HHI	10000
2006	Microporous	{redacted}	92.5	change in HHI	1395
	Daramic	{redacted}	7.5	post-merger HHI	10000
2005	Microporous	{redacted}	96.2	change in HHI	733
	Daramic	{redacted}	3.8	post-merger HHI	10000

(PX0949 at 190-214, *in camera*; PX0949 at 224-33, *in camera*; PX0033 (Simpson Report) at 40, *in camera*).

2. Motive separator market

a. Market participants

386. At the time of the acquisition, Daramic and Microporous were the only market participants in the motive battery separator market in North America. (Gilchrist, Tr. 306-07, 422; PX0078 at 007, *in camera*; *see also* PX0033 (Simpson Report) at 15, *in camera*).
387. Prior to the acquisition, Microporous participated in the North American motive market with its CellForce product. (Gilchrist, Tr. 300-01).
388. Prior to the acquisition, Microporous participated in the North American motive market by selling industrial PE

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separators to East Penn Battery for motive applications. (Leister, Tr. 3999-4000, *in camera*).

389. Prior to the acquisition, East Penn Battery had been purchasing approximately 10 percent of its industrial PE separators from Microporous, even though Microporous' product was higher priced than Daramic's. (Leister, Tr. 4005, *in camera*).
390. Prior to the acquisition, in a contract dated January 2, 2007, and amended in August 2007, Microporous and EnerSys entered into a contract pursuant to which Microporous would supply EnerSys with motive power battery separator requirements from Microporous' Piney Flats plant and, once constructed, from Microporous' planned facility in Europe. The amendment obligated Microporous to add an additional industrial PE line at Piney Flats by June 2009, in exchange for EnerSys committing to additional purchases from Microporous. (RX0207).
391. Prior to the acquisition, Daramic participated in the North American motive market with its Daramic CL and HD products. (PX0211 at 001, *in camera*; Benjamin, Tr. 3503-04).
392. At the time of the acquisition, Entek was not a participant in the North American motive separator market. (Balcerzak, Tr. 4097; Seibert, Tr. 4174, *in camera*).
393. Neither of Entek's manufacturing facilities currently produces motive power separators. PX1833 at 008, *in camera*.
394. Entek was unable to supply Crown Battery with industrial PE separators during the Owensboro strike (*see* F. 952) because Entek did not possess the proper tooling needed to

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make Crown Battery's required profile. (Balcerzak, Tr. 4100-01).

395. When Entek had an opportunity in 2007 to provide a quote to Douglas Battery for motive power separators, Entek understood that it did not have the equipment, and that the prices would not provide sufficient margin to justify the business. (PX1810, *in camera*).
396. When Entek was approached by Bulldog Battery about manufacturing motive separators, Entek told Bulldog Battery it was not interested in the motive market. (Benjamin, Tr. 3520).
397. When Entek received an RFP from Exide in 2007, Entek no-bid on the industrial volume, in part because Entek did not have the capacity; production would require retooling; and Entek believed it could not be competitive on pricing. (Weerts, Tr. 4484, 4507, *in camera*; PX1815 at 001, *in camera*).
398. In recent years, Entek has pursued a strategy of **{redacted}** (Weerts, Tr. 4503, *in camera*; RX0114 at 008, *in camera*). **{redacted}** (Weerts, Tr. 4503-04, *in camera*). **{redacted}** (RX0114 at 008, *in camera*).
399. In today's marketplace, Entek would be willing to supply Exide with industrial product if **{redacted}**. However, at present no agreement has been reached with Exide. (Weerts, Tr. 4489-89, *in camera*).
400. **{redacted}** (PX1833 at 008, *in camera*).
401. Calender rolls cost approximately \$20,000 to \$50,000 a piece. The lead-time from order to delivery of a calender roll takes approximately 12 to 14 weeks. (Gaugl, Tr. 4553-54).

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402. Completion of Exide's **{redacted}** (Gillespie, Tr. 3038-39, *in camera*). Exide is also concerned **{redacted}** (Gillespie, Tr. 3129, 3134-35, *in camera*; PX1092 at 001).
403. Entek is not a participant in the motive market. It has no sales and is not an uncommitted entrant under the Merger Guidelines. (Simpson, Tr. 3461-62, *in camera*).

b. Market shares and HHI

404. According to the executive presentation to the Microporous Board in 2007, Microporous' strategic plan was to increase its share of the United States motive power market from 8% in 2007 to 20% in 2008 to 58% in 2009 through its contracts with EnerSys, as well as with Crown Battery, and through C&D's readiness to switch to CellForce. (PX0080 at 058-59, *in camera*).
405. Microporous anticipated that, by the end of 2009, new sales of CellForce to manufacturers of motive batteries would increase its United States share of the motive market segment to 45 to 50%. (Gilchrist, Tr. 398-99).
406. In considering the strategic implications of an acquisition by Daramic, Microporous calculated that, as a result of the acquisition, Daramic would have more than 97% of the industrial markets for motive power separators worldwide; Amer-Sil in Luxembourg would be the only remaining competitor globally. (PX0076 at 002; Gilchrist, Tr. 422).
407. Crown Battery has only one option for its industrial separator supply, after the acquisition of Microporous by Daramic. (Balcerzak, Tr. 4128).
408. When EnerSys' contract with Daramic expires, EnerSys will continue to purchase separators from Daramic because it has no other choice. (Craig, Tr. 2611).

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409. Daramic's acquisition of Microporous increased the HHI by 1,663 points to 10,000 in the motive market, as shown by the chart set forth in F. 410. (Simpson, Tr. 3185; PX0033 (Simpson Report) at 042, *in camera*).
410. Sales data from 2007 show that the change in HHI and the post-merger HHI for the motive market far exceeds the thresholds listed in the Merger Guidelines. (Simpson, Tr. 3184-85). The 2006-2007 market shares and HHI calculations for motive battery separators in North America are:

		Sales	Shares		
2007	Microporous	{redacted}	9.2	change in HHI	1663
	Daramic	{redacted}	91.8	post-merger HHI	10000
2006	Microporous	{redacted}	10.0	change in HHI	1800
	Daramic	{redacted}	90.0	post-merger HHI	10000

(Simpson, Tr. 3185; PX0033 (Simpson Report) at 042, *in camera*).

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3. UPS separator market**a. Market participants**

411. Prior to the acquisition, Daramic participated in the North American battery separator market for flooded lead-acid UPS batteries with its Daramic CL product. (Burkert, Tr. 2318; Hauswald Tr. 988).
412. Daramic's Darak separator is used in batteries for industrial stationary applications and submarines. Darak can be used in a flooded lead-acid battery or in a valve regulated lead-acid (VRLA) battery (also known as a gel or recombination battery). (PX0949 at 004, *in camera*; Whear, Tr. 4681).
413. Daramic's Darak separator is a polymeric battery separator that is stiff, very chemically stable, and contains no oil. It is not a PE separator product. (PX0949 at 004, *in camera*; Brilmyer, Tr. 1864, 1911).
414. Darak is substantially more expensive than Daramic's PE separators. (Brilmyer, Tr. 1865; Burkert, Tr. 2322).
415. Microporous' CellForce, a PE-based separator with a rubber additive (Ace-Sil dust) can be used in UPS batteries. (Gilchrist, Tr. 307-08, 312, 397-98; Hauswald, Tr. 672).
416. Prior to the acquisition, Microporous sold CellForce separators to C&D for its gel-based VRLA batteries. (Gilchrist, Tr. 398; PX2110 at 006).
417. Prior to the acquisition, Microporous embarked on Project LENO, a component of which was the development of a new product, white PE, to compete with Daramic's battery separators in the UPS flooded lead-acid market. Microporous had been working with EnerSys to bring to

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market a separator to resolve the black scum problem EnerSys had with its UPS batteries. (F. 617-21).

418. Prior to the acquisition, Microporous invested resources to develop the white PE product for UPS batteries and had provided samples to EnerSys for testing. (F. 623).
419. Microporous expected to generate revenues from UPS separators by the end of 2008 or early 2009. (Brilmyer, Tr. 1857-58, 1881, *in camera*; see also F. 624, 626-28).
420. With Project LENO, Microporous would likely have been in the market within one year without the additional expenditure of sunk costs of entry. (F. 417-19).
421. Prior to the acquisition, Entek had made small quantities of PE separators for use in industrial applications, such as stationary, emergency lighting, military and aircraft applications. (Weerts, Tr. 4492-93, *in camera*; PX1833 at 004, *in camera*). However, Entek does not intend to increase these sales and has not been competing in the UPS battery separator market for years. (Gillespie, Tr. 3037; see also PX0033 (Simpson Report) at 17, *in camera*).

b. Market shares

422. As of today, other than Daramic, there is no company in the world that makes a separator that can be used in EnerSys' UPS batteries. (Axt, Tr. 2101). In a global search for UPS separators, EnerSys was unable to find any other company currently making a UPS separator. (Axt, Tr. 2216-17, *in camera*).
423. By combining Daramic, the dominant incumbent supplier of UPS battery separators, with Microporous, which was working to enter this market, Daramic's acquisition of

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Microporous left Daramic as the only effective competitor in this market. (PX0033 (Simpson Report) at 17, *in camera*; Gillespie, Tr. 3041, *in camera*)).

424. Simpson did not calculate HHI for the UPS market. His reasons, according to his report were: Microporous had no sales of UPS battery separators in 2006 or 2007; although Entek may have had some limited sales of UPS separators during this period, the data is insufficient to calculate these sales; and, thus, a calculation of market shares and HHI would not provide any additional information. (PX0033 (Simpson Report) at 17 n.16, *in camera*).

4. SLI separator market**a. Market participants**

425. Prior to the acquisition, Daramic, Entek and Microporous were the only participants in the SLI battery separator market in North America. (PX0033 (Simpson Report) at 18, *in camera*; F. 426-37; *see also* F. 638).
426. Prior to the acquisition, the North American SLI battery separator market was supplied principally by Daramic and Entek. (PX0264 at 003; PX0088 at 001; *see also* Hall, Tr. 2873-74, *in camera*; Leister, Tr. 3984).
427. Prior to the acquisition, Daramic participated in the North American SLI market with its Daramic HP product. (PX0949 at 003, *in camera*; PX0669 at 003, *in camera*). Additional Daramic products, such as Daramic Standard, Daramic V, Daramic HP-S, Daramic HPR, Daramic HPO, and Daramic Duralife can also be used in SLI applications. (PX0949 at 003, *in camera*).
428. Prior to the acquisition, Entek was principally a producer of SLI separators and participated in the North American SLI market from its West Coast facility with its

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RhinoHide product. (Weerts, Tr. 4492, 4510, *in camera*; Gilchrist, Tr. 408, 463).

429. Prior to the acquisition, Microporous had the capability of manufacturing separators for SLI applications. (F. 430, 778).
430. Microporous' production line that manufactures CellForce is also capable of producing straight PE, which is used for SLI battery separators, because CellForce is a PE based product, with Ace-Sil dust added. (Gilchrist, Tr. 311-12). Depending on the type of calender rolls attached to the line, its manufacturing line can produce separators for either SLI applications or industrial applications. (Gilchrist, Tr. 562-63, 569-70).
431. Prior to the acquisition, Microporous' expansion plan included building production lines which could produce either CellForce separators or plain polyethylene separators that could be used for SLI or industrial battery separators. (F. 772-78).
432. Prior to the acquisition, Microporous was marketing PE separators for SLI applications and had endeavored to sell such separators to JCI, Exide, and East Penn Battery. (F. 639-41, 684-91, 694-722).
433. A Microporous document titled "Overview of Battery Separator Industry, September 2007" states: "Microporous Products, at the invitation of [JCI, Exide, and East Penn] seeks to become a supplier to the domestic U.S. automotive industry and help the above manufacturers create a more competitive environment." (PX0088 at 001-02).
434. Prior to the acquisition, Microporous considered Entek and Daramic to be its competitors for the sale of separators

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for the SLI market. (Gilchrist, Tr. 308; PX0078 at 007, *in camera*).

435. Prior to the acquisition, Daramic perceived Microporous to be a threat to Daramic in the SLI market. A 2007 Daramic document, Daramic's Strategy Audit, states "There is currently not a lot of rivalry among competitors, but this could increase in future due to Asia and uncertainties with current competitors (Entek, [Microporous])." "Battery manufacturers lack purchasing power despite their scale due to limited number of suppliers." (PX0265 at 004, 008, *in camera*). In comments on an earlier draft of this Strategy Audit, Tucker Roe of Daramic stated: "I would say that over the past years there has not been an aggressive rivalry among competitors but this has changed when Microporous Products entered the market and more recently seen by Entek." (PX0482 at 002).
436. Prior to the acquisition, Entek considered Microporous a threat to its SLI business. (Weerts, Tr. 4517, *in camera*). Entek understood that Microporous was seeking to supply JCI's SLI business and had in fact made SLI separators for JCI. (Weerts, Tr. 4517, *in camera*). In 2006, Entek feared that Microporous would receive the support of JCI to become a third SLI competitor and thereby change the competitive landscape. (PX1832 at 026-27, *in camera*).
437. After the acquisition, the only participants in SLI separator market in North America are Daramic and Entek. (Balcerzak, Tr. 4128; Hall, Tr. 2873-74, *in camera*; Leister, Tr. 3984).

b. Market shares and HHI

438. Market share charts created by Daramic assign the following shares of SLI sales in North America in 2006:

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Microporous, 4%; Entek, 49%; and Daramic, 47%. (PX0264 at 003).

439. The 2006-2007 market shares and HHI calculations for SLI battery separators in North America are:

		Sales	Shares		
2007	Entek	{redacted}	51.6	change in HHI	0
	Daramic	{redacted}	48.4	post-merger HHI	5005
2006	Entek	{redacted}	53.0	change in HHI	0
	Daramic	{redacted}	47.0	post-merger HHI	5018

(PX0949 at 190-14, *in camera*; PX1833 at 13-65, *in camera*; PX0033 (Simpson Report) at 41, *in camera*).

440. Actual 2007 sales data would not capture Microporous' competitive significance in the SLI market because Microporous was in the process of expanding further into the market. (Simpson, Tr. 3439, *in camera*).
441. A Microporous document from 2007 predicted future market shares for 2010 in a North American SLI battery separator market for Entek, Daramic, and Microporous. Microporous projected a 6% share by 2010, based upon projected sales to Exide. (PX0080 at 060; Simpson, Tr. 3439, *in camera*).

5. Suppliers outside of North America are not market participants in North America

442. Suppliers outside of North America are not participants in the North America SLI market. (F. 443-51).

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443. Amer-Sil operates a plant facility in Luxembourg that produces PVC-based separators for motive batteries. (PX0916 (Dauwe, Dep. at 15), *in camera*; Gilchrist, Tr. 306-307; PX0078, *in camera*). Amer-Sil produces PVC separators for lead-acid batteries and does not produce PE separators. (PX0916 (Dauwe, Dep. at 14), *in camera*). Amer-Sil's PVC separators are used in European flooded motive and stationary batteries, but are not used in automotive batteries. (PX0916 (Dauwe, Dep. at 18-19), *in camera*).
444. There are suppliers in India, China, Indonesia and Korea that produce separators for local customers. They include Anpei and BFR, Chinese manufacturers of SLI separators, Separindo, an Indonesian manufacturer of SLI and industrial separators, owned by Korindo, and Sebang (formerly Global Industrial), a Korean manufacturer of SLI and industrial separators. (Gilchrist, Tr. 307-08, 424, 430; PX0905 (Gaugl, Dep. at 10), *in camera*; Burkert, Tr. 2359, *in camera*). Other Asian battery separator manufacturers include Baotou and Epoch in China and Nippon Sheet Glass (NSG) in Japan. (PX0275 at 020, *in camera*)
445. BFR, a Chinese entity, was founded in 2000 **{redacted}** (Hall, Tr. 2715-16, 2740, *in camera*; RX0050 at 004, *in camera*). **{redacted}** The resulting three-party joint venture continued to be called BFR. (Hall, Tr. 2716). **{redacted}** (Hall, Tr. 2741, *in camera*). **{redacted}** (Hall, Tr. 2740, *in camera*). **{redacted}** (Hall, Tr. 2836, *in camera*). Unanimous BFR Board approval is required for **{redacted}** (Hall, Tr. 2826, *in camera*).
446. BFR's separator production, which consists of PE automotive separators only, goes predominantly to customers in Asia. (PX0907 (Kung, Dep. at 85-86), *in camera*; see also RX0050 at 011). **{redacted}** (PX0907 (Kung, Dep. at 90), *in camera*).

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447. BFR is not considered a market participant in any of the four North American product markets in this case. (Simpson, Tr. 3462, *in camera*).
448. Dr. Simpson considered Asian suppliers but correctly did not consider any to be market participants in any of the four North American markets at issue. (PX0033 (Simpson Report) at 012, 015-16, 018, 140-42, *in camera*).
449. Entek is not aware of any Asian battery separator manufacturers selling products into North America. Entek has not had to adjust its prices in North America due to perceived competition from Asian battery separator suppliers. The pricing of separators being sold in Asia has not had any effect on the prices of Entek's separators being sold in North America. (Weerts, Tr. 4500, 4512 *in camera*).
450. Daramic has not seen instances of Asian PE battery separator manufacturers selling separators for any type of flooded applications to customers in North America. (Thuet, Tr. 4379-80; Roe, Tr. 1236-37). Dr. Kahwaty confirmed that pre-acquisition, no Asian battery separator producer has sold flooded lead-acid separators in North America. (Kahwaty, Tr. 5343, *in camera*).
451. Daramic does not consider itself as competing with Asian separator manufacturers for battery separator sales in the North American market. (Seibert, Tr. 4165, *in camera*; Thuet, Tr. 4381-82). Daramic has not made price concessions to customers in North America due to competition from any Asian battery separator manufacturer. (Roe, Tr. 181).

E. Competitive Effects

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1. In three of four markets, Daramic and Microporous were closest competitors**a. In the deep-cycle market, Daramic was Microporous' only competitive constraint****(i) Product competition**

452. When Microporous instituted new rubber cost pass-through agreements, Daramic analyzed the effect of rubber price increases on Flex-Sil versus HD in an effort to gauge the impact of rubber prices on the prices of the two competing products. (PX0948; Whear, Tr. 4785-86).
453. Before the acquisition, Daramic's pricing for HD was lower than Microporous' pricing for CellForce and Flex-Sil. (Gilchrist, Tr. 467, *in camera*).
454. None of the Asian battery separator manufacturers are producing a deep-cycle separator containing an antimony suppression additive. (Thuet, Tr. 4396; *see* F. 140-42).
455. Exide believes that following Daramic's acquisition of Microporous, Exide no longer has the same leverage for the purchase of deep-cycle battery separators that it had prior to the acquisition, because now there is only one provider of deep-cycle separators for Exide to negotiate with. (Gillespie, Tr. 2953-54).
456. Prior to Daramic's acquisition of Microporous, in addition to offering competitive prices on HD separators, Daramic offered {redacted} (Gillespie, Tr. 2995-97, *in camera*). {redacted} (Gillespie, Tr. 2997, *in camera*).

(a) Daramic's DC's competition with Microporous' Flex-Sil

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457. Daramic spent many years trying to develop a battery separator that would work well in deep-cycle applications. (PX0433 at 001). Daramic made repeated attempts to develop a product to compete with Microporous' Flex-Sil separators in the deep-cycle market. (PX0433 at 001).
458. Daramic first developed a separator known as Daramic DC, a separator for deep-cycle batteries manufactured by combining PE with a {redacted} intended to suppress antimony transfer and water loss in deep-cycle batteries. (PX0911 (Roe, Dep. at 69-70), *in camera*).
459. Daramic DC was Daramic's original deep-cycle separator introduced to the market in 2002. (PX0319 at 003).
460. Daramic DC was specifically designed for the golf cart application. (Whear, Tr. 4776).
461. Daramic began testing Daramic HD, as a replacement for Daramic DC, in 2003. (PX0949 at 019 (Response to CID Request No. 8, *in camera*)).
462. Daramic's early work with U.S. Battery ultimately led to development and sales of Daramic DC. (Qureshi, Tr. 2020). U.S. Battery and Daramic tested Daramic DC and found it to be quite acceptable. (Qureshi, Tr. 2020). The product was commercialized in about 2002. (Qureshi, Tr. 2021). U.S. Battery began purchasing Daramic DC in approximately 2003. (Qureshi, Tr. 2021). At the time U.S. Battery began purchasing Daramic DC, its price was much lower than the price of the Microporous' Flex-Sil product. (Qureshi, Tr. 2021).
463. U.S. Battery first used Daramic DC in a new economy line golf cart battery, the US 1800. (Qureshi, Tr. 2021; McDonald, Tr. 3946-47).

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464. Microporous responded to Daramic's introduction of the DC separator by offering to lower the price of its Flex-Sil separator for use in the US 1800 battery to be closer to the price of the Daramic DC. (Qureshi, Tr. 2023; PX1764 at 002; McDonald, Tr. 3947). Once Microporous lowered the price of Flex-Sil for the US 1800 battery, U.S. Battery approved and began purchasing both Flex-Sil and Daramic DC for use in the US 1800. (Qureshi, Tr. 2024).
465. According to U.S. Battery, there were no noticeable or functional differences between the US 1800 batteries with the Daramic DC separator and US 1800 batteries with the Flex-Sil separator. (Qureshi, Tr. 2025).
466. U.S. Battery expanded the use of Daramic DC to ten different types of deep-cycle batteries that it produced that were all previously using Flex-Sil. (Qureshi, Tr. 2025). The warranties on the batteries that incorporated Daramic DC in place of Flex-Sil carried U.S. Battery's normal one-year warranty. (Qureshi, Tr. 2026). U.S. Battery also used Daramic DC in its economy line batteries that carry a six month warranty. (Qureshi, Tr. 2026). These economy line batteries also contain fewer lead plates to reduce their cost. (Qureshi, Tr. 2027). Less lead plates will lessen the product life. (Qureshi, Tr. 2027). The length of the warranty U.S. Battery puts on its batteries is related more to the number of plates in the battery than the type of separator the battery is using. (Qureshi, Tr. 2085).
467. In a November 9, 2005 Daramic Trip Report to U.S. Battery, Daramic concludes that U.S. Battery's owner, Jon Anderson, "appreciates that we developed a competing product for rubber Jon sees their benefit as having two suppliers in order to manage costs while maintaining product performance. Meanwhile, we benefit by continuing to gain incremental volume (and taking it away from Microporous Products) in a market where we are relatively new entrants." (PX0557 at 003). The

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November 9, 2005 trip report confirms that U.S. Battery communicated to Daramic its interest in incorporating more Daramic HD into its higher quality batteries and that Daramic was interested in supplying more product to U.S. Battery. (Qureshi, Tr. 2029-30; PX0557 at 003).

468. Beginning in 2003, U.S. Battery began manufacturing deep-cycle batteries with Daramic's DC separator in place of Flex-Sil. (Wallace, Tr. 1945). Prior to purchasing Daramic's separator, U.S. Battery was buying only Flex-Sil for its deep-cycle batteries. (Wallace, Tr. 1945-46).
469. U.S. Battery began using Daramic DC before it switched to Daramic HD and as U.S. Battery became more confident with the performance of Daramic's new separators it began to use them in additional battery lines. (Whear, Tr. 4840, *in camera*).

(b) Microporous responded to competition

470. When Microporous found out that U.S. Battery was buying Daramic's DC separator for its deep-cycle batteries, Microporous lowered its pricing on Flex-Sil separators. (Wallace, Tr. 1945-46).
471. Daramic documents reflect the competition by Microporous in the deep-cycle market, stating, *e.g.*, that in this market, "Microporous is attacking with price." (PX0023 at 004, *in camera*).

(c) Daramic improved product and introduced Daramic HD

472. Daramic developed the HD separators to replace its DC separators. (Roe, Tr. 1196). Daramic HD separators are manufactured by combining PE with a latex rubber additive. (Hauswald, Tr. 699-700). HD separators

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provide improved performance over the DC separators. (Roe, Tr. 1196; PX0911 (Roe, Dep. at 69-70), *in camera*). HD separators provide better antimony suppression and less water loss in deep-cycle batteries than the old DC separators. (Roe, Tr. 1196). HD separators also provide improved end-of-charge performance over time than standard PE separators. (PX0423 at 002).

473. U.S. Battery tested the Daramic HD product and the Microporous Flex-Sil product side by side and determined the two “are very comparable.” (Qureshi, Tr. 2033). The main advantage of HD over Flex-Sil is its cost. (Qureshi, Tr. 2033).
474. Exide had tested previous versions of Daramic separators for deep-cycle batteries and none of the versions prior to HD had passed Exide testing. (Gillespie, Tr. 2937).
475. Daramic HD was developed to compete in the deep-cycle market. (Roe, Tr. 1195-96; PX0911 (Roe, Dep. at 56), *in camera*; PX1791; PX1744 at 004, *in camera*; PX1071; PX0222 at 001, *in camera*).
476. Daramic HD’s first commercial sales took place in 2005. (Roe, Tr. 1209).
477. Sales and volume of HD separators increased in 2006 and 2007. (Seibert, Tr. 4308-09, *in camera*). Daramic’s strategy was to grow sales of HD separators in deep-cycle applications, which includes golf carts and floor scrubbers. (Seibert, Tr. 4309-10, *in camera*).
478. Daramic sought to convert customers of rubber separators to Daramic HD separators. (PX0321; Seibert, Tr. 4311, *in camera*). Microporous was the rubber separator producer that Daramic was trying to take customers away from. (Seibert, Tr. 4311-12, *in camera*).

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479. In order to grow sales of HD, Daramic targeted large deep-cycle producers like Trojan Battery, Exide, and U.S. Battery. (PX0321 at 002; PX0904 (Seibert, Dep. at 65), *in camera*).
480. U.S. Battery began to indicate that it wanted to switch from Daramic DC to the improved Daramic HD in 2005. (PX0557; Whear, Tr. 4812, *in camera*). U.S. Battery also indicated a desire to switch four of its new product lines away from Flex-Sil to Daramic HD during 2005 as well. (PX0557 at 002; Whear, Tr. 4812, *in camera*).
481. Because Daramic felt that HD performed better than rubber separators such as Flex-Sil, and PE based separators with rubber additives, such as CellForce and Daramic DC, Daramic decided to phase out Daramic DC and replace it with Daramic HD. (PX0695 at 003). U.S. Battery switched its DC purchases to HD when DC was discontinued by Daramic in 2006. (Wallace, Tr. 1947).
482. A Daramic strategic planning document shows that HD was specifically targeted as an alternative to Microporous' rubber separator, Flex-Sil, being used in golf cart and floor scrubber batteries. (PX0319 at 003).
483. Tests conducted by Daramic accurately showed HD performed pretty close to Flex-Sil. (Whear, Tr. 4839, *in camera*). Daramic is currently still testing HD in comparison to Flex-Sil. (Whear, Tr. 4787).
484. Until the acquisition, Microporous was Trojan Battery's exclusive battery separator supplier. (Godber, Tr. 153).
485. Prior to the acquisition, Daramic tried to sell Daramic HD to Trojan Battery for use in its deep-cycle batteries, including golf cart batteries. (Hauswald, Tr. 659-60).

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486. Daramic attempted to get business from Trojan Battery in 2007. (PX0904 (Seibert, Dep. at 131), *in camera*). An internal Daramic email exchange states: “We know we can price the product where we want to either get business or cause [Microporous] to reduce theirs.” The response notes: “knowing that we’re ‘competitive’ should we take prices down 5% to 10% to get even more aggressive?” (PX0329 at 001).
487. In 2006, U.S. Battery switched all its applications that were using Daramic DC to Daramic’s replacement product, Daramic HD. (Qureshi, Tr. 2028). Daramic HD is superior to Daramic DC in terms of cycle life. (Qureshi, Tr. 2028).
488. A November 9, 2005 Daramic Trip Report to U.S. Battery confirms that U.S. Battery viewed HD as a superior to DC. (PX0557 at 002). Based on a comparison of Daramic HD to Daramic DC in enveloped golf cart batteries, Daramic reported that “Nawaz [Qureshi] wants to switch all DC product immediately to HD Nawaz wants to make a running change as soon as it is available.” (PX0557 at 002). Moreover, Daramic noted that U.S. Battery’s Nawaz Qureshi “provided a list of four (4) new product lines he would like to switch away from rubber. NOTE: Some of these new sizes include mid-level product line.” (PX0557 at 002). Included within the four new products, was the “US 2000 (mid-level golfcart battery).” (PX0557 at 002). The November 9, 2005 trip report also states that “[i]t may be up to us to determine how much more business we want to take away from Microporous Products and when we want to take it.” (PX0557 at 002).
489. In February 2007, Mr. Roe informed the individuals at Daramic who were directly in charge of HD strategy that HD was meant for the same market as Microporous’ Flex-Sil separators. (PX0316 at 002; Roe, Tr. 1200-01). Mr. Keith, a Daramic salesman, specifically noted the

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competition between HD and Flex-Sil, stating that Daramic “must continue to improve our service on HD or we stand a good chance of losing golf car business back to [Microporous] Flex-Sil.” (PX0413 at 005).

490. Daramic believed that the HD separators could match the antimony suppression of Microporous’ pure rubber Flex-Sil separator. (PX0911 (Roe, Dep. at 58-59), *in camera*). Daramic advertised to customers that HD matched the antimony poisoning retardation of the Flex-Sil separators. (PX0423 at 002; Roe, Tr. 1202-03). This advertisement was part of the marketing product literature that was provided to battery manufacturers. (Roe, Tr. 1203).
491. Additionally, Daramic provided battery manufacturers with test results comparing Daramic HD to rubber separators. (PX0423 at 002). The test results indicated that HD outperformed pure rubber separators as well as non-active separators over the life of a battery. (PX0423 at 002). These test results were designed to compare HD to Flex-Sil, as Flex-Sil is the only pure rubber separator available on the market. (PX0911 (Roe, Dep. at 58-59), *in camera*).
492. Daramic informed customers that the HD separators are superior to Microporous’ separators. (RX0598 at 001).
493. When Daramic introduced the HD separators, it understood that on a performance basis they were close to the level of Microporous’ Flex-Sil separators. (PX0433 at 001).
494. Prior to the acquisition of Microporous, Daramic was taking active measures to improve the quality of the HD separators. (PX0911 (Roe, Dep. at 227), *in camera*). For example, when HD was introduced to the marketplace with a 12 mil backweb thickness, there were problems associated with wrinkling of the separators. (Roe, Tr.

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- 1312-13). Daramic was subsequently able to overcome this wrinkling problem by increasing the backweb thickness of the HD separators to 13 mil. (Roe, Tr. 1312-13).
495. Exide understood that Daramic was marketing the HD separators for use in golf cart batteries. (Gillespie, Tr. 2937). When Daramic introduced the HD separators, Daramic approached Exide and asked that Exide test the HD separator in golf cart batteries to see how it performs. (Gillespie, Tr. 2937). Daramic wanted to know what it would take for Exide to get HD into Exide's golf cart batteries. (Gillespie, Tr. 2937-38).
496. From Exide's perspective, Daramic was extremely interested in getting Exide's golf cart business. (Gillespie, Tr. 2938-39; *see also* PX1071 at 001-02 (May 2006 email from Mr. Roe to Mr. Gillespie: "we are aggressively pursuing this market")).
497. When Daramic introduced the HD separators, Exide was interested in buying HD for its deep-cycle batteries for performance and commercial reasons. Exide's testing indicated that HD met Exide's performance criteria for deep-cycle batteries. Daramic offered Exide a competitive price on the HD separators. Additionally, Exide received an incentive for buying HD because it also received a credit back from Daramic for every purchase of HD under their contractual agreements. (Gillespie, Tr. 2937-38).
498. Prior to Daramic's acquisition of Microporous, Daramic was attempting to grow its sales of HD in the deep-cycle segment. (Roe, Tr. 1209; PX0736 at 002). In fact, in February 2006, Mr. Roe informed Exide's head of procurement that Daramic was "aggressively pursuing" sales in the "golf cart/deep-cycle and motorcycle battery business." (PX1071 at 001-02; Roe Tr. 1209-11). In order to grow market share of HD in the deep-cycle

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market, Daramic provided HD samples to most of the significant deep-cycle battery manufacturers including Trojan Battery, Exide, U.S. Battery, and Crown Battery. (PX0262 at 003).

499. Daramic measured HD separators against Microporous' Flex-Sil separators. (PX0904 (Seibert, Dep. at 106-07), *in camera*). Daramic's February 2007 HD Product Strategy Presentation showed that Daramic's HD separators equaled or surpassed Microporous' Flex-Sil separators in the following categories for deep-cycle applications: **{redacted}** (PX0023 at 010, *in camera*).
500. By 2007, Daramic's budget indicated that "gaining market share" in the "[d]eep cycle battery market" was a "critical success factor" for achieving Daramic's goals. (PX0263 at 003-04, *in camera*). Included in the 2007 budget was an HD action plan which sought increased sales of HD to Exide and U.S. Battery. (PX0263 at 008, *in camera*). This action plan targeted a complete conversion of Exide's deep-cycle batteries from Flex-Sil to HD. (PX0263 at 008, *in camera*). Daramic's action plan also included qualification of HD for use in Exide's deep-cycle OEM batteries. (PX0263 at 008, *in camera*). Additionally, the action plan targeted increasing HD's share of U.S. Battery's deep-cycle batteries from **{redacted}** up to **{redacted}** (PX0263 at 008, *in camera*).
501. Daramic wrote in its September 2007 Americas Monthly Sales Report that East Penn Battery and U.S. Battery were concerned about receiving a consistent supply of HD separators from Daramic. (PX0305 at 007). Daramic saw that it had opportunities to increase sales of HD separators to U.S. Battery. (PX0305 at 007). In the Monthly Sales Report, Daramic noted that it must continue to improve its service or it would "stand a good chance of losing golf car

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business back to [Microporous] Flex-Sil.” (PX0305 at 007).

(d) Customers viewed Daramic HD and Microporous’ deep-cycle products as substitutes

502. Exide regards Flex-Sil and Daramic HD separators to be substitutes for each other. (Gillespie, Tr. 2933). Exide uses Flex-Sil and Daramic’s HD separators in its flooded lead-acid batteries for use in golf cart and floor scrubber applications. (Gillespie, Tr. 2932). Exide does not use any other type of separator in its deep-cycle batteries. (Gillespie, Tr. 2933). No other separators meet Exide’s performance criteria for deep-cycle batteries. (Gillespie, Tr. 2933).
503. Flex-Sil and HD are used as substitutes in Exide’s most common golf cart battery, the GC110, which makes up approximately 80% of Exide’s deep-cycle sales. (Gillespie, Tr. 2941-44; PX1401 and PX1402 (demonstrative batteries)). For the end user, there is no difference in the price or warranty between Exide’s GC110 batteries which use HD and those that use Flex-Sil. (Gillespie, Tr. 2944).
504. The testing conducted by U.S. Battery comparing Flex-Sil and HD showed comparable results. (Wallace, Tr. 1972; Qureshi, Tr. 2063).
505. U.S. Battery’s 1800 model deep-cycle battery contains either Flex-Sil or Daramic HD today with no distinction in its performance or warranty claims rate. (Wallace, Tr. 1946). Based on its battery performance testing, U.S. Battery found that Flex-Sil and HD separators are comparable products, *i.e.*, one is not better than the other. (Wallace, Tr. 1971-72).

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506. Prior to Daramic's acquisition of Microporous, JCI purchased HD separators from Daramic for use in golf cart batteries. (Hall, Tr. 2703-05; 2874, *in camera*). JCI was engaged in discussions with Microporous for the supply of separators for golf cart batteries prior to Daramic's acquisition of Microporous. (Hall, Tr. 2704). JCI was interested in Microporous' deep-cycle separators in order to have an alternative to Daramic's HD separators because JCI wanted to "see competition." (Hall, Tr. 2706-07). JCI had obtained samples of CellForce and was preparing to build and test golf cart batteries with CellForce prior to the acquisition. (PX1515 at 006, *in camera*). Discussions with Microporous about deep-cycle separators continued even after discussions regarding a possible Microporous expansion to support PE SLI separator business with JCI had fallen apart. (Hall, Tr. 2704-05; *see* F. 684-93).
507. JCI's contract {redacted} (Hall, Tr. 2874, *in camera*; RX0072, *in camera*).
508. Exide benefits from purchasing HD because HD costs less than Flex-Sil. (Gillespie, Tr. 2944, 2996, *in camera*). Exide has no issues with the quality of the HD separators. (Gillespie, Tr. 2944).
509. After the merger, U.S. Battery met with Daramic and told Daramic that in identical applications, there were no noticeable differences between HD and Flex-Sil. (Qureshi, Tr. 2088-89; *see also* PX0682 at 002, *in camera* (U.S. Battery's assessment of the benefits of HD versus Flex-Sil in identical applications showed no notable differences between the products) (emphasis omitted)).
510. Crown Battery is testing Daramic HD as a replacement for Flex-Sil in its golf cart batteries. (Balcerzak, Tr. 4138). Crown Battery has qualified HD in deep-cycle golf cart

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application, but has found that HD does not perform as well as Flex-Sil. (Balcerzak, Tr. 4123-24, 4135-36).

(e) HD took sales from Microporous

511. Microporous' CEO knew "[w]ithout a doubt" that HD was "competing" and was a "threat" to Microporous in the deep-cycle market. (Gilchrist, Tr. 467-68, *in camera*). Microporous did, in fact, lose business to HD, which competed against Flex-Sil and CellForce. (Gilchrist, Tr. 343, 368-70; McDonald, Tr. 3949).
512. Daramic increased the sales of HD in every year between the introduction of HD and Daramic's acquisition of Microporous. (Roe, Tr. 1209). Daramic was gaining market share in the deep-cycle market in part through customers who were converting the separators that they were using in their deep-cycle batteries from Flex-Sil to HD. (Roe, Tr. 1212-13; 1277-78). Both Exide and U.S. Battery switched from Flex-Sil to HD for a portion of their deep-cycle golf cart batteries. (Roe, Tr. 1212-13).
513. Exide began switching from Flex-Sil to HD separators for its deep-cycle batteries in 2005. (Gillespie, Tr. 2936-37).
514. U.S. Battery switched from Flex-Sil to HD separators for some of its deep-cycle batteries. (Gilchrist, Tr. 369-70).
515. U.S. Battery is pleased with the performance of HD, such that its purchases have increased over time and are included in additional models in its product line. (Wallace, Tr. 1947-48). U.S. Battery planned additional purchases of the HD separator for its Group 27 and 31 lines of batteries prior to Daramic's acquisition of Microporous. (Wallace, Tr. 1948).
516. Daramic felt that it was within its discretion to determine how much of U.S. Battery's deep-cycle business it wanted

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to win away from Microporous. (PX0557 at 002 (“It may be up to us to determine how much more business we want to take away from Microporous Products and when we want to take it.”)).

517. In the months prior to the acquisition of Microporous, Daramic continued to try to gain market share through conversion of Exide’s batteries from Flex-Sil to HD. On December 21, 2007, Daramic submitted a comprehensive supply proposal to Exide with regards to Exide’s separator purchases. (PX0261, *in camera*). In this proposal, Daramic encouraged Exide to complete the switch of Flex-Sil to HD for its golf cart batteries which would result in “well-defined cost savings programs” to save Exide {redacted} on its golf cart battery separator purchases. (PX0261 at 002, 007, *in camera*). Daramic believed that {redacted} (Roe, Tr. 1789, *in camera*).
518. Daramic’s December 2007 sales report indicates that Exide was interested in converting another size of its golf cart batteries from Flex-Sil to HD. (PX0222 at 001, *in camera*).
519. Daramic’s HD separator had been making inroads into the deep-cycle golf cart market prior to the merger. (McDonald, Tr. 3943-45). HD sales had been growing among Microporous golf cart customers. (McDonald, Tr. 3945).

(f) HD constrained pricing of Microporous

520. Due to the threat of HD’s emerging presence in the deep-cycle market, Microporous lowered prices on its Flex-Sil separator, attempting to protect market share. (McDonald, Tr. 3943). Trojan Battery, Exide, and U.S. Battery all used HD as a competitive threat to Microporous’ deep-cycle battery separators. (Gilchrist, Tr. 379-80, 406).

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521. In 2005, the possibility that U.S. Battery could retaliate against an effective price increase by purchasing HD prevented Microporous from removing a material rebate program U.S. Battery enjoyed. (PX0509; McDonald, Tr. 3912).
522. On three occasions between 2006 and 2007, Exide used HD to successfully constrain the price of Flex-Sil. (Gillespie, Tr. 2945-53). With both HD and Flex-Sil qualified for use in deep-cycle batteries, Exide had some added leverage in negotiations with both Daramic and Microporous. (Gillespie, Tr. 2945-46). Having two potential suppliers of deep-cycle separators mitigated Exide's risk and exposure in the supply chain by mitigating the risk of sole-sourcing and by providing a backup source of supply in case of disruption of supply capability. (Gillespie, Tr. 2945).
523. In 2006, Exide used HD as leverage in negotiations with Microporous to get better pricing and payment terms from Microporous. (Gillespie, Tr. 2946-50). In March 2006, Microporous informed Exide that it was raising prices on the Flex-Sil separators and decreasing Exide's payment terms. (PX1059 at 001; PX0636 at 002). At that time, Exide told Microporous that "we will begin to explore other opportunities to obtain golf cart separators." (PX1059 at 001). One day later, Gordon Ulsh, Exide's CEO, informed Mr. Gilchrist that Microporous' pricing action was "forcing us to run quicker to alternate supply." (PX0636 at 001). Mr. Gillespie told Mr. Gilchrist that Exide had qualified HD and would move the majority (and possibly all) of its deep-cycle purchases to Daramic in response to Microporous' pricing actions. (Gillespie, Tr. 2946-48).
524. In March 2006, Daramic became aware that Exide had threatened to move from Flex-Sil to HD. (PX1710 at

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001). On March 17, 2006, Mr. Hauswald informed Mr. Toth that Microporous “found out that we are taking their market share with our Daramic HD, for the golf cart business.” (PX1710 at 001).

525. Exide and Microporous did come to an agreement on the pricing of Flex-Sil, with Exide receiving more favorable pricing terms and obtaining pricing concessions from Microporous. (Gillespie, Tr. 2949; *see also* PX0635 (April 2006 email from Mr. Gilchrist to Mr. Ulsh noting “we are anxious to return our relationship with Exide to a more cooperative realm. And as such . . . I am extending our terms to Exide to 50 days.”)).
526. Exide believes that in this instance the only reason that Exide was “able to negotiate or have this leverage” to obtain lower prices and better pricing terms from Microporous was because it had HD as a “viable option.” (Gillespie, Tr. 2949-50).
527. In 2007, Exide used HD as leverage with Microporous to fight off a rubber surcharge that Microporous had sought to add to Flex-Sil separators. (Gillespie, Tr. 2950-53; Gilchrist, Tr. 375-79). Exide had refused to pay the rubber surcharge proposed by Microporous because Exide had HD as a “viable alternative to switch the business” and informed Microporous that “if you levy the surcharge, you’re going to lose that business.” (Gillespie, Tr. 2951-53).
528. Also in 2007, Exide used HD as leverage to fight off a price increase on Flex-Sil separators. (Gillespie, Tr. 2953). At that time, Microporous attempted to impose a base price increase on the Flex-Sil separators being sold to Exide. Exide refused to pay this price increase because at that time it had the ability to threaten to move its deep-cycle business to Daramic. (Gillespie, Tr. 2953; *see also*

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PX1097, *in camera* (February 05, 2008 email from Exide to Microporous regarding Microporous' proposed price increase ("Exide has a compelling argument which would suggest [Microporous] owes Exide a substantial reduction in its current pricing.")).

529. Trojan Battery also used the threat of switching to Daramic's HD as leverage in pricing negotiations with Microporous. (PX1663; Godber, Tr. 258, *in camera*; Gilchrist, Tr. 371-72, 379, 406 (Trojan Battery would bring up HD every time we instigated the need for a price increase.)).
530. Trojan Battery met with Daramic in February 2005 to discuss the fact that Daramic was going to introduce the HD product at the Battery Council International ("BCI") convention in April, and that test results showed the product would do as well as Flex-Sil. (Godber, Tr. 178). At the time, Trojan Battery was concerned with Microporous' capacity to supply it with separators and was also interested in learning if the HD product had some pricing advantage. (Godber, Tr. 182-83).
531. Trojan Battery discussed the potential of using the Daramic HD separator at an internal meeting on February 21, 2005 because of its "[n]eed for a second source to ensure supply and competitive pricing." (PX1651; Godber Tr. 183-84). After February 2005, Daramic's potential ability to offer a competitive product became a platform for discussions with Microporous regarding price reductions and capacity. (Godber, Tr. 183-84; *see also* PX0429 (email from Rick Godber to Mike Gilchrist: "We now understand that Daramic may have a separator that can compete in performance, and may have cost advantages to Flex-Sil and CellForce.")).
532. At the 2005 BCI convention, Daramic made a presentation about the HD product, which left people very excited that

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Daramic had a product that could match Flex-Sil performance. (Godber, Tr. 187-88; *see also* PX1653 (email from Trojan Battery's technical director stating: "Daramic's technical presentation at BCI was well received by the people I talked to [Daramic's] presentation will generate additional interest in HD separators which will make it a common separator for deep-cycle applications in time.")).

533. Trojan Battery received samples of and pricing for the HD separator in May 2005. (Godber, Tr. 188). The pricing on the HD separator was, depending on the product line, 10 to 28% below what Trojan Battery was currently paying Microporous for Flex-Sil. (Godber, Tr. 188).
534. Trojan Battery tested Daramic's HD separator and approved it for its batteries in its Pacer line of golf carts. (Godber, Tr. 171). Today, CellForce, Daramic HD, and Flex-Sil are qualified for use in Trojan Battery's Pacer batteries. (Godber, Tr. 172).
535. Trojan Battery was able to get Microporous to provide cost reductions by threatening to test and switch to Daramic's HD separator. (Godber, Tr. 190-91; *see also* PX1655 at 001 (email from Trojan Battery to Microporous stating: "[HD] appears to be a fairly immediate replacement for CellForce at a substantial lower cost. Longer term it may work as a Flex-Sil replacement in our products.")).
536. Prior to the introduction of HD separators by Daramic, Microporous did not respond positively to Trojan Battery's request for price reductions. (Godber, Tr. 199). After the introduction of the Daramic HD separator, Microporous told Trojan Battery that it was going to work with Trojan Battery to reduce its costs to alleviate the need for Trojan Battery to switch to HD separators. (Godber,

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Tr. 199-200). Microporous made reference to Daramic's HD during its price discussions with Trojan Battery. (Godber, Tr. 200).

537. During the 2005 cost discussions with Microporous, Trojan Battery also was trying to accelerate its ability to use more CellForce, since it was less expensive than Flex-Sil. (Godber, Tr. 191). At the time, Trojan Battery was not able to get all the CellForce that it wanted from Microporous because there was limited capacity and a large demand from the motive market. (Godber, Tr. 195).
538. From 2005 to the time of the acquisition, Trojan Battery continually used the threat of buying Daramic HD to get lower prices from Microporous. (Godber, Tr. 200-15). In October 2005, Trojan Battery used the threat of moving business to HD as leverage against Microporous to negotiate down a proposed energy charge from 5.5% to 3.75%. (Godber, Tr. 200-01).
539. In early 2006, Microporous attempted to increase the prices it charged Trojan Battery by around 6.5% for Flex-Sil and by 4.5% for CellForce. (Godber, Tr. 202). Trojan Battery did not accept the price increases. (Godber, Tr. 202). In its negotiations with Microporous, Trojan Battery used the threat of switching to HD separators to reduce the amount of the price increase down to 4.5% across the board for all Microporous separators. (Godber, Tr. 202). At the time Trojan Battery was negotiating the price increase, Mr. Gilchrist stated: "We must put the specter of Daramic's [HD] product totally behind us." (PX1660 at 004; Godber, Tr. 203-04).
540. In August 2007, Microporous again proposed a price increase to Trojan Battery on its Flex-Sil and CellForce products of 6.5% and 4.5 to 5%, respectively. (Godber, Tr. 204). The price increases covered separators that went

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into Trojan Battery's OE and aftermarket golf cart batteries. (Godber, Tr. 293-95).

541. The August 2007 price increase led to discussions in which Trojan Battery told Microporous "[y]ou're forcing us to again now go look at an alternative like Daramic HD, which was the only alternative." (Godber, Tr. 204-05; *see also* PX0428 at 001, *in camera* ("appears to be a perception we have no options. . . . I felt [Microporous' owners] needed to understand there are alternatives.")). A Trojan Battery internal email exchange confirms that Trojan Battery was contemplating HD as an alternative on some of its product lines and was also contemplating giving up the exclusive separator design that Microporous provided Trojan Battery in return for Trojan Battery's sole source commitment. (Godber, Tr. 206-07; PX1663).
542. Microporous and Trojan Battery ultimately signed an agreement regarding the August 2007 price increase whereby Trojan Battery would receive a **{redacted}** price increase on Flex-Sil and a **{redacted}** price increase on CellForce on December 1, 2007, and another **{redacted}** price increase on Flex-Sil and a **{redacted}** price increase on CellForce on December 1, 2008. (Godber, Tr. 214-15; PX1664). By accepting these price increases, Trojan Battery and Microporous agreed **{redacted}** (Godber, Tr. 214-15). Trojan Battery and Microporous agreed that Microporous would be allowed no further price increases **{redacted}** (Godber, Tr. 214-15, 235, *in camera*; PX1664).

(g) Microporous responded to HD by offering CellForce

543. Microporous recognized HD as a threat and offered CellForce to Exide at a cost savings. (McDonald, Tr. 3949).

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544. Microporous offered to sell CellForce to U.S. Battery. (Wallace, Tr. 1952-53). Prior to U.S. Battery's use of HD, Microporous had not offered it CellForce for deep-cycle application. (Wallace, Tr. 1953).
545. U.S. Battery approved the purchase of CellForce and planned to purchase this new brand of separators from Microporous. (Wallace, Tr. 1977).
546. Trojan Battery has determined that 25% of its deep-cycle batteries could use CellForce instead of Flex-Sil. (Godber, Tr. 173). The same 25% of Trojan's batteries that could use CellForce, also could use Daramic HD, instead of Flex-Sil. (Godber, Tr. 173).
547. Currently, 16% of Trojan Battery's deep-cycle batteries contain CellForce. (Godber, Tr. 176). The percentage of Trojan's batteries using CellForce was expected to grow to 21% prior to Daramic's acquisition of Microporous. (Godber, Tr. 176). Microporous informed Trojan Battery that "once we get this [the Austrian expansion (*see* F. 769-72)] up and going, we will have some more CellForce that will be available in the states." (Godber, Tr. 224).
548. Trojan Battery wanted to expand its use of CellForce to get a cost savings because CellForce was less expensive than Flex-Sil. (Godber, Tr. 225). Trojan Battery had plans to move a considerable amount of its Flex-Sil batteries to CellForce when Microporous got its Austrian plant up and running in spring 2008. (Godber, Tr. 226-27). The conversion to CellForce was delayed approximately four months once Daramic acquired Microporous and due, in part, to Daramic's strike at its Owensboro plant (*see* F. 952). Trojan Battery estimated that the delay in the transition from Flex-Sil to CellForce resulted in Trojan Battery paying approximately \$140,000

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more for its separators than it had been expecting to. (Godber, Tr. 228-29).

(ii) Anticompetitive effects in the deep-cycle market

549. Microporous' Flex-Sil has unique properties that differentiate it from other battery separators. (PX0131 at 014). Because Flex-Sil is differentiated from other products, its owner has market power, and, thus, would not lose all of its sales if it were to increase price above cost. (Simpson, Tr. 3176). "[T]he owner of Flex-Sil has the incentive to increase price until it gets to the point where the profit that it loses as sales shift to other products just begins to exceed the additional profit that it gets from getting a higher price on those sales it continues to make." (Simpson, Tr. 3177; PX2251 at 017, *in camera*).
550. Daramic HD was the closest independently-owned substitute for Flex-Sil. Thus, if the owner of Flex-Sil were to increase price a little more, some of the sales that would be lost would shift to Daramic HD. (Simpson, Tr. 3177-78). If Flex-Sil and Daramic HD are owned by the same owner, then the joint owner recovers some of the profit on the lost Flex-Sil sales that shift to Daramic HD. (Simpson, Tr. 3178). "[I]n this way a price increase that would not make sense for an independently owned Flex-Sil (or Flex-Sil and CellForce) would make sense if they also owned Daramic HD." (Simpson, Tr. 3178, PX2251 at 017, *in camera*; Kahwaty, Tr. 5514-15, *in camera*).
551. Daramic's acquisition of Microporous was a merger to monopoly in the deep-cycle market. (Simpson, Tr. 3193, *in camera*). By eliminating the competition between Daramic and Microporous, the acquisition enables Daramic to increase price. (Simpson, Tr. 3193, *in camera*). Since the acquisition, Daramic has not lost any

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deep-cycle business to any competitor anywhere in the world. (Roe, Tr. 1217-18).

**(a) Daramic's refusal to honor
Microporous' commitments to Trojan
Battery**

552. Just prior to Daramic's acquisition of Microporous, Trojan Battery was in discussions with Microporous on a contract extension and had agreed to most major terms including contract length and the pricing formula. (Godber Tr. 215-17). The current contract between Microporous and Trojan Battery was set to expire in 2010 and Trojan Battery wanted to create a longer-term arrangement so that it would be protected in the event that Microporous was sold. (Godber, Tr. 215).
553. After the acquisition, Daramic stated to Trojan Battery that it wanted to stand behind the commitments that Microporous had made to Trojan Battery. (Godber Tr. 218-19). In a letter to Trojan Battery's Rick Godber on March 31, 2008, about one month after the acquisition, Daramic's Pierre Hauswald wrote:

Mike [Gilchrist] has explained to me that just before Daramic acquired Microporous, you and he were very, very close to concluding a new supply contract between Trojan and MP that would have gone through 2019. We are prepared to stand behind the commitments MP made to you before this acquisition. So, if you are still interested, we just need to work out the very few details that were still open when you last discussed this topic with Mike, and then we could finalize the extension. . . . I just wanted you to know that we are still willing to honor the commitments MP made to you personally and to Trojan.

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(PX1666).

554. Contrary to its statement that it was “prepared to stand behind the commitments [Microporous] made” before the acquisition, Daramic insisted upon material changes to the contract extension that was being negotiated. (Godber, Tr. 239, *in camera*). Those changes included the pricing structure, **{redacted}** changes to the contract length **{redacted}** and a clause stating that **{redacted}** (Godber, Tr. 239-40, *in camera*). None of these terms had been in the draft contracts exchanged between Trojan Battery and Microporous prior to the merger. (Godber, Tr. 240, *in camera*). **{redacted}** (Godber, Tr. 241, *in camera*).
555. After the acquisition, Trojan Battery was left with no alternatives to Daramic for deep-cycle separators. (Godber, Tr. 291).
556. Daramic had notified Trojan Battery of a price increase **{redacted}** even though Microporous and Trojan Battery had agreed prior to the merger that **{redacted}** (Godber, Tr. 232-33, *in camera*). **{redacted}** (PX1664; Godber, Tr. 235, *in camera*; Gilchrist, Tr. 407-10). Trojan Battery was angry about the notice because of “the thought that they would be coming out with a price increase, A, shortly after their acquisition and, B, because of the agreement I had set up with Mike Gilchrist the fall before for December of ‘08.” (Godber, Tr. 232-33, *in camera*).
557. Daramic’s proposed price increase to Trojan Battery was **{redacted}** (Godber, Tr. 233, *in camera*). Trojan Battery was upset because it had never seen such a high price increase before. (Godber, Tr. 234, *in camera*). The highest price increase Trojan Battery had previously received from Microporous was **{redacted}** (Godber, Tr. 234, *in camera*).

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558. Daramic told Trojan Battery that the price increases were based on energy costs and material costs. (Godber, Tr. 234, *in camera*). Daramic did not share its cost information with Trojan Battery, as it is not contractually obligated to do so. (PX0904 (Seibert, Dep. at 203), *in camera*).
559. Although the 2007 contract between Trojan Battery and Microporous regarding pricing, limited price increases to Trojan Battery to **{redacted}** (PX1664), **{redacted}** (Godber, Tr. 236, *in camera*). **{redacted}** (Godber, Tr. 236, *in camera*).
560. Trojan Battery and Daramic were unable to reach an agreement. (Godber, Tr. 236, *in camera*). **{redacted}** (Seibert, Tr. 4209-10, *in camera*). Subsequently, Daramic sued Trojan Battery. (Godber, Tr. 247-48, *in camera*). The dispute between Daramic and Trojan Battery is ongoing. (Godber, Tr. 238, *in camera*).
561. The latest proposal from Daramic would result in Trojan Battery paying approximately **{redacted}** more than it had agreed to in September 2007. (Godber, Tr. 238, *in camera*). Since the acquisition, Trojan Battery has looked for other alternatives for supply but has determined it has no alternatives. (Godber, Tr. 241, *in camera*).
562. In 2007, when Microporous announced a rubber surcharge and price increase, Exide avoided both by threatening to switch to HD. (Gillespie, Tr. 3044-45, 3132, *in camera*). After the acquisition, Daramic informed Exide that it had to pay the **{redacted}** or Daramic would stop supplying Flex-Sil to Exide. (Gillespie, Tr. 3044, 3132-33, *in camera*).
563. Exide agreed to pay the **{redacted}** (Gillespie, Tr. 3044-45, *in camera*). The net effect of the agreement has Exide

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paying **{redacted}** higher prices for Flex-Sil after the acquisition than it had been paying to Microporous before the acquisition. (Gillespie, Tr. 3044-46, 3121, 3132-34, *in camera*).

(b) Daramic's post-acquisition strategy to sell Flex-Sil

564. In September 2007, approximately six months prior to the acquisition of Microporous by Daramic, Mr. Qureshi of U.S. Battery wrote to Microporous stating: "CellForce separators look very promising." (PX1740 at 001, *in camera*). In a November 2007 Microporous Customer Contact Report on U.S. Battery, Microporous reported that U.S. Battery "was very comfortable with CellForce" and would decide if it would commit a certain volume once it received pricing. (PX1763 at 003). The report states that Microporous told U.S. Battery that it would have capacity available, but if U.S. Battery did not want to commit, Microporous needed to know, so that it could sell the CellForce volume elsewhere. (PX1763 at 003).
565. On February 5, 2008, just three weeks before the acquisition, Microporous' North American Sales representative, Roger Berger, informed U.S. Battery's Mr. Qureshi that with Microporous' Austrian facility "right on schedule," it would have available capacity to supply U.S. Battery with **{redacted}** at a "cost savings versus Flex-Sil." (PX1741 at 004, *in camera*). Mr. Berger's email to Mr. Qureshi stated: "My question for you guys is do you want me to keep this available capacity open for U.S. Battery beginning in April?" (PX1741 at 004, *in camera*). The next day, Mr. Qureshi responded that "[w]e have decided to switch **{redacted}** to CellForce." (PX1741 at 003, *in camera*).

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566. After the acquisition, when U.S. Battery approached Daramic for supply of its HD separator for a new battery it had been developing, Daramic communicated to U.S. Battery that Daramic did not have the appropriate tool to be able to produce an HD separator in the requested profile. (McDonald, Tr. 3823-24). Daramic told U.S. Battery it also could not provide CellForce for the requested profile because it did not have the proper tooling. (McDonald, Tr. 3823-24). Daramic instead offered U.S. Battery a Flex-Sil quotation. (McDonald, Tr. 3824).
567. Although U.S. Battery would prefer to use CellForce in its mid-level golf batteries, they are currently using the more expensive Flex-Sil. (Qureshi, Tr. 2042). U.S. Battery was told by Daramic that CellForce would not be available. (Qureshi, Tr. 2042).
568. Since the acquisition of Microporous, Daramic documents show that Daramic has discussed preventing customers from converting from the higher priced, higher margin Flex-Sil as a way of increasing its profitability. (PX0617 at 001-02, *in camera*). When **{redacted}** tried to increase its purchases of the lower priced HD from the more expensive Flex-Sil in March of 2008, **{redacted}** instructed his sales team to **{redacted}** (PX0441 at 001-02, *in camera*).
569. In response to a June 12, 2008 email from Pierre Hauswald to his subordinates criticizing their lack of efforts and seeking ideas for improving Daramic's profitability, Steve McDonald, Daramic's Sales Manager for the Americas, proposed that **{redacted}** conversion from FS to HD. Not only do we take a major hit on margin, we also lose the higher dollar sale." (PX0617 at 001-02, *in camera*).

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570. Daramic has restricted the number of HD separators available to U.S. Battery for purchase. (Wallace, Tr. 1979).
571. In the later part of 2008, after the acquisition, U.S. Battery had designed two deep-cycle batteries – the Group 27 and 31 batteries – that it had previously been purchasing from another company. (Qureshi, Tr. 2042-43). U.S. Battery designed the batteries to use the more cost-effective separator, Daramic HD. (Qureshi, Tr. 2044, 2049; PX1747). Daramic informed U.S. Battery that the separators it wanted for the batteries were not available in either CellForce or HD. (Qureshi, Tr. 2049). When these batteries go into production, they will be using Flex-Sil separators instead. (Qureshi, Tr. 2044).
572. Prior to the merger, U.S. Battery had hoped to increase its purchase of Daramic’s HD separators in the next two to three years to between 30 to 50%. (Qureshi, Tr. 2090). Daramic internal trip reports regarding U.S. Battery also recognized that U.S. Battery had hoped to achieve a more even balance in purchases between Daramic and Microporous prior to the merger. (*See, e.g.*, PX1739 at 002, *in camera* (“[U.S. Battery’s] unit cost per battery is lower using HD than Flex-Sil thus incentive exists to narrow the 85/15 gap closer to 50/50.”); PX0681 at 002; PX0326 at 001 (“U.S. Battery is presently purchasing 1 T/L [truckload] of Daramic for 5 T/L of Microporous Products material. They would like to achieve a more even balance between their two separator suppliers.”)). Since the acquisition, U.S. Battery has been unable to purchase more HD from Daramic. (Wallace, Tr. 1980).
573. In April 2008, U.S. Battery met with Daramic and discussed the then recent acquisition of Microporous. (Qureshi, Tr. 2051). U.S. Battery expressed its concern that the lack of competition between Microporous and

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Daramic could adversely impact U.S. Battery. (Qureshi, Tr. 2051-52; *see also* PX0682 at 002, *in camera*).

574. Exide also lost the leverage it had to get a competitive price when Daramic bought Microporous because there was “only one provider” of deep-cycle separators left. (Gillespie, Tr. 2953-54).
575. After the merger, when Daramic was unable to supply sufficient HD to Exide due to the strike at Owensboro, Exide was forced to purchase Flex-Sil, which was the only available alternative product for its deep-cycle batteries. (Roe, Tr. 1223). Only by purchasing Flex-Sil was Exide able to avoid a supply interruption during the strike. (RX1260, *in camera*). In purchasing Flex-Sil in place of HD during the strike, Exide had to pay more, since Flex-Sil was priced higher than HD. (Roe, Tr. 1223-24).
576. {redacted} (PX0904 (Seibert, Dep. at 191), *in camera*).

b. In the motive separators market, Microporous was Daramic’s only competitive constraint

(i) Product competition

577. Prior to the acquisition, Daramic and Microporous were the only suppliers of separators for motive power batteries for North American customers. (Gilchrist, Tr. 306-07, 342; Benjamin, Tr. 3533; Douglas, Tr. 4075-76; Leister, Tr. 4027-28; McDonald, Tr. 3949; PX0506 *in camera*).
578. Entek is not in the motive separator business anymore. (Balcerzak, Tr. 4097; Seibert, Tr. 4174, *in camera*; Axt, Tr. 2186, *in camera*; *see also* F. 386, 392-98, 403).
579. EnerSys has searched for alternatives to Daramic’s motive separators and has not found any manufacturers of motive separators in North America. (Axt, Tr. 2216-17, *in*

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camera). Although EnerSys has sought motive separators from Entek, Entek has not supplied them. (Axt, Tr. 2189, *in camera*).

580. During the time period from 2003 until the acquisition of Microporous, the only competitor that Daramic lost North American motive power business to was Microporous. (Roe, Tr. 1278-79; PX0911 (Roe, Dep. at 16), *in camera*). During that time, Microporous was also the only battery separator manufacturer whose competition caused Daramic to lower prices on motive batteries. (Roe, Tr. 1264-66, 1812-13).
581. Microporous sought to capture market share from Daramic in the motive market. (PX0131 at 062-65). Microporous' efforts to obtain business from EnerSys put competitive pressure on Daramic to respond by reducing its prices. (PX0247, *in camera*; PX0243, *in camera*).

(a) Daramic viewed Microporous as a threat

582. Daramic recognized Microporous as a competitor in 2003, noting that “we have a new polyethylene competitor entering the North American market. Micro-Porous Products . . . they have attacked all the large manufacturers and to keep from losing business, we have adjusted prices as needed which has eroded our margins” (PX0153 at 002).
583. The only motive competitor that Daramic lowered its prices to meet in North America was Microporous. (Roe, Tr. 1265). In 2002, Daramic was lowering prices on motive products to “fight the aggressive offers” of Microporous. (PX0243 at 001, *in camera*).

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584. In 2002, Daramic lowered prices on industrial products to East Penn Battery “to fight” Microporous. (PX0243 at 002, *in camera*).
585. In 2002, Daramic signed an exclusive supply agreement with C&D to supply C&D with motive power PE separators. (PX0836 at 001; Roe, Tr. 1254). Daramic’s contract with C&D contained a competitive pricing clause which allowed C&D the opportunity to move product to a competitor if it received a lower-priced offer and Daramic declined to match the offer. (PX0836 at 001; Roe, Tr. 1254-55).
586. Soon after signing the contract with Daramic, C&D brought a lower-priced offer from Microporous for motive power separators to Daramic. (Roe, Tr. 1255; PX0836 at 001). In response to Microporous’ lower-priced offer and in order to maintain its relationship with C&D, Daramic made price concessions to C&D. (Roe, Tr. 1255-57; PX0836 at 001). Daramic’s reduced price did not match the price offered by Microporous. (Roe, Tr. 1255; PX0836 at 001).
587. In early 2003, Daramic learned that Microporous was again offering even lower prices to entice C&D to switch from Daramic to Microporous. (PX0836 at 001). C&D informed Daramic that Daramic’s prices were 60% higher than the Microporous offer. (PX0836 at 001). C&D again reminded Daramic about the competitive price clause in their contract. (PX0836 at 001). Mr. Roe was surprised that Microporous continued to offer lower prices. (Roe, Tr. 1257). In response to Microporous’ second attempt to win C&D’s business, Daramic again offered price concessions to C&D amounting to a savings for C&D of \$275,000. (PX0836 at 001). Ultimately, Daramic gave C&D an 11.2% price reduction in April 2004 in order to maintain C&D’s business in the face of competition from Microporous. (PX0409 at 001; Roe Tr. 1261).

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588. Daramic wanted to “eliminate the competitive clause of [its] agreement” with C&D. (PX0836 at 002). By eliminating the competitive price clause, Daramic felt that it could tie up 100% of the C&D business for the next three years and keep Microporous from supplying C&D. (PX0836 at 002; Roe, Tr. 1259).
589. Daramic expected that it would continue to face price competition at C&D from Microporous in the future. (Roe, Tr. 1266). In 2005, Mr. Roe informed Mr. Hauswald that he expected there to be a “price fight” with Microporous for the C&D business when the contract expired at the end of 2006. (Roe, Tr. 1266-67; PX0209 at 001). Mr. Roe also expected that Daramic’s prices would be higher than Microporous’ at the end of the contract period. (PX0209 at 001).
590. Daramic had no interest in splitting C&D’s separator business with Microporous after 2006. (PX0209 at 001). In order to keep 100% of C&D’s business, Mr. Roe suggested that Daramic “play our card that we supply all or nothing.” (PX0209 at 001). Mr. Roe thought that an “all or nothing” strategy could be successful with C&D because he did not believe that Microporous was capable of supplying all of C&D’s motive and stationary separator needs at that time. (PX0209 at 001; PX0922 (Roe, IHT at 104-05, 115-16), *in camera*).
591. With respect to East Penn Battery, Daramic reacted to Microporous price competition on motive power separators by lowering prices in 2004 by 3% for East Penn Battery to maintain that business. (PX0409 at 001; Roe, Tr. 1262-63).

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592. Competition between Microporous and Daramic also resulted in lower prices for EnerSys in 2004 and 2005. F. 593-94).
593. In 2004, EnerSys was able to use a bid from Microporous for its motive power business to negotiate a reduction in price from Daramic in the \$200,000 range for its North American motive separator business. (Axt Tr. 2121-22; RX0208). Daramic lowered prices on its motive power separators at EnerSys by about 14% from an average price of \$2.04 per square meter to an average price of \$1.75 per square meter. (PX0409 at 001; Roe, Tr. 1263-64).
594. In 2005, EnerSys and Daramic were exchanging emails relating to an energy surcharge sought by Daramic. (RX0582; Axt, Tr. 2242, *in camera*). Referring to Microporous' CellForce, EnerSys wrote to Daramic, "I tell you right now, if you expect any more than the **{redacted}** that I have approved, EnerSys will have to change our supply chain strategy due to newer technology that is available in the marketplace." (RX0582; Axt, Tr. 2243, *in camera*).
595. In negotiations with EnerSys in February 2006, Daramic offered to **{redacted}** (Axt, Tr. 2165-66, *in camera*). EnerSys received a proposal from Microporous that was significantly better for EnerSys, offering EnerSys a savings of **{redacted}** (Axt, Tr. 2166, *in camera*). EnerSys told Daramic that its proposal was not attractive and that there was a high probability that EnerSys would go with Microporous. (Axt, Tr. 2166, *in camera*). In August 2006, Daramic offered EnerSys a savings of **{redacted}** (PX1204, *in camera*).
596. In its 2006 discussion document entitled "3-Year Strategy," Daramic saw Microporous as a threat in that Microporous' planned capacity expansions (*see generally* F. 769-804) could threaten additional Daramic industrial

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sales and noted that the key for Daramic to securing its motive sales as either execution of a long-term contract with EnerSys or the acquisition of Microporous. (PX0171 at 008).

597. In 2007, Microporous sought a rubber cost pass-through agreement with its customers, including EnerSys. (RX0210 at 001). This new rubber cost pass-through **{redacted}** (RX0207, *in camera*). After several weeks of negotiations, EnerSys accepted it with respect to **{redacted}** (RX0210 at 001-02; McDonald, Tr. 3909; Burkert, Tr. 2313-14, 2334-36, 2358-59, *in camera*). With respect to **{redacted}** EnerSys was able to threaten to switch its volume to Daramic in order to avoid the new rubber cost adjustment formula. (RX0210 at 001; Axt, Tr. 2246).
598. On November 7, 2007, Daramic wrote to EnerSys to inform it that Daramic's prices would increase in 2008 commensurate with Daramic's costs. (RX0768 at 001, *in camera*). Mr. Roe added, however, that Daramic would **{redacted}** (RX0768 at 001, *in camera*).
599. EnerSys responded to Daramic stating that it was "not at all surprised by the Daramic, negotiate with a gun to the customer's head, strategy in regards to contracts" but that, because of the availability of Microporous, "[u]nfortunately for Daramic, these types of ploys will have no success in future negotiations with EnerSys." (RX0768 at 001, *in camera*; Burkert, Tr. 2343-44, *in camera*) ("banking on having Microporous as a supplier, . . . I could just walk away and say no, I'm not signing a contract, I don't need to buy from you.").
600. With respect to Exide, Daramic, in 2005, noted that because Exide could not go to Microporous, Daramic could "negotiate a little tougher." (PX0843 at 001).

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601. Daramic sold “HD to certain traction customers, primarily as a defensive move against [Microporous’] CellForce.” (PX0316 at 002; PX0023 at 004, *in camera*; Hauswald, Tr. 853, *in camera*). Daramic measured HD separators against Microporous’ CellForce separators for use in motive applications. (PX0023 at 010, *in camera*). Daramic’s February 2007 HD Product Strategy Presentation showed that Daramic’s HD separators equaled or surpassed Microporous’ CellForce separators in the following categories for motive applications: {redacted} (PX0023 at 010, *in camera*).
602. In 2007, Daramic projected that it would lose to Microporous sales of motive power separators of 500,000 square meters for East Penn Battery, 250,000 square meters for Douglas Battery, and 250,000 square meters for Crown Battery. (PX0258 at 002; Roe, Tr. 1288-89).

(b) Microporous took sales from Daramic

603. Bulldog Battery was Microporous’ first big motive customer. (Benjamin, Tr. 3515).
604. In 2002 to 2003, Bulldog Battery switched to Microporous for separators for its motive batteries because Daramic, Bulldog’s Battery supplier at that time, was not providing reliable delivery and consistent product quality. (Benjamin, Tr. 3511-12). Daramic had been supplying Bulldog Battery with a PE type separator which could run on a sleeve machine. Microporous began supplying Bulldog Battery with its newly developed CellForce product which could also run on a sleeve machine. (Benjamin, Tr. 3508, 3514).
605. In an effort to source motive separators from the only other motive separator supplier, Bulldog Battery proposed buying a tool for Microporous, if Microporous would run

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the tool for Bulldog Battery. Microporous responded to Bulldog's Battery offer, by saying it would buy the tool if Bulldog Battery would sign a one-year contract. Bulldog Battery agreed to Microporous' proposal. (Benjamin, Tr. 3513-14).

606. After Bulldog Battery became a customer of Microporous, Daramic would periodically contact Bulldog Battery and ask it to switch back to buying from Daramic. (Benjamin, Tr. 3517).
607. In 2006, after Bulldog Battery had switched to Microporous, Daramic unsuccessfully tried to win back this business by offering Bulldog Battery lower pricing on Daramic HD. (Benjamin, Tr. 3516, 3518, 3557). Bulldog Battery continued to source most of its motive battery separators from Microporous which lowered its price for CellForce in response to Daramic's pricing offer. (Benjamin, Tr. 3516-17).
608. In 2006, Bulldog Battery was able to receive a 2.5% price decrease on all of its separator purchases from Microporous after telling Microporous that Daramic had offered it a lower price. (Benjamin, Tr. 3545-48). If Bulldog Battery wanted to switch its motive separators from Microporous' CellForce separators to Daramic's HD separators, it could do so. (Benjamin, Tr. 3518, 3555). Thus, if Microporous and Daramic were independent, Bulldog Battery would have two sourcing options for its motive separator needs, instead of only one today. (Benjamin, Tr. 3555).
609. In August 2006, Daramic reported North America 2006 gross margins of 37.2% for its PE industrial separators, but an average of 28% for its HD separators. Daramic feared that a shift to PE/rubber separators for the motive market would lead to higher HD sales and that it could not charge

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a premium for HD due to competition from CellForce. (PX0319 at 013).

(ii) Anticompetitive effects in the motive market

610. Daramic's acquisition of Microporous was a merger to monopoly in the motive market. (Simpson, Tr. 3193, *in camera*). By eliminating the competition between Daramic and Microporous, the acquisition enables Daramic to increase price. (Simpson, Tr. 3193, *in camera*).
611. Effective January 1, 2009, Daramic announced price increases that ranged from **{redacted}** for motive customers. (PX0950 at 014-16, *in camera*). **{redacted}** (PX0255 at 001, *in camera*; Roe, Tr. 1292-94, 1352-54, *in camera*; see F. 820-23, 849-50).
612. On April 2, 2009, **{redacted}** Mr. Michael Shor, Daramic's Director of Litigation, wrote a letter to **{redacted}** advising him that **{redacted}** [Daramic would] be forced to take whatever steps are necessary to protect Daramic's interests." (PX2262 at 001-02, *in camera*).
613. After the acquisition, Daramic raised the prices for CellForce separators sold to Bulldog Battery by 10%. This price increase took effect on January 1, 2009. (Benjamin, Tr. 3522). Previously, Daramic charged Bulldog Battery a 7% energy surcharge in 2008. (Benjamin, Tr. 3521). Bulldog Battery has no ability to determine whether these increases are justified by increases in Daramic's raw material costs. (Benjamin, Tr. 3524-25). However, as compared to past pricing increases from separator suppliers, the President of Bulldog Battery feels the 10% price increase is "pretty exorbitant." (Benjamin, Tr. 3525). For example, in the five-year period during which it purchased CellForce separators from Microporous, the cumulative price increases from

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Microporous totaled about 3% and the largest price increase was 1 to 1 ½%. (Benjamin, Tr. 3526).

614. After Daramic notified Bulldog Battery that a 10% price increase effective January 1, 2009 would be occurring, Bulldog Battery did not try to negotiate a lower price with Daramic because “[t]here was no way to negotiate a lower price. There was no place to go.” (Benjamin, Tr. 3522). Further, Bulldog Battery did not look to source its needs from another motive battery separator manufacture because there is no other supplier. (Benjamin, Tr. 3526).
615. Since the acquisition of Microporous in February 2008, Daramic has not lost any motive power business in North America to any competitors. (Roe, Tr. 1279). Nor has Daramic made any price concessions to North American customers for motive products due to competition from any other competitor. (Roe, Tr. 1812-13).

c. In the UPS separator market, Microporous was Daramic’s only competitive constraint

616. Prior to the acquisition, Daramic was the only supplier of separators for reserve power for flooded high-end batteries to North American customers. (Gilchrist, Tr. 305-06; 343).

(i) Microporous was in the process of commercializing a UPS separator to address the black scum issue

617. Prior to the acquisition, Microporous had been working on the development of a separator for the UPS market, as part of its project LENO, which stands for low electrical resistance, little or no oil. The project was initially approved in early 2007. (Brilmyer, Tr. 1835-36).

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618. The LENO project began as an effort by Microporous, at the request of EnerSys, to develop a separator to compete with Daramic's Darak product used in EnerSys' gel batteries and a separator that would address the black scum problem in UPS batteries. (McDonald, Tr. 3863, *in camera*; Brilmyer, Tr. 1839-40, 1864).
619. Darak was substantially more expensive than PE separators. (Brilmyer, Tr. 1842-43). Because Darak was a high cost/high margin product compared to the battery separator developed by the LENO project team, Microporous hoped to take a substantial portion of Daramic's Darak business after the new product was available in commercial quantities. (Brilmyer, Tr. 1865, 1878-79, *in camera*, 1917, 1874, *in camera*).
620. Included in the LENO project was the development of a "white PE" separator, which involved {redacted} in an effort to address the black scum problem experienced with some UPS batteries. (PX0663 at 002, *in camera*; Brilmyer, Tr. 1836-42, 1863-65; McDonald, Tr. 3865, *in camera*; Whear, Tr. 4731-32, 4821, *in camera*; F. 227).
621. Black scum can result from the interaction of various chemicals and the oil component of a separator through a process of oxidation. (Hauswald, Tr. 1096-98; Brilmyer, Tr. 1834-35; Whear, Tr. 4707-08). Black scum interferes with the maintenance of a flooded UPS battery by obscuring the indicators for the acid level in the battery, by making it harder to detect the formation of lead sulfate on the surface of the plates, and by allowing a valve for the watering system to get stuck. (Brilmyer, Tr. 1852-55; F. 228-29).
622. The LENO team eventually discovered what it believed to be a solution to the black scum problem, {redacted} (Brilmyer, Tr. 1855-56).

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623. Microporous developed samples of a potential Darak replacement and the white PE product, and provided samples to EnerSys for testing in July or August of 2007. EnerSys tested the proposed Darak replacement on a flooded, stationary battery and a gel battery. (Brilmyer, Tr. 1855-57; McDonald, Tr. 3863-64, *in camera*).
624. EnerSys wanted to switch to Microporous' white PE product for its flooded UPS batteries as soon as the product was validated by engineering, and advised Microporous of this fact. (Axt, Tr. 2103-04; Burkert, Tr. 2325-26).
625. Salespeople from Microporous were optimistic that there was customer demand for its new battery separator in the United States and Europe, including from customers such as EnerSys, Exide and East Penn Battery. (PX0490, *in camera*; Brilmyer, Tr. 1868, *in camera*). Battery customers prefer having more than one plant as a source for their separators to ensure supply security and to obtain competitive pricing. Because Daramic manufactured Darak at only one plant in Germany, customers were interested in another source for this type of battery. (Brilmyer, Tr. 1869, *in camera*).
626. Prior to the acquisition, Microporous had made capital expenditures in its European facility, and was planning on additional expenditures at its United States facility, in anticipation of separator sales from project LENO as early as late 2008 or early 2009. (Brilmyer, Tr. 1858; PX0664 at 002, *in camera*).
627. Microporous determined that the potential market for LENO would be "both in the U.S. and Europe with customers like EnerSys, Exide, East Penn." These customers had been identified early in the planning process and helped to determine the profit potential of the

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enterprise. (PX0490, *in camera*; Brilmyer, Tr. 1868, *in camera*).

628. The manager of the LENO project, George Brilmyer, expected that the new products from the project would generate revenues from commercial sales by the end of 2008 or early 2009. Microporous projected revenues in this time frame for both the calcium stearate-free PE separators and the new gel battery separator. (Brilmyer, Tr. 1857-58, 1881, *in camera*).

(ii) The acquisition halted efforts to address black scum in UPS market

629. After the acquisition, Microporous' technical shop was moved from Piney Flats, Tennessee to Owensboro, Kentucky. (Whear, Tr. 4820, *in camera*). Daramic moved Brilmyer from Piney Flats, Tennessee to its Owensboro Kentucky facility and disbanded the R&D group of the former Microporous against the request of Brilmyer and Rick Wimberly, Vice President of Technology, who thought that the projects that they had been engaged in under an independent Microporous were worthy of a continued concerted focus. As a result, work on the LENO project slowed down. (Brilmyer, Tr. 1861-62).
630. After the acquisition, Daramic contemplated halting work on the former Microporous' LENO project. (PX0579 at 003, *in camera*) (October 06, 2008 internal Daramic email discussing the LENO project and its potential importance at EnerSys) ("LENO . . . project likely to be stopped. This is a cannibalizing product of Daramic PE and Darak").
631. Daramic had also previously been working on a fix for its PE separators' black scum problem. (PX0913 (Whear, Dep. at 197), *in camera*; Whear, Tr. 4825, *in camera*). It halted those efforts in 2004 or 2005 and instead offered the Darak product, which does not create black scum, to

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EnerSys as an alternative. (Whear, Tr. 4722; PX0913 (Whear, Dep. at 200), *in camera*; Axt, Tr. 2104).

632. There was little support for the LENO project among Daramic management since the goal of the project was to replace the costly, “very high-margin” Darak product with a less expensive, lower margin PE based separator. (Brilmyer, Tr. 1863-64).

(iii) Anticompetitive effects in the UPS market

633. By removing Microporous as a potential competitor with products it was working on developing in the UPS market (F. 617-32), the acquisition harms competition and enables Daramic to increase price. (Simpson, Tr. 3188, 3193, *in camera*).
634. When EnerSys searched for alternatives to Daramic’s UPS separators, it did not find any other manufacturers of UPS separators in North America. (Axt, Tr. 2216-17, *in camera*).
635. There are no alternatives besides Daramic for UPS customers anywhere in the world today. (Axt, Tr. 2101-03, 2220-22, *in camera*).

d. In the SLI market, Microporous was a competitive constraint

636. Prior to the acquisition, the North American SLI battery separator market was supplied principally by Daramic and Entek. (F. 426). Microporous had the capability of manufacturing separators for SLI applications and was actively competing in the SLI market. (F. 430, 778, 638-51, 684-90, 694-722).

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637. Daramic's May 2007 Strategy Audit acknowledges: "Battery manufacturers lack purchasing power despite their scale due to limited number of suppliers," and "[t]here is currently not a lot of rivalry among competitors but this could increase in future due to Asia and uncertainties with current competitors (Entek, [Microporous])." (PX0265 at 004, 008, *in camera*). In comments on an earlier draft of this Strategy Audit, Tucker Roe of Daramic stated: "I would say that over the past years there has not been an aggressive rivalry among competitors but this has changed when Microporous Products entered the market and more recently seen by Entek." (PX0482 at 002).

(i) Microporous was taking steps to expand in SLI

638. Microporous was an uncommitted entrant into the North American SLI market because its presence caused Daramic to lower prices for SLI battery separators to at least East Penn Battery. (Simpson, Tr. 3461-62, *in camera*). Dr. Kahwaty agreed that Microporous was an uncommitted entrant in the SLI market. (Kahwaty, Tr. 5413-14, *in camera*).
639. Prior to the acquisition, at its Piney Flats plant, Microporous manufactured samples for SLI batteries for JCI, Exide, and several battery manufacturers in the European Union. (Gilchrist, Tr. 312-13, 417-18; F. 651, 688, 707-08).
640. Microporous manufactured samples of PE separators for JCI off its CellForce line at Piney Flats. (F. 651, 760). When JCI returned the samples because they did not qualify for use at JCI (F. 651), Microporous approached two of its existing customers, Douglas Battery and Voltmaster, about purchasing these materials. These customers each performed runability tests with no

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problems and Voltmaster purchased the material from Microporous. (McDonald, Tr. 3795-96).

641. Microporous also talked to East Penn Battery about supplying them PE for SLI. (F. 717-22; McDonald, Tr. 3879-80, *in camera*).
642. Microporous' overall expansion plans, (F. 769-804) included firm plans for expansion in the SLI market. (F. 770-71, 778-84, 801-03).
643. Even if Microporous did have higher costs than Daramic in the manufacture of SLI battery separators, these higher costs did not prevent Microporous from competing. (Simpson, Tr. 3463, *in camera*).

(a) Microporous' discussions with JCI on entering SLI market

644. JCI is the largest manufacturer of flooded lead-acid batteries in the world. (Hall, Tr. 2662-63). In the United States, JCI is one of "only three major automotive battery manufacturers." (PX0088 at 001).
645. JCI's PE SLI separator suppliers from 2004 through 2007 were Daramic and Entek. (Hall, Tr. 2687-88).
646. JCI described the separator supply base in 2004 as an "[o]ligopoly," with two major suppliers, Entek and Daramic, controlling close to 80% of the worldwide separator market. (PX1505 at 002, *in camera*).
647. From 2004 through 2007, JCI continued to see price increases, despite double digit growth in its separator purchases, whereas it got lower prices from suppliers of other commodities as JCI's business grew. (Hall, Tr. 2692).

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648. While JCI investigated moving some supply away from Entek, JCI had no other supplier outside of Daramic that JCI could use as a source of separator supply. (Hall, Tr. 2802-03). From 2004 through 2007, JCI's goal was to bring new separator manufacturers into the marketplace in order to get more competition. (Hall, Tr. 2691, 2693). JCI's desire was to change "the mind set of the existing suppliers from 'entitlement' to 'compete' for the JCI business." (PX1509 at 009, *in camera*).

- ***Microporous' work with JCI in 2003***

649. JCI decided in the summer of 2003 to pursue a "Global Separator Strategy" in an effort to create more competition among suppliers and thereby reduce its purchasing costs. (PX2112, *in camera*). The company viewed Microporous as one of three "Major PE Separator Suppliers" in October 2003, and considered it a "New Supplier" that it was developing, particularly for JCI's United States facilities. (PX2112 at 006, 019, *in camera*). "We'll start developing [Microporous] as the third separator source, planning to incorporate them by 12/2003." (PX2112 at 019, *in camera*).

650. As part of JCI's separator sourcing strategy, JCI engaged in discussions with Microporous prior to 2003 in an effort to develop Microporous as a new entrant into the SLI separator business. (Hall, Tr. 2670). JCI wanted a third supplier to create more competition and improve the pricing and performance of Entek and Daramic. (PX2112, *in camera*; Hall, Tr. 2670-71, 2698-99).

651. JCI tested a sample PE SLI separator manufactured by Microporous in 2003. (Hall, Tr. 2696). The Microporous sample SLI separator was produced off of a production line in Microporous' Tennessee facility that had been modified to try to create the requisite SLI sample for JCI.

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(Hall, Tr. 2696). The PE SLI sample that Microporous provided to JCI in 2003 did not perform well for JCI from a functionality standpoint, and was not qualified by JCI. (Hall, Tr. 2696, 2811, *in camera*; PX0672 at 006, *in camera*).

- ***Daramic forced JCI into contract extension***

652. In 2002, JCI was “primarily a North American company.” (Hall, Tr. 2666). It had just acquired Hoeppeke, a smaller European battery producer. (Hall, Tr. 2666). About one year later, it also acquired Varta, another European battery producer. (Hall, Tr. 2672).
653. Daramic supplied JCI facilities in Mexico, Brazil, India and Europe with PE battery separators in 2002. Daramic held “{redacted} share of [JCI’s] volume” in Europe. (PX2112 at 014, *in camera*; PX1503 at 003, *in camera*; Hall, Tr. 2666).
654. Entek had been the exclusive supplier of PE battery separators to JCI facilities in the United States through December 31, 2003. (PX2112 at 011, *in camera*; PX0820 at 017). Entek also supplied JCI’s facility in Torreon, Mexico in 2003. (PX2112 at 014, *in camera*). From 2004 through 2007, JCI purchased between 110 and 120 square meters of PE separators on an annual basis from Entek without a contract. (Hall, Tr. 2690).
655. Soon after becoming Global Vice President for Procurement at JCI in 2002, Rodger Hall sought better separator pricing for the company. (Hall, Tr. 2666). It did not appear to Mr. Hall that Entek and Daramic were aggressively competing for JCI’s business. (Hall, Tr. 2666-67). For example, JCI requested a quote on the United States business from Daramic and after a delay on

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Daramic's part of several months, the quote received from Daramic suggested to JCI that Daramic was not aggressive about getting into JCI's United States business. (Hall, Tr. 2668).

656. In 2003, JCI perceived a lack of competition between Entek and Daramic for its business. (RX0039 at 016, *in camera*; Hall, Tr. 2670). JCI felt that Daramic and Entek were "defending their business and . . . using aggressive tactics that restrict the growth of our supply base." (PX1505 at 002, *in camera*).
657. In early 2003, Daramic began pressing JCI to negotiate a global supply contract and give it more business. (PX1503, *in camera*). Daramic outlined for JCI a general proposal under which the parties would enter into a **{redacted}** (PX1503 at 003, *in camera*).
658. In 2003, JCI wanted to reduce the mandatory minimum volumes committed to Entek and Daramic so that space could be created for new competition. (Hall, Tr. 2670-74).
659. JCI's and Daramic's negotiations continued during 2003 and Daramic continued to supply JCI's facilities in Europe and elsewhere outside the United States at previously invoiced prices. (Hall, Tr. 2672, 2780). As of November 2003, Daramic considered its "negotiations for a global contract [with JCI] . . . still pending." (PX1786 at 027).
660. In June 2003, JCI considered Daramic's attitude toward JCI to be "complacent," "lazy" and unresponsive, particularly with respect to pricing. (PX0928 at 001; Hall, Tr. 2873-74, *in camera*). JCI explained that Daramic does not appear to compete and does not have to, given the absence of market forces. (Hall, Tr. 2873-74, *in camera*, RX0044 at 002, *in camera*). Daramic was, to JCI, "'arrogant' and difficult to deal with" and unwilling to lower its prices to JCI during "the last six or seven years"

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while JCI's purchasing volume had grown. (PX0928 at 001-02).

661. At a meeting in June 2003 at JCI headquarters, Microporous discussed the potential for it to supply "as high as 50,000,000 square meters on a worldwide basis" of JCI's PE separator needs for the SLI market. (PX0928 at 001).
662. In addition to considering Microporous, JCI, in 2003, also considered a start-up company in Europe named Alpha as a potential new supplier. (Hall, Tr. 2683-86). However, JCI believed there to be high risks associated with Alpha because it was not yet in existence. (Hall Tr. 2686, 2872; PX1505 at 002, *in camera*). JCI also did not view Alpha as being on equal footing with Microporous because Microporous was producing separators with a proven technology. (Hall, Tr. 2872-73, *in camera*).
663. In 2003, during the course of negotiations with JCI, Daramic came to understand that Microporous was bidding on a portion of JCI's SLI business in both the United States and Europe. (Roe, Tr. 1237; PX0693). Daramic understood that JCI was reviewing a proposal for the establishment of a new battery separator manufacturing facility in Europe and assumed that this would be a new Microporous manufacturing facility. (Roe, Tr. 1240; PX0693).
664. Daramic and JCI continued their negotiations throughout 2003. (Roe, Tr. 1674-76). On December 2, 2003, Daramic informed JCI that Daramic was withdrawing its earlier proposals. (PX1504 at 001). If JCI did not sign Daramic's proposed contract by the end of the month, then "all purchases for product in Europe will be priced on a spot purchase price that will be significantly higher than those previously quoted." (PX1504 at 001).

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665. On December 3, 2003, JCI told Daramic that it wanted two proposals, one for the United States and one for Europe. (PX0965 at 013, *in camera*). Daramic took a position it would only negotiate for a worldwide contract, and was unwilling to submit a proposal for JCI's European business only. (Roe, Tr. 1680-81).
666. In late 2003, Daramic believed that Microporous was offering to supply JCI under a five-year contract with continuous price reductions passed along to JCI. (Roe, Tr. 1237-38; PX0693; PX0758 at 017, *in camera*). JCI had requested a similar price reduction clause from Daramic, which Daramic "totally rejected." (PX0693).
667. Soon after learning of Microporous' bid for JCI's SLI business, in December 2003 or January 2004, Daramic threatened to cut off supply to JCI in Europe if JCI did not sign a long-term contract. (PX0758 at 017, *in camera*).
668. JCI did not consider the negotiations finalized with Daramic over the contract on the table in the beginning of 2004. JCI was still negotiating pricing and was unhappy with the minimum volume requirements. (Hall, Tr. 2674). Additionally, JCI was not satisfied with the length of the contract and wished to have a shorter-term contract. (Hall, Tr. 2684). JCI informed Daramic that it was not through negotiating the contract. (Hall, Tr. 2675).
669. By early January 2004, the back-and-forth discussions between Daramic and JCI had "escalated," and Mr. Hall, JCI's Vice President of Procurement, became directly involved. (Hall, Tr. 2676-77). Frank Nasisi, the general manager of Daramic at the time, called Mr. Hall and told him the contract "negotiations weren't moving forward at a pace that [Nasisi] considered appropriate and that **{redacted}** price increase was going to occur" on a date certain in the immediate future if JCI did not sign a

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contract. (Hall, Tr. 2676-77). JCI understood that the **{redacted}** price increase would have covered every product that Daramic was supplying to JCI **{redacted}** (Hall, Tr. 2866-67, *in camera*).

670. JCI responded to Daramic's statement, described in F. 669, that the parties should have a five day "cooling-off period" and then resume discussions about the contract. (Hall, Tr. 2677-78). The parties then agreed to get back to each other after five days. (Hall, Tr. 2677-78).
671. Before the five day period to which the parties agreed, described in F. 670, had passed, Daramic called JCI and stated that Daramic was going to stop shipping separators to JCI if JCI did not sign the Daramic contract in its present form. (Hall, Tr. 2677-78; PX0965 at 013, *in camera*). Daramic informed JCI that if the contract was not signed Daramic intended to close down Daramic's main supply plant to JCI located in Potenza, Italy. (Hall, Tr. 2678). Daramic also told JCI that it would supply JCI with the separators it had in inventory (about a nine-day supply), and when those ran out, JCI would no longer be a Daramic customer unless it signed the contract. (Hall, Tr. 2677-78). Daramic gave JCI only several days to sign the contract and send it back to Daramic as it was, without any changes. (Hall, Tr. 2678).
672. After Daramic made the statement, described in F. 671, to JCI, JCI came to learn that Daramic's Potenza, Italy plant was actually shut down. (Hall, Tr. 2678-80). JCI did not understand why Daramic would shut down the Potenza plant when JCI was continuing to order separators from Daramic. (Hall, Tr. 2868-69, *in camera*).
673. At the time it was negotiating with Daramic in January 2004, JCI believed that the impact of a shutdown of Daramic's Potenza plant on JCI in Europe would be dire;

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it would create “a very serious problem with supplying [the company’s] customers.” (Hall, Tr. 2679-80). If Daramic stopped production at the Potenza plant, JCI would be forced to choose which of its battery customers to serve, and which it could no longer supply. (Hall, Tr. 2680-81).

674. After learning that Daramic’s Potenza plant had been shut down, JCI contacted Entek to find how much available capacity Entek could supply to JCI. JCI found that Entek could not supply the sizes and the volume that would be required to replace what JCI could not get from Daramic and the Potenza plant. (Hall, Tr. 2680). Even if JCI could obtain some separators from Entek, it still would have faced “a considerable shortfall” in meeting its needs in Europe at that time. (Hall, Tr. 2680).
675. Daramic and Entek were the only suppliers qualified by JCI to supply separators to the company in Europe as of January 2004. (Hall, Tr. 2681). JCI had no other suppliers to turn to. (Hall, Tr. 2681).
676. In January 2004, after searching for other supply options, Mr. Hall went to Greg Sherrill, JCI’s General Manager and explained the situation. At that point JCI decided it “had no choice but to sign the contract as it was.” (Hall, Tr. 2681-82). JCI did not wish to sign this contract with Daramic, but the company’s management “felt we were being forced to sign this contract.” (Hall, Tr. 2682).
677. On January 12, 2004, JCI conceded that Daramic’s “aggressive tactics” had left [JCI] with no option but to sign **{redacted}** (PX1505 at 002, *in camera*).
678. A Daramic document notes: “Under pressure, JCI signed the proposed contract, and the deal was done January 19th, 2004.” (PX0965 at 013, *in camera*).

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679. Daramic believed that by forcing JCI into a long-term contract in 2004, it had stopped Microporous' work with JCI on SLI supply. (PX0433 at 004). At the same time, Daramic recognized that the JCI contract did not entirely eliminate the future threat of Microporous in the SLI business. (PX0433 at 004). Daramic worried that JCI and Microporous might continue to work together during the course of the Daramic contract, with Microporous bringing on new capacity in the United States and/or Europe to fulfill volume commitments that JCI could make for the end of the contractual period. (PX0433 at 004; Roe, Tr. 1274-75).
680. In a series of emails, Daramic's executives acknowledged "strong arming" JCI during 2003 to 2004 contract negotiations. Daramic knew that its coercive negotiating engendered "bad blood" between JCI and Daramic. (PX0750 at 001).
681. Just two weeks after Daramic and JCI agreed to a contract extension, on January 26, 2004, Mr. Roe informed Daramic's worldwide sales team that Microporous had been qualified for use in automotive products at JCI and might soon be pursuing automotive opportunities. (PX0244; Roe Tr. 1249-50). Mr. Roe told the Daramic sales team that it had "become critical that we assess the true sales situation of [Microporous'] Cell-Force product." (PX0244; Roe Tr. 1248). Daramic understood that, at that time, Microporous' CellForce line was running at full capacity and that Microporous was planning a second PE line for its Piney Flats facility. (PX0244; Roe, Tr. 1251-53). Mr. Roe requested that his sales team estimate where Microporous might be supplying customers, and informed the sales team that this was a "critical exercise in order to understand the potential threat of this competitor." (PX0244; Roe, Tr. 1251).

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682. **{redacted}** contract between JCI and Daramic took effect as of January 1, 2004. (PX0965 at 013, *in camera*). It obligated JCI to purchase **{redacted}** square meters of SLI separator material annually. JCI quantified the “opportunity cost” of not having a third supplier for its separator needs for the Americas at **{redacted}** (PX1505 at 002, *in camera*).
683. Daramic’s purpose in entering into the 2004 **{redacted}** contract with JCI was, in part, to prevent Microporous from becoming a supplier to JCI and expanding its capacity. Daramic understood that JCI was (and is) “a big buyer of separator, and we had a contract with them [in 2004] so that volume wasn’t available” to Microporous. (PX0908 (Amos, Dep. at 133), *in camera*). In particular, Daramic knew that Microporous had “tried to get into the automotive [SLI] space for a while,” and that the 2004 contract with JCI “effectively blocked them out of the space in [a] significant way.” (PX0744 at 001; PX0908 (Amos, Dep. at 148), *in camera*).
- ***JCI renewed work with Microporous in 2005***
684. JCI reengaged in discussions with Microporous in 2005 about possible supply of PE SLI separators from Microporous to JCI in the United States and in Europe. (Hall, Tr. 2693-94).
685. JCI informed Microporous in 2005 that it wanted to bring Microporous on as an additional SLI separator supplier because Daramic and Entek needed competition to improve their pricing and their performance as suppliers. (Hall, Tr. 2698-99).
686. In 2005, Microporous was intending to expand into SLI for JCI and further expand into industrial separators with

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CellForce production for EnerSys. (Trevathan, Tr. 3718-19).

687. Microporous advised JCI in 2005 that it was planning to add capacity in Europe, and that this would also free capacity in the United States. JCI contemplated that it would supply its European plants from Microporous' planned European plant, and would supply its Winston-Salem or Tampa plant from Microporous' Piney Flats plant. (Hall, Tr. 2692-95).
688. Subsequent to JCI's 2005 discussions with Microporous, JCI tested Microporous' PE SLI separators a second time, after Microporous had improved the manufacturing process. (Hall, Tr. 2696-97). The problems that had been encountered by JCI in its earlier testing of Microporous separators had been fixed. (Hall, Tr. 2696-97).
689. JCI's technical representatives had discussions with Microporous personnel to make sure that Microporous understood the manufacturing process and understood the changes that were made from the previous failed attempt by Microporous, in order make sure that Microporous could successfully manufacture the separators on a repeated basis. (Hall, Tr. 2697). Following these discussions, JCI was comfortable that Microporous could produce an SLI separator that JCI could use. (Hall, Tr. 2697).
690. Microporous' PE SLI separators were qualified for use at JCI in 2007. (PX0672 at 006, *in camera*).

- ***JCI negotiations ended***

691. Ultimately, the JCI and Microporous negotiations in 2005 did not lead to a contract between the two parties. (Hall, Tr. 2697). One reason the parties did not enter into a

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contract was that JCI wanted an assignability clause in the contract that would protect JCI in the event Microporous was acquired by a competitor. (Hall, Tr. 2697-2700; 2800).

692. JCI felt it needed an assignment clause in a contract with Microporous because JCI was aware of Daramic's previous acquisitions of separator manufacturers. (Hall, Tr. 2701). JCI considered it a possibility that Daramic might acquire any new separator manufacturing entrant and thereby undo JCI's strategy to add new competitors to the marketplace. (Hall, Tr. 2701).
693. JCI was also concerned that Daramic's arbitration case against Microporous (F. 765) could delay Microporous' installation of capacity such that it would not have the requisite production capacity by the end of 2008. (Hall, Tr. 2700). JCI felt strongly that it needed new capacity in place in a timely manner to avoid being in the same situation it had been in with Daramic in 2004. (Hall, Tr. 2699-2700). Daramic's history with JCI led JCI to be concerned about a potential disruption of supply. (Hall, Tr. 2701, 2748-49, *in camera*).

**(b) Microporous worked with Exide to
become a supplier of SLI separators**

694. In the summer of 2007, Exide issued an RFP to Microporous, Daramic, Entek, Nippon Sheet Glass (NSG), and Amer-Sil for bids on Exide's global separator business starting in 2010. (Gillespie, Tr. 2962; 2965-67; RX0013). The RFP covered Exide's needs for automotive, motive, stationary and golf cart batteries. (Gillespie, Tr. 2967).
695. At that time, summer 2007, Daramic was the only separator manufacturer in the world that could supply all of Exide's PE separator needs. (Gillespie, Tr. 2978).

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696. Exide intended to use the 2007 RFP process to “go from a single source to a multi-source environment to mitigate the risk and exposure that Exide had from the single exposure.” (Gillespie, Tr. 2966). Exide made all of the potential suppliers aware that Exide intended to pursue a multi-sourcing strategy. (Gillespie, Tr. 2966).
697. Microporous and Exide entered into a Memorandum of Understanding (“MOU”), signed by Microporous on July 20, 2007 and by Exide on September 28, 2007. (Gillespie, Tr. 2968-69; PX1080).
698. The MOU documented the discussions between Exide and Microporous to move forward with Microporous supplying 22 million square meters of PE automotive separators to Exide beginning in 2010. (Gillespie, Tr. 2968-69; PX1080). This represented about one-third of Exide’s PE separator business on a worldwide basis. (Gillespie, Tr. 2978-79).
699. The MOU recites that Microporous operates a plant in Tennessee that is “technologically capable of producing” SLI separators and industrial separators, including CellForce that will meet Exide’s needs for automotive and motive power applications. The MOU further states that the parties intend to discuss an agreement under which Exide would “provide [Microporous] the opportunity to participate in” supplying Exide and that Microporous would install and operate two PE lines, capable of producing either SLI or industrial separators. Both of the lines would be located in Tennessee or at “[Microporous’] future manufacturing facility to be located in Feistritz, Austria,” or one line would be located in each location. (PX1080 at 002-03).
700. The MOU noted that the parties would agree whether the individual lines would produce SLI or industrial

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separators, but that “[e]ach manufacturing line would be capable of producing approximately 11,000,000 square meters annually of SLI separator material, or the industrial equivalent of 4,000,000 square meters . . . for a total initial supply position of approximately 22,000,000 square meters annually.” The MOU further recites that Microporous “would commit to have the above volumes available to Exide by no later than January 1, 2010, and to supply at least that volume each year over the life of” the intended supply contract, which the MOU states would be a five-year contract, and that Exide would make a reasonable effort to purchase “the Agreed Volume of 22,000,000 square meters volume of SLI separator material (or its equivalent in industrial separator square meters, or any combination of the two) from [Microporous] on an annual basis” (PX1080 at 003-04).

701. The MOU noted that each party’s participation in the business opportunity was subject to the approval of each party’s Board of Directors. Microporous’ participation was also subject to Microporous’ ability to obtain financing for the project. (PX1080 at 005)
702. The MOU includes as “steps to be taken in the near future,” that Microporous “will form an engineering and financial team to completely define the scope of the project to install and operate two (2) SLI/Industrial battery separator manufacturing lines”; and that Microporous would manufacture samples for Exide. (PX1080 at 005-06).
703. The parties agreed in the MOU that all commercial and other information shared, as well as the existence of the MOU itself, would be kept confidential. (PX1080 at 006).
704. Mr. Gillespie was responsible at Exide for negotiating the MOU with Microporous. (Gillespie, Tr. 2970-71).

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705. Mr. Gilchrist was the point person for Microporous in negotiations with Exide over the MOU and on the expansion for SLI in the United States. (Gillespie, Tr. 2970-71; Trevathan, Tr. 3756).
706. At the August 16, 2007 Microporous Board of Directors meeting, Microporous management reported that a MOU on the two-line SLI expansion had been signed, and that Microporous had given Exide a draft supply agreement. (PX1106 at 031).
707. After negotiating the MOU, Exide went forward with testing of Microporous' separator samples and developing specific pricing for the separators. (Gillespie, Tr. 2974).
708. Exide's initial bench testing of Microporous' PE SLI separators looked good and Exide then produced batteries in the United States and Europe for testing using Microporous separators. (Gillespie, Tr. 2973-74; PX1024; PX1095).
709. Exide personnel also met with Microporous personnel on numerous occasions in furtherance of their work together on future supply of PE SLI separators. (Gillespie, Tr. 2975). For example, members of Exide's procurement team met with Microporous in Paris in January 2008 to discuss Microporous' capabilities and testing of Microporous separators. (PX1023 at 001, 100). Additionally, Exide was working throughout this period of time to get internal buy-in for the strategy to move forward with Microporous, including working on a redlined draft of a supply contract. (Gillespie, Tr. 3075, 3077).
710. The original MOU between Exide and Microporous expired in 2007. (PX1080). In February 2008, Exide and

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Microporous extended their MOU. (Gillespie, Tr. 2976). At that point in time, Exide intended to purchase PE SLI separators from Microporous in 2010. (Gillespie, Tr. 2976).

711. Prior to the acquisition, Microporous and Exide were working on a draft supply contract and Mr. Gilchrist of Microporous was expecting a counter-offer or revised draft contract from Exide. (Gilchrist, Tr. 445-47, *in camera*).
712. When Microporous renewed its MOU with Exide on February 14, 2008, acquisition negotiations with Daramic were in “stop-start” mode. Because Mr. Gilchrist was concerned that the acquisition might fall through, he carried on developing Microporous’ business until the merger agreement was signed. (Gilchrist, Tr. 448-49, *in camera*; RX0403).
713. Just days before the acquisition, Microporous executives, including Mr. Trevathan and Mr. Gilchrist, traveled to Atlanta to meet with Exide to “finalize an agreement” between Microporous and Exide for the PE line expansion at Piney Flats. (Trevathan, Tr. 3734; Gilchrist, Tr. 447-49, *in camera*; PX0392).
714. Microporous’ purpose in the February 2008 meeting with Exide was to find out Exide’s intent in going forward and to reassure Exide that Microporous was still interested in building a line for them. (McDonald, Tr. 3939).
715. Exide did not return its redline of the draft supply contract to Microporous, and no agreement was finalized prior to the acquisition. (Gillespie, Tr. 3089; Trevathan, Tr. 3640, 3733-35; PX0392).
716. Right up to the date of the acquisition, Microporous had no assurance from Daramic that the acquisition would be

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consummated. (Trevathan, Tr. 3753). If the acquisition had fallen through, Microporous would have continued with its expansion plans including those involving Exide. (Trevathan, Tr. 3753-54).

(c) Microporous held discussions with East Penn Battery regarding SLI separator supply

717. In October 2007, East Penn Battery discussed the possibility of Microporous supplying PE separators to East Penn Battery for use in SLI batteries. (Leister, Tr. 3990, 4011-12; PX0082).
718. East Penn Battery advised Microporous, in October 2007, that East Penn Battery wanted an alternative to Entek for East Penn's Battery East Coast business because Entek's lead-times exceeded East Penn's Battery manufacturing time, resulting in East Penn Battery having to store more material at its plant than it wanted to. In addition, East Penn Battery was paying freight charges to transport Entek's product from Entek's West Coast facility to East Penn's Battery Lyon Station, Pennsylvania, facility. (Leister, Tr. 3698, 4007-09; PX0082).
719. Based on its October 2007 visit to Microporous' plant in Piney Flats, East Penn Battery believed that Microporous had the manufacturing capability to handle some of its volume. During the visit, East Penn Battery communicated to Microporous that it might be willing to enter into a long-term contract with Microporous for the supply of PE SLI separators. East Penn Battery wanted Microporous to know that East Penn Battery was serious about the possibility of it purchasing SLI material from Microporous. (Leister, Tr. 4016-17).

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720. During the 2007 discussions, East Penn Battery provided Microporous with part numbers and volumes that East Penn Battery might be interested in purchasing from Microporous, but Microporous did not have the machinery or the tooling to supply the volumes that East Penn Battery requested. (Leister, Tr. 3991).
721. Microporous did not commit to East Penn Battery that it could supply East Penn Battery with the sizes and volumes of PE separators discussed in 2007. (Leister, Tr. 3991).
722. By the time of the acquisition, Microporous had not been qualified by East Penn Battery as an alternative supplier of PE separators. (Leister, Tr. 3991).

(ii) Anticompetitive effects in the SLI separator market**(a) Economic analysis****1. Unilateral effects**

723. Daramic's acquisition of Microporous had two harmful unilateral effects in the SLI market. (Simpson, Tr. 3194, *in camera*). The first concerns sales to Exide. Although Microporous would not initially be in a position to supply all of the needs of Exide, Exide wanted to have Microporous as an independent supplier because Exide believed that it could obtain better pricing with an additional supplier competing for its business. (F. 696, 744; Simpson, Tr. 3194, *in camera*).
724. The second harmful unilateral effect of the acquisition concerns sales to smaller battery manufacturers. "For smaller battery manufacturers, Microporous would be in a position to meet all of their demand. And Microporous could be their best supplier, in which case eliminating it would reduce competition. They [Microporous] could be

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their second best supplier, in which case they would be the constraint on the supplier who was the best [In that way], the acquisition would reduce competition.” (Simpson, Tr. 3194-95, *in camera*).

2. Coordinated interaction

725. After the acquisition, Daramic and Entek are the only suppliers of separators for SLI (automotive) batteries to North American customers. (F. 437; Gilchrist, Tr. 307-08, 342).
726. Daramic’s acquisition of Microporous would facilitate coordinated interaction. (Simpson, Tr. 3201-02, *in camera*).
727. Coordinated interaction refers to anticompetitive effects that can only occur when the merged firm acts in concert with some of its rivals. (Simpson, Tr. 3199-3200, *in camera*). While outright collusion is an example of coordinated interaction, “firms that repeatedly interact can learn over time that they make more profits if they don’t compete too aggressively, so just that over time firms through repeated interaction begin to behave in a way that’s less competitive . . . and recognize that by behaving not as aggressively they earn more profits.” (Simpson, Tr. 3200, *in camera*). “While sellers sometimes explicitly coordinate their behavior, sellers often simply learn to cooperate through repeated interaction.” (PX0033 (Simpson Report) at 020-021, *in camera*).
728. For coordinated interaction to occur, firms need to reach terms of coordination, monitor those terms, and enforce those terms. (Simpson, Tr. 3201, *in camera*). The following factors would make coordinated interaction more likely: repeated interaction among firms; a small number of firms; and information being readily available

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in the marketplace about what other firms are doing. (Simpson, Tr. 3201, *in camera*).

729. The factors that make coordinated interaction more likely are present in the SLI market. (Simpson, Tr. 3201-02, *in camera*). Daramic knew against whom it was competing if a customer was dual sourcing its separator needs. (PX0904 (Seibert, Dep. 142), *in camera*). Daramic's salespeople would know if they only had a portion of the customer's separator needs and would see the competitor's separators at the customer's location. (PX0904 (Seibert, Dep. 142-43), *in camera*).
730. Daramic views itself as the "market leader" when it comes to pricing. (PX0235). Daramic was the first in the industry to announce a price increase for 2006. Soon after Daramic's announcement, Entek "followed [Daramic's] lead" and increased prices. (PX0235). Daramic was "excited" because Entek "had again shown that Daramic is the market leader." (PX0235). Daramic's Vice President of worldwide sales informed his sales team to "NOT BE AFRAID TO FORCE THE INCREASE." (PX0235, emphasis in original).
731. If Daramic hears a rumor about a competitor, it is a small enough community that Daramic can check and find out whether the information is accurate. (Hauswald, Tr. 834, *in camera*). The industry is small enough that competitive information such as Microporous' opening of a factory, Daramic's strike at a plant, or a plant closing for any significant length of time, is known by everyone in the industry. (Hauswald, Tr. 835-37, *in camera*).
732. In 2006, Mr. Hauswald learned and wrote down sales information relating to the customers to whom Microporous was selling and the quantities they sold. (Hauswald, Tr. 840, *in camera*; PX0093 at 046, *in camera*). Daramic gets such information from its

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workforce regarding what customers are buying. (Hauswald, Tr. 840, *in camera*).

733. Mr. Hauswald wrote down what he thought to be Microporous' total sales to the United States broken down by customer, including EnerSys, East Penn Battery, Exide, C&D, Douglas Battery, Crown Battery, and Bulldog Battery. (PX0093 at 046, *in camera*; Hauswald, Tr. 841, *in camera*). Mr. Hauswald also wrote down the difference in price for C&D between Daramic's and Microporous' product, with Microporous offering a price **{redacted}** lower than Daramic. (PX0093 at 046, *in camera*; Hauswald, Tr. 843, *in camera*).

(b) Post-acquisition duopoly in SLI

734. JCI entered into a long-term contract with Entek in 2007 to be an exclusive supplier to JCI in the Americas and Europe. (Hall, Tr. 2747, *in camera*). Subsequent to the completion of the long-term contract, **{redacted}** (Hall, Tr. 2747, *in camera*).
735. **{redacted}** (Hall, Tr. 2762-63, *in camera*). **{redacted}** (Hall, Tr. 2762-63, 2823-24, *in camera*). **{redacted}** (Hall, Tr. 2763-64, 2823-24, *in camera*).
736. When JCI's contract with Daramic expired on December 31, 2008, JCI transitioned that business to Entek. (Hall, Tr. 2748, *in camera*). This constitutes a loss of **{redacted}** in annual revenue for Daramic. (Toth, Tr. 1535; RX0998, *in camera*).
737. Entek will not constrain Daramic's post-acquisition pricing **{redacted}** (Simpson, Tr. 3195, *in camera*). **{redacted}** (Simpson, Tr. 3196-97, *in camera*).

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738. **{redacted}** (Simpson, Tr. 3197, *in camera*) **{redacted}** (Simpson, Tr. 3197, *in camera*).
739. **{redacted}** (Simpson, Tr. 3442, *in camera*). **{redacted}** (Simpson, Tr. 3441, *in camera*). **{redacted}** (Simpson, Tr. 3442, *in camera*).
740. **{redacted}** (Simpson, Tr. 3197, *in camera*). **{redacted}** (Simpson, Tr. 3197-98, *in camera*).
741. Entek's lack of a constraining effect on Daramic can be seen by comparing Daramic's response to **{redacted}** (Simpson, Tr. 3198-99, *in camera*). Microporous was building a new factory in Austria and had plans to add an additional line at its Tennessee plant. (Gaugl, Tr. 4576). The additional capacity at the Austria plant would have freed up capacity at its Tennessee plant which previously had supplied European customers. (PX2301 (Heglie, Dep. at 38-39), *in camera*).
742. Daramic responded to Microporous' new capacity by instituting its MP Plan which offered favorable pricing to customers that Daramic thought might shift to Microporous. (F. 820-52).
743. **{redacted}** (PX1823 at 001, *in camera*). **{redacted}** (PX1823 at 001, *in camera*).
744. **{redacted}** (Gillespie, Tr. 3022, *in camera*). **{redacted}** (Gillespie, Tr. 3022, *in camera*).
745. In 2009, Exide has been taking steps to move some of its SLI business from Daramic to Entek. (Gillespie, Tr. 2977, 3049, *in camera*, 5826-5827, *in camera*). Exide intends to purchase **{redacted}** of its SLI needs after 2009 from Entek. (RX1704 at 001, *in camera*, Gillespie, Tr. 5826, 5838-39, *in camera*). Exide has **{redacted}** (Gillespie, Tr.

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5868, *in camera*). Additionally, Exide would not {redacted} (Gillespie, Tr. 5826-28, *in camera*).

746. Beginning in June 2009, and pursuant to the supply contract between Exide and Daramic, Exide began {redacted} (RX01676, *in camera*; RX01723, *in camera*; Siebert, Tr. 5671; Gillespie, Tr. 5855-56).
747. Exide's purpose {redacted} and was not to enable Exide to replace Daramic with another supplier. (Gillespie, Tr. 5795-96). Exide's purpose in this regard was communicated to Daramic. (RX01679 at 002, *in camera* (Daramic acknowledging its "understanding" that Exide {redacted})).
748. Exide's most recent contract proposal to Daramic {redacted} (RX1687 at 002, *in camera*; Gillespie, Tr. 5812-13, *in camera*).
749. In an 8-K filing made with the Securities and Exchange Commission ("SEC") on January 19, 2010, Polypore announced that Daramic entered into a new evergreen supply agreement with Exide. Order on Complaint Counsel's Motion for Official Notice, February 16, 2010.

2. Daramic acquired Microporous to eliminate a competitive threat

750. As early as July 2003, Daramic's head of sales, Tucker Roe, sent a memo to the President of Daramic summarizing the rationale for acquiring Microporous: "The only reason for acquisition would be purely defensive to secure our market share of the traction market and terminate the continued price erosion." (PX0935 at 001; *see also* PX0433 at 004 ("The main disadvantage I see if we do not acquire [Microporous] is that [Microporous] may continue their plans for a second line

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resulting in either our loss of current customers or further reduction in our market pricing, hence loss of margins.”)).

751. In 2003, the President of Daramic put an acquisition of Microporous at the top of his list of possible acquisitions, describing the benefit to Daramic as “[e]liminate price competition.” (PX0932).
752. The effects of price competition eventually led Daramic in 2005 to consider an outright acquisition of Microporous. (PX0433). Daramic understood that the benefit of an acquisition of Microporous would be the elimination of their low price competitor. (PX0433 at 003).
753. The main disadvantage that Daramic saw in 2005 in not acquiring Microporous was that Microporous might continue its expansion plans, resulting in either a loss of customers for Daramic or a further reduction in Daramic’s market pricing. (PX0433 at 004; Roe, Tr. 1271-72). Daramic believed that if Microporous remained independent and was “allowed to add additional capacity,” it would “further reduce the overall market pricing.” (PX0433 at 003-04; Roe, Tr. 1270-71; PX0919 (Riney, IHT at 294-95), *in camera*).
754. Bob Toth became CEO of Polypore in July 2005. (PX0901 (Toth, Dep. at 7), *in camera*). Upon becoming CEO, Mr. Toth was provided with “a summary of several memos done by Tucker [Roe]” regarding Daramic’s “need to protect [its] market share, by discouraging new competitors (H&V, . . .) or through acquisition (PIL in Potenza, Jungfer in Austria).” (PX2242 at 001, *in camera*). Mr. Hauswald told Mr. Toth that “[Microporous] falls mainly in this category, they represent a threat to Daramic for the future. . . . Their first line costs us {redacted} million/year, in price concession and loss of business. The second line could cost us another {redacted} million.” (PX2242 at 001, *in camera*).

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755. In September 2005, Mr. Hauswald again advises Mr. Toth that Daramic should buy [Microporous] because it has taken EnerSys business from Daramic and threatens to take even more. (PX0168). Mr. Hauswald told Mr. Toth that “[Microporous] is a real threat for our business, not only in the industrial market, but, later, in the automotive market, because there is no doubt that JCI and EXIDE will contact them for a deal, when our contracts will expire. I’m still recommending to buy [Microporous], as a defensive action.” (PX0168 at 002).
756. One month later in October 2005, Frank Nasisi, advised Mr. Toth that based on the information Daramic has received about Microporous building a plant in Europe for EnerSys, “[w]e must do everything possible to stop this process The bottom line is that [Microporous] can be another Entek: building plants to exclusively supply EnerSys, JCI, East Penn and so forth.” (PX0694 at 001). Mr. Hauswald felt that Daramic should “solve the [Microporous] case definitively.” (PX0694 at 001).
757. Daramic recognized that customers might view a Daramic acquisition of Microporous as an elimination of a potential PE supplier, thereby creating a situation where battery manufacturers would have even greater dependency on Daramic for supply of PE separators. (PX0433 at 004). Daramic further understood that customers would not take well to a Daramic acquisition of Microporous in light of Daramic’s past history of acquisitions of other PE suppliers such as Evanite, PIL, and Jungfer. (PX0433 at 004; Roe, Tr. 1275-76).
758. In August 2006, Daramic personnel including, Mr. Hauswald, Mr. Roe, Mr. Whear, and Mr. Riney, met to discuss the direction of the company. (PX0992 at 001, *in camera*; Hauswald, Tr. 826, *in camera*). Daramic at the

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time believed that Microporous was gaining market share due to three factors: “1) price, 2) Daramic was too slow to respond to customer’s needs for new products, and 3) [its] available production capacity.” (Hauswald, Tr. 827-28, *in camera*; PX0992 at 004, *in camera*). Daramic also stated that Microporous’ products were similar in performance to Daramic’s products. (PX0992 at 004, *in camera*).

759. On August 23, 2006, Mr. Frank Nasisi sent an email to Pierre Hauswald on various issues at Daramic. In his email, Mr. Nasisi stated, “[Microporous] will be a problem for Daramic. They have acquired momentum and it will be very difficult to stop them unless the BOARD will approve its purchase at any price (it will be more now than a year ago).” (PX0167).

3. Daramic attempted to prevent Microporous from using Jungfer technology to sell PE SLI in Europe

760. In 1999, Microporous installed at its Piney Flats facility a PE line that was designed to make CellForce and SLI separators. Microporous bought this line from Jungfer, a company in Austria that had a business of making separators and installing manufacturing lines for other companies to make separators. (Gilchrist, Tr. 320, 391; Hauswald, Tr. 772, *in camera*; McDonald, Tr. 3903).
761. In 2001, Daramic acquired Jungfer and acquired Jungfer’s assets, two production lines. (Hauswald, Tr. 772, *in camera*; PX2241 at 002). After Daramic acquired Jungfer, Daramic closed down the Jungfer plant. (Gilchrist, Tr. 320-21; Hauswald, Tr. 772, *in camera*).
762. In May 2005, Frank Nasisi, the departing CEO of Polypore, notified Michael Graff by email that while looking through his files he had found the contract between Jungfer and Microporous relating to the PE

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production line that Jungfer installed for Microporous in 2001. In the email he stated:

The contract puts a restriction on Microporous Products to sell PE product for automotive application in Europe or Korea, places where at that time Jungfer was selling its product. This is certainly a big restriction of anyone who wants to expand the business by going into the automotive market

It certainly will reduce their value for anyone outside Daramic. Phillip [Bryson, Polypore General Counsel,] will investigate it further and provide us with a clear picture of this new finding.

(PX0747).

763. In June 2006, **{redacted}** (PX0751 at 001, *in camera*). In his email reply, Mr. Hauswald stated:

[Microporous]: waiting to see what are our chances to re-enforce the contract [Microporous]-Jungfer, when Jungfer sold the equipment, with a clause saying that they aren't authorize[d] to produce and sell automotive product in Europe. **{redacted}**

(PX0751 at 001, *in camera*).

764. Pierre Hauswald assembled a team to come up with a plan to keep [Microporous] from gaining additional business at Daramic's expense resulting from the plant in Europe. (PX0246, *in camera*). The email to the team discusses the actions taken by Daramic thus far, and noted among other things that **{redacted}** (PX0246, *in camera*).

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765. In addition, in October 2006, Daramic sued Microporous to prevent it from selling SLI separators in Europe from lines using the Jungfer manufacturing process. (PX2241, *in camera*). Further, {redacted} (PX2237 at 006, *in camera*).

4. Prior to the acquisition Microporous was expanding

766. Prior to the acquisition, Microporous had been owned by Industrial Growth Partners (“IGP”). (Gilchrist, Tr. 301). In evaluating its investment in Microporous, IGP saw growth opportunities in golf cart, reserve power and motive power battery separator markets, and potential opportunity in the automotive market. (PX2300 (Heglie, IHT at 21-23), *in camera*). Other attributes that IGP evaluated in making its investment in Microporous included a highly engineered product, strong profitability, that a large component of the business was aftermarket, which tends to have a steady demand, and good cash flow characteristics. (PX2300 (Heglie, IHT at 22), *in camera*).

767. At the time of IGP’s acquisition of Microporous, IGP determined that Microporous had multiple growth strategies. (PX2301 (Heglie, Dep. at 22), *in camera*). During the course of IGP’s ownership of Microporous, the Microporous Board, which was comprised of mostly IGP employees or partners, wanted to grow Microporous’ sales and profits. (PX2301 (Heglie, Dep. at 24), *in camera*).

768. Because Microporous was owned by private equity companies, starting in the 1990s, it was imperative that the company develop growth strategies and expansion into the SLI market was the first place the company looked. (Gilchrist, Tr. 299).

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769. Various plans had been considered by Microporous regarding the addition of production facilities in Europe and at Piney Flats. Microporous' original plan was to add one line in Europe to free up capacity in Piney Flats and thereby be able to supply EnerSys' growing industrial battery separator needs in the United States and Europe. When JCI and others showed interest in buying automotive product from Microporous, the plan expanded to add a second line in Austria. The second line could be used for separators for industrial or automotive batteries. (Gilchrist, Tr. 401-02, 558; Gaugl, Tr. 4559-60; *see* RX0207).
770. In November 2006, the IGP Board approved a larger expansion plan which provided for two lines in Europe, including the building of a new facility, as well as the installation of a new line at Piney Flats. This expanded program anticipated supplying East Penn Battery with separators for SLI application. (Trevathan, Tr. 3722, 3598-99).
771. In May 2007, Microporous management presented the Microporous Board with the strategic plan, which included "Protect golf car market"; "Protect position in European traction"; "Regain U.S. traction position"; and "Create position in SLI market." (PX1102 at 029 (emphasis omitted). The Board was generally supportive of the strategic plan. (PX2301 (Heglie, Dep. at 30), *in camera*; PX2300 (Heglie, IHT at 159), *in camera*). With regard to creating a position in SLI, while there were debates between management and the Board regarding the details and execution, "the core tenet of trying to create a position in that market," was agreed to by the Microporous Board. (PX2301 (Heglie, Dep. at 31), *in camera*; PX2300 (Heglie, IHT at 160), *in camera*).

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772. At the time Microporous was planning the Austrian expansion, it was contemplating expanding in the United States as well. (Gaugl, Tr. 4560). When it began ordering equipment for the expansion, it ordered equipment for three lines. (Gaugl, Tr. 4576). Two of those lines were to be built in Austria, and one was to be built in Piney Flats, Tennessee. (Gaugl, Tr. 4576).

a. Microporous was planning to add capacity

773. Microporous planned to add a production line for polyethylene separators at the Piney Flats facility in May or June of 2008. (Gilchrist, Tr. 374-75, 457, *in camera*; Gaugl, Tr. 4560).

774. Long lead-time items for a PE line are those pieces of equipment that take from ten to twelve months to arrive. Microporous ordered the long lead-time items for the additional PE line to be installed in Feistritz, Austria in December 2006. (Trevathan, Tr. 3599-600).

775. Microporous purchased equipment for the new Piney Flats line, including the mixers, extruder, calender roll, heat exchangers for the condensation unit, dryers, and the pinhole detection system. (Gaugl, Tr. 4561). Initial work on the additional line at Piney Flats began prior to the acquisition, including designing and planning work, hiring an engineering firm, and drawing up blueprints. (Gaugl, Tr. 4575).

776. Microporous spent approximately 1.5 million Euros on the equipment for a third line. Mainly, only electrical equipment was necessary to finish the line. (Gaugl, Tr. 4560-64; Trevathan, Tr. 3599-60).

777. In the fall and early winter of 2007, Microporous moved ahead with plans to expand. Microporous met several times with a building contractor, J.A. Street, and hired it to

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draw plans for additional PE capacity in its Piney Flats facility. (Trevathan, Tr. 3725-26, 3735-36). Other than the design and planning work, however, no work was done to install a third line prior to the acquisition. (Gaugl, Tr. 4574-75).

778. At the time of the acquisition, Microporous had built two “state-of-the-art” production lines at a plant in Feistritz, Austria, both of which could produce either CellForce separators or plain polyethylene separators and, therefore, could be used for SLI batteries or industrial batteries. Microporous’ plan was to have the Feistritz plant operational in March 2008. (Gilchrist, Tr. 312, 332, 558-59; Trevathan, Tr. 3714; Gaugl, Tr. 4551; PX0078 at 025, *in camera*).
779. As acknowledged by both Daramic and Microporous in the summary of major terms of the acquisition, at the time of the acquisition, “Phase I consisting of 2 lines is on track for completion in Austria and will be able to achieve production capacity of up to {redacted} square meters of CellForce for SLI or first quality PE (or up to {redacted} square meters of industrial CellForce) separators per month by no later than June 2008.” (PX0742 at 007, *in camera*).

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(i) Microporous planned to expand to meet customer requests

780. This original Austrian plan expanded when other customers of Microporous showed interest in buying separators in Europe. At the end of 2005, JCI showed interest in buying automotive separators from Microporous. The anticipated volume was 22 million square meters. Accordingly, Microporous' Austrian expansion plan was changed to install a second line in Austria and an additional line in Piney Flats. (Gaugl, Tr. 4559-60; Trevathan Tr. 3598-99).
781. In early 2007, Microporous' negotiations with JCI broke down. By this time Microporous had begun discussions with Exide, and had been provided a copy of a Memorandum of Understanding to sign, under which Microporous would supply a volume that equated to roughly 22 million square meters. (Trevathan, 3601-10). When the JCI deal fell through, Microporous believed the expansion would supply Exide. (Trevathan, Tr. 3722).
782. Microporous' planned Phase II expansion consisted of a third line for completion in Austria that would be able to "achieve production capacity of up to **{redacted}** square meters of CellForce for SLI or first quality PE (or up to **{redacted}** square meters of industrial CellForce) separators per month by June 2009." (PX0742 at 007, *in camera*).
783. Collectively, Phases I and II of Microporous' expansion consisted of three production lines capable of producing a total of up to **{redacted}** square meters of CellForce for SLI or first quality PE (or up to **{redacted}** square meters of industrial CellForce) separators per year. (PX0742 at 007, *in camera*).

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784. Phase III of Microporous' planned expansion consisted of "2 additional lines with up to **{redacted}** square meters of capacity of CellForce for SLI or first quality PE (or up to **{redacted}** square meters of industrial CellForce) separators per year." (PX0742 at 007, *in camera*).
785. All together, the three phase expansion plan was projected to increase Microporous' capacity from **{redacted}** million square meters to **{redacted}** million square meters by 2011. (PX0462 at 005, *in camera*; PX0738 at 013, *in camera*; PX0463 at 002, *in camera*).
786. Microporous planned to devote one full line in Austria to serving the EnerSys business in Europe. (Gilchrist, Tr. 401-02).
787. **{redacted}** This meant that EnerSys would **{redacted}** (PX1200; Axt, Tr. 2144, *in camera*). Initially, EnerSys committed each of its battery manufacturing plants to Microporous except Richmond, Kentucky, which was not included because EnerSys wished to keep two suppliers and because CellForce could not be sleeved at that time. (Axt, Tr. 2131).
788. **{redacted}** (Axt, Tr. 2150, *in camera*). **{redacted}** Microporous did not have enough capacity in Piney Flats to support the total EnerSys demand. Microporous had to go back to its Board of Directors and get approval for a new industrial line. (Axt, Tr. 2151, *in camera*).
789. **{redacted}** (RX0207 at 010, *in camera*; Axt, Tr. 2152, *in camera*). The new line was to be completed between June 1 and August 1, 2009. (RX0207 at 010, *in camera*; Axt, Tr. 2156, *in camera*). From EnerSys' perspective, **{redacted}** (Axt, Tr. 2153, *in camera*).

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790. In 2007, Microporous negotiated a contract with EnerSys for industrial CellForce volume related to the European facility as well as the expanded United States facility. (Trevathan, Tr. 3728). One of the commitments that Microporous made to EnerSys was to **{redacted}** (RX0207 at 010, *in camera*). **{redacted}** (RX0207 at 009-10, *in camera*).
791. The Microporous Board **{redacted}** at its August 16, 2007 Board meeting, after the amendment was executed. (PX2300 (Heglie, IHT at 164-65), *in camera*); PX1106 at 031).
792. While the 2007 contract amendment that committed Microporous to **{redacted}** (PX2300 (Heglie, IHT at 138), *in camera*).
793. The Microporous Board wanted to maintain its customer position with EnerSys. (PX2301 (Heglie, Dep. at 38), *in camera*). Fulfilling commitments to EnerSys was important to the Microporous Board. (PX2301 (Heglie, Dep. at 38), *in camera*).
794. At no point did Microporous go back to EnerSys to say that it could not fulfill the 2007 contract. (PX2300 (Heglie, IHT at 164), *in camera*).

(ii) Backfill supply for North America

795. By moving production of EnerSys' European volumes to Austria, Microporous planned to make capacity available at Piney Flats for North American customers. (Gilchrist, Tr. 402-03; Trevathan, Tr. 3763, 3774).
796. The "backfill" describes how to refill idle or unutilized capacity in Microporous' Piney Flats, Tennessee plant that would become available when Microporous transferred a

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portion of its United States business to Austria. (PX2301 (Heglie, Dep. at 38-39), *in camera*).

797. As part of its 2007 backfill plan, Microporous was trying to sell United States based customers, including East Penn Battery, additional volumes of CellForce for motive power, displacing the PE separators they had previously used in this application. (Gilchrist, Tr. 344; McDonald, Tr. 3874-77, *in camera*).

(a) Microporous owners had funded and were willing to continue to fund Microporous expansion plans

798. By the summer of 2007, Daramic was aware of Microporous' expansion plans. In an August 9, 2007 email reporting on his conversation with Mr. Bryson about a possible acquisition of Microporous, Mr. Heglie wrote that he "told him [Mr. Bryson] that we were in the early stages of our investment, had partnered with management and were not looking to divest, and are in the midst of executing on our own multi-pronged expansion plan for which we have plenty of capital and support." (PX1105 at 002).
799. On November 14, 2007, three months after Microporous and Daramic began discussing a potential acquisition, and three months after Microporous and {redacted} the Microporous Board issued "strategic mandates" to Mr. Gilchrist to "make the Board's long- and near-term objectives for the Company more clear . . . as well as assist in the 2008 strategic financial planning process." (PX2301 (Heglie, Dep. at 64), *in camera*).
800. The November 2007 Board mandates were not intended to tell Microporous management that there would be no further expansion. (PX2301 (Heglie, Dep. at 65), *in*

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camera). Nor did the mandates mean that Microporous should stop the work that it was doing to try to grow the business. (PX2301 (Heglie, Dep. at 65-66), *in camera*).

801. After the issuance of the mandates on November 14, 2007, the Microporous Board “was still open to the possibility of moving into the . . . PE SLI market.” (PX2301 (Heglie, Dep. at 71), *in camera*; see also PX2300 (Heglie, IHT at 183), *in camera* (“I think the [IGP part of the] Board’s, my view . . . is the SLI automotive market wasn’t as attractive as other market opportunities available for the company, but it was still a potential growth opportunity.”)).
802. In 2007, Exide wanted “to move forward with an SLI project for two lines (one in U.S. and one in Europe) to begin supply January 1, 2010.” (PX1102 at 024; PX2300 (Heglie, IHT at 153-54), *in camera*; Trevathan, Tr. 3757). Exide was “[a]lso interested in incremental industrial volumes in Europe.” (PX1102 at 024; PX2300 (Heglie, IHT at 153-54), *in camera*). Mr. Heglie, on behalf of the Board and IGP, did not tell Mr. Gilchrist to cease work on the Exide SLI project. (Gilchrist, Tr. 454-55, *in camera*).
803. Microporous management was working in good faith with Exide in 2007 on potential expansion for PE SLI separators. (PX2301 (Heglie, Dep. at 75-76), *in camera*).
804. Growth opportunities as relating to customer development would have continued to be a focus of IGP and Microporous absent the acquisition. (PX2300 (Heglie, IHT at 219-21), *in camera*).

5. Competition between Daramic and Microporous increased in the months preceding the acquisition

805. In 2007, Daramic faced competition from Microporous at five of Daramic’s top ten customers. (Roe, Tr. 1307). This included renewed competition from Microporous in

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both motive and automotive markets. In the automotive market, Daramic understood that Microporous was competing with Daramic for business at JCI, Exide, East Penn Battery and Fiamm. (Roe, Tr. 1303-07). Daramic during this period viewed Microporous as a viable competitor for automotive separator supply. (Roe, Tr. 1307-08; PX0922 (Roe, IHT 359-61), *in camera*). At the same time, Microporous was competing with Daramic for motive business at EnerSys, Exide and East Penn Battery. (Roe, Tr. 1303-06). Daramic and Microporous continued to compete for deep-cycle customers as well. (PX0263 at 003-04, 008, *in camera*).

806. In 2007, Daramic grew concerned about the possible loss of automotive business to Microporous at JCI. (PX2078). At that time, Daramic was supplying about 55 million square meters of separators to JCI on an annual basis. (Roe, Tr. 1296). Daramic also understood that it was JCI's strategy to have multiple suppliers in each geographic region (the Americas, Europe and Asia) in order to exert pressure on PE suppliers. (Roe, Tr. 1296-98; PX2078).
807. In 2007, Daramic considered Microporous to be a competitive threat for JCI's automotive business. (Roe, Tr. 1307). In August 2007, Mr. Roe informed Mr. Hauswald that "one likely scenario" for JCI would include Microporous taking 20 to 25 million square meters of product in 2009, product which to date was being supplied to JCI by Daramic. (PX2078; Roe, Tr. 1301). Mr. Roe further believed that Microporous might get an even larger share of JCI's separator business beginning in 2010. (PX2078; Roe, Tr. 1301).
808. In the fall of 2007, Daramic believed that it was facing an EBITDA loss of **{redacted}** between 2008 and 2010

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without an acquisition of Microporous. (PX0276 at 007, *in camera*).

809. On November 10, 2007, Mr. Hauswald emailed Mr. Roe asking whether the 2008 budget and long range plans were realistic. (PX0238 at 001; PX0922 (Roe, IHT at 362-63), *in camera*). Mr. Roe responded by email dated November 12, 2007, stating that “2008 will be the most challenging year ever faced by Daramic.” (PX0238 at 001). Mr. Roe stated that Daramic was “finishing 2007 on a down-swing” and was “beginning to feel the real effects” of price competition and Daramic’s past performance issues. (PX0238 at 001). Mr. Roe indicated that Daramic had to be the “price leader” and “continue to push/force price increases” even as the competition was lowering prices. (PX0238 at 001). Mr. Roe also emphasized to Mr. Hauswald that 2008 would be a uniquely difficult year for Daramic because of Microporous’ ongoing expansion project which was “an element we have not faced in many years.” (PX0238 at 001). According to Mr. Roe, “unlike prior years, we have a true legitimate big competitor entering the market (MP) and for sure they will capture volume at whatever it takes.” (PX0238 at 001; PX0922 (Roe, IHT at 362-363), *in camera*; Roe, Tr. 1302-03).

6. The acquisition eliminated capacity expansion plans

810. Microporous had discussions with East Penn Battery about expanding into SLI in the United States around the time of the acquisition discussions with Daramic in late 2007. (PX2300 (Heglie, IHT at 186-88), *in camera*). Microporous put off discussions with East Penn Battery in part “based on the uncertainty with the Daramic transaction . . . IGP was unwilling to commit a bunch of capital to it without knowing if we’re going to be compensated for it.” (PX2300 (Heglie, IHT at 188), *in camera*).

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811. Microporous was likewise reluctant to invest additional capital to gain Exide's business while it was engaged in acquisition discussions with Daramic. (PX2300 (Heglie, IHT at 190), *in camera*).
812. With the acquisition of Microporous by Daramic, Exide's strategy of adding separator suppliers to the marketplace (F. 696, 744) was defeated. (Gillespie, Tr. 2979-80).
813. The additional PE line (F. 773-76) was never installed. (Gaugl, Tr. 4560). Part of the equipment for that line is sitting in boxes in Austria and Piney Flats. The extruder is at the supplier in a semifinished stage and the pinhole detector is being used in Piney Flats. (Gaugl, Tr. 4565).

7. The acquisition impacted innovation competition

814. Daramic and Microporous competed with one another to innovate deep-cycle battery separators. (Qureshi, Tr. 2049-50). Daramic improved the performance of its original deep-cycle separator, Daramic DC, **{redacted}** such that it would behave physically like Flex-Sil. (PX0949 at 019, *in camera*; Qureshi, Tr. 2050). The new improved product became known as Daramic HD. (PX0949 at 019, *in camera*).
815. With U.S. Battery's increased use of Daramic DC and Daramic HD, Daramic became aware that the **{redacted}** of the separators slowed down the hand assembly of the cells at U.S. Battery. (PX1742 at 002, *in camera*). A November 2006 document discussing a visit to U.S. Battery stated that "[i]f we [Daramic] are to earn more sales, **{redacted}**" (PX1742 at 001, *in camera*). An April 4, 2007 Daramic Trip Report to U.S. Battery reiterates that "[a] lack of stiffness in leaf separators had been an impediment to further sales by Daramic." (PX0681 at

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- 001). The April 4, 2007 trip report states that Daramic made a presentation to U.S. Battery on its **{redacted}** project, a project to improve separator stiffness for better handling. (PX0681 at 001; PX0682 at 001, *in camera*). After the presentation, U.S. Battery indicated an interest in receiving separators with sodium silicate for added stiffness to test. (PX0681 at 002).
816. In April 2008, Daramic visited U.S. Battery and reviewed the results of the **{redacted}** project and determined that the sodium silicate additive affected the capacity of the battery. (PX0682 at 001, *in camera*; Qureshi, Tr. 2087-88). During the Daramic visit to U.S. Battery, Mr. Qureshi suggested that Daramic use polyvinyl alcohol to improve stiffness. (PX0682 at 001, *in camera*; Qureshi, Tr. 2087-88). U.S. Battery does not know whether Daramic has followed up on its suggestions to improve stiffness. (Qureshi, Tr. 2051, 2087-88).
817. Microporous had several technically innovative projects underway prior to the acquisition, including, but not limited to, projects LENO, to address the black scum and Darak replacement issues at EnerSys (F. 617-28); **{redacted}** (Whear, Tr. 4730-46, *in camera*).
818. Despite the prospects for the new gel battery separator from the LENO project, after the acquisition (F. 617-28), Daramic's management was not interested in the further development of a product to replace Darak, a very high-margin product for Daramic. (Brilmyer, Tr. 1863-64).
819. Of the Microporous innovation projects listed in F. 817, **{redacted}** in the flooded lead-acid battery arena after having come under Daramic's control. (Whear, Tr. 4736-52, *in camera*).

**8. Daramic's reaction to Microporous' expansion –
The MP Plan**

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820. In the fall of 2007, Daramic took active steps to respond to what Daramic estimated would be a potential loss of **{redacted}** in global sales in the SLI and motive markets. Mr. Roe and Mr. Hauswald developed a project known as the “MP Plan.” The goal of the MP Plan was to secure long-term agreements with customers who Daramic identified as being at risk of shifting their sales to Microporous. (PX0255, *in camera*; PX0911 (Roe, Dep. at 184-87), *in camera*; PX0258 at 001 (“What do we want to achieve? Secure select [long term] agreements to fight the [Microporous] threat.”)).
821. Regarding the MP Plan, Daramic projected that, for East Penn Battery, Daramic was at risk of losing as much as 1 million square meters of automotive product, and 500,000 square meters of motive power separators, to Microporous. Daramic projected that, for Douglas Battery, Daramic was at risk of losing as much as 250,000 square meters of motive product to Microporous. Daramic projected that, for Crown Battery, Daramic was at risk of losing as much as 250,000 square meters of motive product to Microporous. (PX0258 at 002; Roe, Tr. 1288-89). Daramic based its projections on information that Microporous had visited Crown Battery, Douglas Battery, and East Penn Battery, and assumed that Microporous had given these customers quotations. (Roe, Tr. 1289-90).
822. Daramic offered these customers contracts that **{redacted}** (PX0255 at 001, *in camera*; Roe, Tr. 1292-94, 1350-54, *in camera*). The terms offered to customers under the MP Plan limited **{redacted}** (PX0258; PX0255 at 001, *in camera*).
823. The goals of the MP Plan were to: Secure select long-term agreements to fight the Microporous threat; achieve price improvements; achieve margin improvements; achieve

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price stability; and increase volume resulting in net margin increase. To achieve its goals, Daramic planned to offer customers: Fixed or guaranteed delivery times; inventory commitments; price stability; consignment; rebate schedules; limited price increases; and a competitive price in comparison to Microporous. The MP Plan also noted that “[a]s a last resort we play hard – no agreement – no supply.” (PX0258).

a. The Crown Battery contract

824. Fifty percent of Crown Battery’s product line is SLI batteries for automobile replacement, trucks, and buses. Crown Battery includes in its SLI division the batteries it makes for deep-cycle batteries for sweeper/scrubbers, golf carts and marine vehicles. The other fifty percent is what Crown Battery refers to as motive power industrial, which is primarily forklift batteries and coal mine equipment batteries. (Balcerzak, Tr. 4092).
825. Crown Battery signed a **{redacted}** contract with Daramic in December 2007 to purchase no less than 100% of Crown’s requirements for polyethylene battery separators for lead-acid batteries for its motive and automotive power applications. The products and specifications included Daramic High Performance for SLI applications, Daramic Industrial for motive power applications, and Daramic HD for deep-cycle, motive, or marine applications. (Balcerzak, Tr. 4104, *in camera*; RX0994, *in camera*).
826. Crown Battery had previously had **{redacted}** with Daramic prior to entering into the December 2007 contract. It was Daramic’s suggestion that they enter into a **{redacted}** Crown Battery saw the choice to enter into the contract as a “no-brainer.” (Balcerzak, Tr. 4104-06, 4111, *in camera*; RX0994, *in camera*).

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827. Other factors that led Crown Battery to enter into the contract with Daramic were that Crown Battery had been dealing with Daramic for over 20 years; Crown Battery viewed Daramic as one of its best suppliers that had provided Crown Battery with great service; and the ability to lock in a fair price, when raw materials were “going through the roof . . . was an offer that [Crown] couldn’t refuse.” (Balcerzak, Tr. 4104-06, 4111, *in camera*; RX0994, *in camera*).
828. As an inducement to Crown Battery to sign a long-term contract, **{redacted}** of the cost of the tool required for making Crown Battery’s desired profile. (Balcerzak, Tr. 4116, *in camera*; RX0994 at 009, *in camera*).
829. Although Crown Battery had purchased Microporous products for its golf cart batteries, and had considered CellForce when it first came on the market, Crown Battery stopped considering CellForce for industrial applications many years before the 2007 contract with Daramic and did not consider the price of CellForce when negotiating the 2007 contract with Daramic. Crown Battery had no test results for CellForce and would not switch to a supplier without test results from them. (Balcerzak, Tr. 4106-08, *in camera*).
830. **{redacted}** (Balcerzak, Tr. 4106, *in camera*; 4128-29).

b. The East Penn Battery contract

831. East Penn’s Battery automotive division includes its SLI batteries used for cars, boats and recreational vehicles. Included in its automotive division are its deep-cycle batteries. East Penn’s Battery industrial division manufactures motive power batteries, for forklifts and mine equipment, and stationary batteries for backup

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systems, for hospitals, telephones and cable. (Leister, Tr. 3976-77).

832. East Penn Battery uses “straight” polyethylene battery separators for all its flooded batteries, including those used for its deep-cycle batteries used in golf carts and floor scrubbers. For its sealed battery technology, used in stationary power batteries, it uses AGM. For its motive power batteries, it used to purchase small quantities of rubber-based PE from Microporous, but does not any longer. (Leister, Tr. 3978-80).
833. On January 7, 2008, East Penn Battery entered into a three-year contract with Daramic to supply **{redacted}** of its automotive and 90% of its industrial PE needs through December 31, 2010, at specified prices. (PX0637 at 002-09, *in camera*; RX1519, *in camera*; Leister, Tr. 2980, 3999-4000, 4005, *in camera*).
834. The percentages agreed to in the January 2008 contract were based upon East Penn’s Battery then-current purchasing habits. At that time, East Penn Battery was purchasing small quantities of rubber-based PE separators from Microporous for motive power batteries, in an amount meeting less than 10% of its needs. East Penn Battery wanted to continue to purchase this quantity, even though Microporous was higher priced than Daramic, but was not interested in buying more than 10% from Microporous. (Leister, Tr. 3980, 3999-4000, 4005, *in camera*).
835. East Penn Battery has never purchased any other type of separator from Microporous for commercial use in any other battery application. (Leister, Tr. 3985-86, 3990-91).
836. Pursuant to the terms of the January 2008 Agreement, East Penn Battery **{redacted}** (RX1519, *in camera*; Leister, Tr. 3999-4000, 4005, *in camera*).

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837. East Penn Battery reviews its suppliers on a regular basis in the areas of quality, delivery, performance, technology, information feedback, and cost. Daramic consistently ranks in the top 20 suppliers, with a score of 80%-90%. Daramic rates “excellent” with East Penn Battery in on-time delivery and technology, and is equal to all competitors with respect to quality. (Leister, Tr. 3986-88).
838. East Penn Battery has never had a long-term supply contract or a memorandum of understanding with Microporous for the purchase of separators. (Leister, Tr. 3989, Gilchrist, Tr. 503, *in camera*).
839. In 2007, East Penn Battery discussed the possibility of Microporous supplying PE separators to East Penn Battery for use in SLI batteries. (Leister, Tr. 3990). East Penn Battery provided Microporous part numbers and volumes that East Penn Battery might be interested in purchasing from Microporous, but Microporous did not have the machinery or the tooling to supply the volumes that East Penn Battery requested. (Leister, Tr. 3991).
840. Microporous never committed to East Penn Battery that it could supply East Penn Battery with the sizes and volumes of PE separators discussed in 2007. Microporous has never been qualified by East Penn Battery as an alternative supplier of PE separators. (Leister, Tr. 3989-91).
841. After East Penn Battery had entered into a three-year contract in 2008 for most of its PE separator needs, Microporous felt that, with the exception of Crown Battery and Exide, Microporous had “no more opportunities to sell much CellForce, or PE for that matter, for motive power or SLI in North America.” (PX0108).

c. The Douglas Battery contract

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842. Douglas Battery manufactures batteries for forklifts used for material handling, UPS or reserve power batteries for cell phone towers, and deep-cycle batteries for vehicles used in coal-mining. The company does not make flooded lead-acid batteries for any stationary application. (Douglas, Tr. 4051-55, 4082).
843. Douglas Battery has purchased motive separators from Daramic since at least 1974. Douglas Battery has been happy with Daramic's service and products. (Douglas, Tr. 4059-61, 4075).
844. Douglas Battery and Daramic entered into a supply agreement dated January 1, 2008, and signed February 22, 2008, pursuant to which Douglas Battery agreed to purchase no less than 100% of its total requirements for polyethylene battery separators, exclusively from Daramic, including Daramic HD and Daramic CL, **{redacted}** (PX2058, *in camera*; Douglas, Tr. 4066-68, *in camera*).
845. The parties to the 2008 contract agreed that **{{redacted}}** and, thus, provided an enhancement to the contract. (PX2058, *in camera*; Douglas, Tr. 4066-68, *in camera*).
846. Microporous had approached Douglas Battery about purchasing battery separators in 2004. Douglas Battery has not discussed the supply of separators with Microporous since 2004. (Douglas, Tr. 4067, *in camera*).
847. Douglas Battery had tested a golf cart separator manufactured by Microporous, and found it too brittle. (Douglas, Tr. 4062-63, 4067, *in camera*; 4083-84).
848. At the time of entering into the 2008 supply contract with Daramic, Douglas Battery was not engaged in any discussions with Microporous. (Douglas, Tr. 4062-63;

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4067, *in camera*; 4083-84). Douglas Battery understood that Microporous made a hard rubber separator for flooded batteries, but the battery Douglas Battery makes for UPS stationary applications uses absorbed glass mat, and takes a different separator than the separators available from Microporous. (Douglas, Tr. 4053-54, 4068, *in camera*, 4081-84).

d. Effect on pricing

849. Under the 2007 contract Daramic entered into with Crown Battery under the MP Plan, **{redacted}** despite Daramic's increases in raw material and energy costs during that time period. (Roe, Tr. 1352-53, *in camera*).
850. Under the 2008 contract Daramic entered into with Douglas Battery under the MP Plan, Daramic was unable to pass through **{redacted}** in 2009. (Roe, Tr. 1353, *in camera*).
851. Under the 2008 contract Daramic entered into with East Penn Battery under the MP Plan, Daramic passed through **{redacted}** (Roe, Tr. 1353, *in camera*).
852. In contrast to the customers at threat of loss to Microporous, Daramic was unwilling to offer to **{redacted}** (F. 897-916; PX0985, *in camera*; Roe, Tr. 1344-45, *in camera*).

9. Polypore Board documents analyzing the acquisition predicted anticompetitive effects

853. As chairman of the Polypore Board, Mr. Graff's role in the Microporous acquisition was to "encourage management to do diligence and come forward with a recommendation of how they wanted to proceed." (Graff, Tr. 4855). Those responsible for the due diligence were people from

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Daramic assisted by Polypore employees. (Graff, Tr. 4865, *in camera*). Mr. Graff, along with the other Polypore Board members, was responsible for approving the Microporous acquisition. (Graff, Tr. 4865, *in camera*).

854. On October 24, 2007, at Polypore's regular third quarter Board of Directors meeting, Mr. Hauswald made a presentation, to the Polypore Board regarding the results of the due diligence. (Hauswald, Tr. 778, *in camera*; Graff, Tr. 4868-69, *in camera*). On October 4, 2007, approximately three weeks before presenting his results to the full Board, Mr. Graff received a copy of the Project Titan Board presentation, which included Mr. Hauswald's speaker notes. (Graff, Tr. 4870-71, *in camera*; PX0738, *in camera*). The October 4, 2007 presentation was an interim report from the due diligence team. (Graff, Tr. 4879-80, *in camera*).
855. Included in the October 4, 2007 interim report as one of the rationales for making the acquisition was Hauswald's projection that Daramic would lose **{redacted}** square meters of volume in 2008, **{redacted}** square meters in 2009, and **{redacted}** square meters in 2011, if it did not make the acquisition. (PX0738 at 004, *in camera*).
856. In reviewing the October 4, 2007 interim report with Mr. Graff, Mr. Hauswald discussed the downside scenario that Daramic would have to "lower prices by **{redacted}** square meters of industrial volume to avoid Microporous Phase III." (Graff, Tr. 4873-74, *in camera*; PX0738 at 004, *in camera*). The October 4, 2007 interim report also listed that one of the "Acquisition Benefits" is to "Implement **{redacted}** price increase to non-contract customers on industrial products in 2010." (PX0738 at 007, *in camera*).
857. The October 4, 2007 interim report showed the "impact on Daramic's LRP (EBITDA loss) without acquisition," to be

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losses of **{redacted}** in 2008, 2009, and 2010, respectively. This “was the downside case [if Daramic] didn’t do the acquisition.” (Graff, Tr. 4874, *in camera*; PX0738 at 008, *in camera*).

858. The October 4, 2007 interim report also stated that without the acquisition, Daramic would have a “5-year EBITDA loss of **{redacted}** by fighting against [Microporous] Phase III”; that there would be “[e]xcess supply and market price erosion”; and that Daramic [would have a] market share loss of **{redacted}** (PX0738 at 010, *in camera*).
859. With the exception of the speaker notes and backup slides, the presentation to the Board of Directors on October 24, 2007 was identical to the October 4, 2007 interim report that Mr. Graff reviewed three weeks earlier. (*Compare* PX0738 at 002-11, *in camera*, with PX0203 at 080-89, *in camera*). The rationale for the acquisition that was presented to the Board of Directors included: the **{redacted}** price increase on industrial products in 2010; the impact on Daramic LRP (EBITDA loss) without the acquisition; the 5-year EBITDA loss of **{redacted}** by fighting against Microporous’ expansion; the excess supply and market price erosion that would occur without the acquisition; and the **{redacted}** market share loss that Daramic would suffer if it did not acquire Microporous. (PX0203 at 085-86, 088, *in camera*).
860. In January 2008, approximately a month before the acquisition, the due diligence team provided the Board additional rationales for acquiring Microporous, which included the team’s belief that Microporous had plans to expand PE capacity from **{redacted}** square meters to **{redacted}** square meters by 2011. (Graff, Tr. 4883-84, *in camera*; RX1097 at 002, *in camera*).

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861. Approximately four days before the acquisition, the due diligence team provided the Board with a presentation that again included as an acquisition benefit the **{redacted}** price increase on industrial products in 2010. (PX0464 at 004, *in camera*).
862. When it reviewed the Daramic 2008 budget, which was presented to the Polypore Board on December 11, 2007, the Polypore Board considered the due diligence team's findings regarding the impact of not acquiring Microporous and the impact of having to compete with an independent Microporous. (PX0823, *in camera*; Roe, Tr. 1225; Graff, Tr. 4885-88, *in camera*).
863. Daramic assembles its budget based on certain assumptions with regard to volume and pricing and includes a three-year long-term plan. (Roe, Tr. 1226-27). The assumptions that Daramic incorporates into the budget are Daramic's best estimate of what is going to happen in the upcoming year with respect to volume and pricing of the separators that Daramic sells. (Roe, Tr. 1226-30). These assumptions are specifically laid out in the budget to show the Polypore Board how the budgetary figures were prepared. (Roe, Tr. 1226-27).
864. Daramic did not know whether its MP Plan would successfully maintain customers at risk of loss to Microporous. Despite launching the MP Plan, Daramic's 2008 budget included the assumption that **{redacted}** square meters of PE separator volume would be lost to Microporous in 2008. (PX0823 at 002, 008, *in camera*; Graff, Tr. 4887-88, *in camera*). This is the same volume that Daramic was projecting in the MP Plan to lose to Microporous. (Roe, Tr. 1370, *in camera*).
865. The 2008 budget also included Daramic's long-range plans covering the time period of 2008 through 2010. (PX0823 at 007-12, *in camera*). The long-range plan is

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the budget that Daramic sets for what it thinks is a likely scenario. (PX0919 (Riney, IHT at 298), *in camera*). In its long-range plans, using its best estimates of what was likely to occur in the coming three years, Daramic's management assumed that it would lose to Microporous: **{redacted}** square meters in 2008, **{redacted}** square meters in 2009, and **{redacted}** square meters in 2010. (PX0823 at 008, *in camera*; Roe, Tr. 1371-75, *in camera*; Graff, Tr. 4887-88, *in camera*). The only competitor mentioned in Daramic's 2008 budget is Microporous. (Graff, Tr. 4888-89, *in camera*).

866. Daramic's documents show an assumption that it would have to lower prices by **{redacted}** square meters of product in 2009. (PX0276 at 019, *in camera*; Roe, Tr. 1388-82, *in camera*). The **{redacted}** square meters of separators matches the figures that Daramic was providing to the Polypore Board for consideration of an acquisition of Microporous. (*See* PX0276 at 016, 019, *in camera*).
867. When Daramic presented the 2008 budget to the Board for approval in December 2007, Daramic also provided a comparison of how the long-range plan would look with and without the Microporous acquisition. (PX0823 at 013-14, *in camera*). With an acquisition of Microporous, Daramic's underlying sales assumptions changed dramatically. Daramic assumed that with an acquisition of Microporous, it would retain the millions of square meters of separators that it previously projected as losing to Microporous. Additionally, Daramic assumed that it would no longer have to lower prices by **{redacted}** square meters of separators in 2009. Daramic also assumed it would be able to increase prices on CellForce and other industrial separators in 2010, resulting in a total increase of **{redacted}** in EBITDA for Daramic in 2010. (PX0823 at 013, *in camera*).

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868. Polypore's Board approved Daramic's 2008 budget. (Roe, Tr. 1382, *in camera*).

a. Daramic acquired Microporous to avoid market share loss and EBITDA loss

869. Mr. Hauswald gave a presentation entitled "Project Titan" regarding the acquisition of Microporous to the Polypore Board in October 2007. (PX0203 at 080-89, *in camera*; Hauswald, Tr. 776, 778-79, *in camera*). Mr. Hauswald confirmed that he put together a financial model of what the world would look like with the acquisition and without the acquisition and had the numbers checked to make sure they were accurate. (Hauswald, Tr. 778-79, *in camera*). Mr. Hauswald prepared the presentation at the direction of Mr. Toth. (Hauswald, Tr. 900-01, *in camera*).

870. The model presented in the Project Titan showed that Daramic would receive **{redacted}** additional EBITDA between 2008 and 2012 with the acquisition. (PX0203 at 084, *in camera*).

871. The Project Titan Board presentation also projected a business risk without the acquisition was that Daramic would lose market share of **{redacted}** and would lose **{redacted}** in EBITDA over 5 years by fighting against Microporous' Phase III expansion. (PX0203 at 088, *in camera*; PX0738 at 010, *in camera*; *see also* PX0275 at 012, *in camera*).

872. The Project Titan Board presentation revealed that the impact on Daramic long-range planning EBITDA without the acquisition would be a **{redacted}** (PX0203 at 086, *in camera*; Hauswald, Tr. 783, *in camera*). While the cumulative loss for the three years of 2008 through 2010 was predicted to be **{redacted}** the loss was expected to increase over the next two years for a total "5-year EBITDA loss of **{redacted}** by fighting against MP Phase

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III.” (PX0203 at 086, 088, *in camera*; Hauswald, Tr. 783, *in camera*).

873. Mr. Hauswald’s speaker notes for the October 2007 Project Titan Board presentation showed, by customer, the volume of business Daramic was projected to lose to Microporous over the next four years, if it did not acquire Microporous. (PX0174 at 003, *in camera*, Hauswald, Tr. 788-89, *in camera*). Hauswald projected Daramic would lose industrial at EnerSys, industrial and automotive at East Penn Battery, and automotive at both JCI Europe and JCI Americas. (Hauswald, Tr. 788-89, *in camera*, PX0174 at 003, *in camera*). The total volume of business that Daramic was predicted to lose to Microporous at these customers was **{redacted}** (PX0174 at 003, *in camera*). By comparison, the cumulative loss to Microporous for Entek over the same four-year period was projected to be only **{redacted}** square meters of automotive. (PX0174 at 003, *in camera*; Hauswald, Tr. 789, *in camera*).
874. Mr. Hauswald’s speaker notes for the October 2007 Project Titan Board presentation also projected that Daramic would lose **{redacted}** because of the loss of some Exide business to Microporous. (Hauswald, Tr. 789, *in camera*; PX0174 at 003, *in camera*).
875. In addition, Mr. Hauswald’s speaker notes for the October 2007 Project Titan Board presentation projected that, without the acquisition, Daramic would need to lower its price by **{redacted}** on the industrial part of the business and would need to offer price concessions to Exide of **{redacted}** (Hauswald, Tr. 789, 791 *in camera*; PX0174 at 003, *in camera*).
876. Daramic believed that, absent the acquisition, it would have to lower prices and build low cost facilities to compete on price with Microporous. The October 2007

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Project Titan Board presentation speaker notes stated under the heading, “No Acquisition - Sales volume loss and aggressive approach to block MP phase 3 expansion,” that without an acquisition Daramic would “[t]arget specific MP customers with minimum **{redacted}** price reduction” and that Daramic would “[b]uild low cost production line to compete on price.” (PX0738 at 017, *in camera*).

877. Mr. Hauswald informed the Polypore Board, in the October 2007 Project Titan Board Presentation, that a benefit of the acquisition was to “[s]ecure our market share,” by avoiding the loss of share to an expanding Microporous. (Hauswald, Tr. 784, *in camera*; PX0203 at 086, *in camera*). Microporous had **{redacted}** square meters of PE capacity with plans to expand to **{redacted}** square meters by 2011 in a 3-phase expansion plan. (PX0462 at 005, *in camera*; PX0738 at 013, *in camera*; PX0463 at 002, *in camera*). Daramic’s documents show that it expected to lose customers and orders due to the extra capacity installed by Microporous, which would come up to **{redacted}** of Daramic’s capacity and saw as one of the “[b]enefits of an acquisition to Daramic: . . . Preserve our Market Share WW, by avoiding the loss of customers and orders due to the extra capacity installed (**{redacted}** of our present capacity).” (PX0463 at 003, *in camera*).
878. In the October 2007 Project Titan Board Presentation, Mr. Hauswald also informed the Polypore Board that a business risk with a Microporous acquisition was customer reaction, response or potential legal action by customers. (PX0203 at 088, *in camera*; Hauswald Tr. 785-86, *in camera*).
879. Prior to the acquisition, Daramic projected profit and loss scenarios with and without the acquisition of Microporous. (PX0051, PX0095 at 001-02, *in camera*). The non-

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acquisition scenario accounts for “[c]ompetitive pricing to block additional expansion [of Microporous].” (PX0051). The combined revenues of Daramic and Microporous from 2008 through 2012 in the non-acquisition scenario with competitive pricing is {redacted} less than the acquisition scenario. (PX0051, PX0095 at 001-02, *in camera*).

b. Daramic acquired Microporous to raise prices

880. At the October 2007 Polypore Board meeting, Mr. Hauswald explained to the Polypore Board that with the acquisition, Daramic would be able to institute a {redacted} price increase to non-contract customers on industrial products in 2010, which would result in {redacted} in incremental EBITDA. (Hauswald, Tr. 782, 819-20, *in camera*; PX0203 at 084, *in camera*; PX0738 at 006-07, *in camera*; PX0463 at 008, *in camera*; PX0464 at 004).
881. The Polypore Board documents also indicated that Daramic planned to gain {redacted} in additional EBITDA by phasing out its low margin Daramic HD production in Owensboro with CellForce in 2009, and increasing the market price on HD in 2010. (PX0203 at 085, *in camera*; PX0738 at 006, 007, *in camera*; PX0463 at 005, 008, *in camera*; PX0464 at 004, *in camera*). Once HD was phased out, customers who had been purchasing HD would have to pay more for CellForce. (Hauswald, Tr. 819, *in camera*).

c. Polypore Board approved the acquisition based on the due diligence team’s findings as stated in the Board documents

882. The Board of Directors approved the acquisition of Microporous on February 27, 2008 at a special meeting. (PX0742 at 001, *in camera*; Toth, Tr. 1476-77, *in*

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camera). At the meeting, Mr. Toth first provided a summary of the strategic rationale for the transaction and the key financial projections. (Toth, Tr. 1477, *in camera*; PX0742 at 001, *in camera*). Based on the management team's presentation and recommendation, {redacted} a resolution to acquire Microporous. (Toth, Tr. 1477, *in camera*; PX0742 at 001 *in camera*).

883. When the Board voted for the resolution approving the Microporous purchase at the February 27, 2008 special meeting, it was relying on the term sheet that was attached. (PX0742 at 001, *in camera*; Toth, Tr. 1607, *in camera*). The term sheet includes Microporous' expansion plans. (Toth, Tr. 1607, *in camera*; PX0742 at 007, *in camera*). The Board's resolution stated that "the Board previously conducted a detailed review of this project at prior meetings, including an analysis of the strategic rationale, financial terms, and post-acquisition business plans." (PX0742 at 001, *in camera*). The presentations analyzed at the prior meetings included the financial data presented in the Board documents (F. 854-59) that Daramic would increase prices after an acquisition, but would have to lower prices without the acquisition. (PX0203 at 080-89, *in camera*; PX0738, *in camera*; PX0463, *in camera*; PX0464, *in camera*). The analysis referred to in the resolution included the presentations made by the due diligence team at the October and January Board meetings. (Graff, Tr. 4890-91, *in camera*).
884. The resolution approving the acquisition also references the "Term Sheet," which summarizes "the final key terms of the Acquisition." (PX0742 at 001, *in camera*; Graff, Tr. 4892, *in camera*). The term sheet refers to "Underlying Assumptions (see attached Exhibit A)," which included the three-phased expansion project that Microporous was undertaking. (PX0742 at 003, 007, *in camera*).

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885. In approving the acquisition, the resolution, as reflected in the Board Minutes states: “NOW, THEREFORE, BE IT RESOLVED that the Acquisition as presented to the Board by the Company’s management on February 27, 2008 and substantially as summarized on the attached Term Sheet, [is] hereby approved.” (PX0742 at 001, *in camera*).

10. Microporous recognized that Daramic’s offer to acquire it eliminated competition

886. On August 9, 2007, Eric Heglie and Phillip Bryson met “to have an initial discussion . . . concerning a potential acquisition.” (PX1104 at 002). Mr. Heglie is one of the principals at IGP and a Board member of Microporous. (PX2300 (Heglie, IHT at 15), *in camera*; Gilchrist, Tr. 419-20). Mr. Bryson is in-house counsel for Polypore. (PX1104 at 001).

887. In preparation for the August 9, 2007 meeting between Mr. Heglie and Mr. Bryson, Mr. Gilchrist emailed Mr. Heglie to suggest that Mr. Heglie stress that Microporous “be valued at what its immediate significant growth opportunities offer”; and that “IGP [is] committed to growth and infusing necessary capital for Microporous to execute its growth plans.” (PX1104 at 001). In addition, Mr. Gilchrist suggested that Mr. Heglie stress the following:

Any offer must take into account the significant strategic implications of what Daramic gains by owning Microporous:

- Total control of deep-cycle markets (no competitor)

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- Total control of industrial markets (no competitor)
- Regains complete upper hand in automotive with no new competitor being introduced
- Control of CellForce
- Control of new developments in our chemistry

(PX1104 at 001; PX1106 at 040).

888. Mr. Gilchrist's August 9, 2007 email to Mr. Heglie concluded that Daramic's attempt to purchase Microporous "is a 'strategic' play on Daramic's part and not based on current financials but the prospects of taking Daramic's most dangerous competitor out of play." (PX1104 at 001).
889. On the evening of August 9, 2007, the same day that he met with Mr. Bryson, Mr. Heglie documented the conversation the two had that day, "while fresh in [his] mind." (PX1105 at 001). In an August 9, 2007 email to Mr. Gilchrist, Mr. Heglie reported that Polypore's Phillip Bryson stated that Daramic management saw "benefits in pricing/market share consolidation" (PX1105 at 001). Mr. Heglie further reported that Mr. Bryson said that "one of their strategic goals is to get bigger in golf cart market, and that we can either battle it out or combine to achieve that." (PX1105 at 001).
890. In the August 9, 2007 email reporting on his conversation with Mr. Bryson about a possible acquisition of Microporous, Mr. Heglie wrote that he "told him [Mr. Bryson] that we were in the early stages of our investment, had partnered with management and were not looking to divest, and are in the midst of executing on our own multi-pronged expansion plan for which we have plenty of capital and support." (PX1105 at 002).

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891. In preparing for a follow-up meeting scheduled for August 21, 2007 between Microporous and Daramic, IGP and Microporous spent the weekend of August 18, 2007, working on information sheets for Mr. Gilchrist to present verbally to Daramic. (PX0069; PX1108; PX1109). According to Mr. Heglie, the theme of the discussion “obviously being that in 4-5 years we will be competing more head-on with Daramic in their key markets and will be a much more diversified business than we are today.” (PX0069 at 001). Moreover, Mr. Heglie believed that at the meeting Microporous should play up our differentiated technology via CellForce and its derivatives. Heglie wrote: “I think if we can make Daramic feel that we are not only going to attack their markets, but also do it with proprietary technology that has significant benefits over their existing products, it will make our case that much stronger.” (PX1108 at 001).
892. The August 20, 2007 revised information sheet that Microporous prepared in anticipation of meeting with Daramic included the “Current Situation: Microporous is spending capital to execute a three-phase capacity expansion plan which includes facility construction and five (5) new CellForce and/or polyethylene process lines.” (PX1109 at 002). The information sheet also included: “End of Year 2010 Financial Estimate: Incremental estimated EBITDA growth from present to End-of-Year 2010: **{redacted}** Of the **{redacted}** in incremental growth, approximately 90% will be replacing Daramic existing business.” (PX1109 at 002).
893. The incremental growth that Microporous was expecting by 2010 tracks closely to the **{redacted}** of EBITDA loss in 2010 that Daramic reported to the Polypore Board of Directors as the impact on its long range plan if it did not acquire Microporous. (PX0203 at 086, *in camera*).

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894. The August 20, 2007 revised information sheet also included “Strategic Implications to be Considered:

- Daramic will have the benefit of existing differentiated technologies (Flex-Sil, Ace-Sil, and CellForce).
- Daramic will have complete control of 100% of the deep-cycle markets.
- Daramic will have complete control of >97% of the [i]ndustrial markets for motive power.
- Daramic will have complete control of 100% of the industrial flooded reserve power markets.
- Daramic will dissolve the threat of Microporous in automotive SLI as no new competitor will be introduced into the market with a secured position.”

(PX1109 at 003).

a. Microporous and Daramic found assignment of contracts irrelevant because customers had no options

895. In an August 2007 email from Mr. Gilchrist to Mr. Heglie regarding EnerSys’ reaction to a potential acquisition of Microporous by Daramic, Mr. Gilchrist wrote:

EnerSys, as well as others, will be frustrated by this acquisition. Our contract with EnerSys allows only for the fact that EnerSys cannot be compelled to assign the contract to a competitor buying [Microporous]. The reality is that this means basically nothing as there are no other choices from which to source industrial separators but [Microporous] and Daramic –

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Amer-Sil is not an option. The reality is that everyone would be stuck with Daramic – like it or not. This lack of assignment does not diminish our value to Daramic.

(PX1104 at 001).

896. In late January 2008, with the closing for the acquisition just a month away, IGP was concerned that it needed to make assignments of the Trojan Battery and Daramic contracts post-closing issues, because it feared that Daramic's general counsel, Phillip Bryson, would refuse to close without knowing what the customers would say. (PX1125 at 001). Jeff Webb of IGP and Mike Gilchrist agreed that Mr. Gilchrist should broach the subject with Pierre Hauswald because he "will best understand the practical business issue of both EnerSys and Trojan having nowhere else to go and will probably be the most agreeable to dealing with assignments after closing." (PX1125 at 001). Mr. Hauswald agreed with this assessment. (PX0079).

11. The acquisition allowed Daramic to impose anticompetitive price increases

a. Price increases to certain customers

897. {redacted} (RX0945 at 097, *in camera*; Roe, Tr. 1352-53, *in camera*). {redacted} (Roe, Tr. 1222).
898. {redacted} (PX0950 at 015 *in camera*; Benjamin, Tr. 3521-22).
899. {redacted} (PX0950 at 015, *in camera*).
900. {redacted} (PX0950 at 015, *in camera*).

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901. **{redacted}** (Godber, Tr. 233, 236-38, *in camera*; PX0950 at 014, *in camera*). Daramic later revised the announced price increases to a **{redacted}** (Godber, Tr. 236-37, *in camera*). **{redacted}** (Godber, Tr. 238, *in camera*). Compared to the pricing in the contract that **{redacted}** (Godber, Tr. 239, *in camera*).
902. **{redacted}** (Gillespie, Tr. 3001-02, *in camera*; PX2052 at 003, *in camera*).
903. Subsequent to Daramic's acquisition of Microporous, Daramic has **{redacted}** (Gillespie, Tr. 3002, *in camera*).
904. **{redacted}** (Gillespie, Tr. 3000, *in camera*).
905. Daramic's post-acquisition supply proposals to **{redacted}** (Gillespie, Tr. 3047, *in camera*). Daramic's pricing proposals have **{redacted}** (Gillespie, Tr. 3047, *in camera*). **{redacted}** (Gillespie, Tr. 3047, *in camera*).
906. On July 1, 2008, Daramic instituted **{redacted}** for most customers. (PX0950 at 004-13, *in camera*; Riney, Tr. 4949, 4951, *in camera*).
907. **{redacted}** (Seibert, Tr. 4285, 4299, *in camera*). **{redacted}** (Seibert, Tr. 4285, *in camera*; RX0542).
908. **{redacted}** (PX0704 at 010, *in camera*).
909. Mr. Hauswald sent a June 12, 2008 email to Mr. McDonald explaining his frustrations with the Daramic organization **{redacted}** (McDonald, Tr. 3881-82, *in camera*; PX0617 at 001-02, *in camera*). Mr. McDonald emailed a response to Mr. Hauswald ideas for improving earnings **{redacted}** (PX0617, *in camera*; McDonald, Tr. 3885-86 *in camera*).

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910. Daramic establishes a budgeted volume and budgeted pricing for each customer. (Seibert, Tr. 4301-02, *in camera*). {redacted} (Seibert, Tr. 4284, *in camera*).
911. {redacted} (PX0950 at 013, *in camera*).
912. During the period August 31, 2008, through approximately November 30, 2008, Daramic notified customers of price increases scheduled to take effect anywhere between September 1, 2008 and January 1, 2009. (PX0950 at 014, *in camera*; PX0371). The notification letter informed customers that Daramic's energy costs and input costs had increased. (PX0371). The proposed price increases by customer range from {redacted} (PX0950 at 014-15, *in camera*).
913. Effective January 1, 2009, Daramic announced price increases that ranged from {redacted} (PX0950 at 014-16, *in camera*).
914. Effective January 1, 2009, Daramic announced price increases that ranged from {redacted} (PX0950 at 014-16, *in camera*).
915. Effective January 1, 2009, Daramic announced price increases that ranged from {redacted} (PX0950 at 014-16, *in camera*).
916. Mr. Seibert, the Vice President and Business Director for sales, marketing, and technical assistance, is not aware of any customers who moved their business to another separator manufacturer as a result of Daramic raising prices effective January 1, 2009. (Seibert, Tr. 4287-90, *in camera*). Mr. Seibert has not even received a report from anyone in his sales team stating that Daramic would lose business as a result of its proposed price increase of

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{redacted} effective January 1, 2009. (Seibert, Tr. 4288, *in camera*).

b. Economic analysis

917. Daramic's acquisition of Microporous led to price increases. (Simpson, Tr. 3165).
918. The acquisition enabled Daramic to increase price unilaterally. (Simpson, Tr. 3192-94, *in camera*).
919. "The most straightforward method of looking to see whether an acquisition or a merger led to higher prices is to compare pricing before and pricing after the acquisition. . . . [T]here are other factors that also affect price, and one has to control for these factors . . ." (Simpson, Tr. 3209-10, *in camera*).
920. Four factors could lead to higher prices in a market: increasing demand for the product, changes in productivity, increasing input costs, and increasing market power. (Simpson, Tr. 3212, *in camera*). Daramic's fall 2008 price increase can not be explained by increasing demand for battery separators since demand for battery separators has fallen since mid-2008. (Simpson, Tr. 3212-13, *in camera*). Productivity changes do not explain Daramic's 2009 price increase, since learning by doing generally makes firms more productive over time. (Simpson, Tr. 3213, *in camera*).
921. Input price increases do not explain Daramic's 2009 price increase. (Simpson, Tr. 3213-20, *in camera*). {redacted} (Weerts, Tr. 4510-11, *in camera*). For example, Daramic's raw material and energy inputs are based on crude oil. (PX2068 at 001). Several price indices can be used to estimate changes in the price of these raw material and energy inputs. (PX2068 at 001). The United States Bureau of Labor Statistics publishes price indices for

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crude petroleum – domestic production and fuels and related products and power on its website. (Simpson, Tr. 3215-17, *in camera*). The price indices for crude petroleum – domestic production and fuels and related products and power declined markedly during the period that Daramic was notifying customers of price increases. (Simpson, Tr. 3217, *in camera*).

922. The price index for crude petroleum, domestic production was 252.6 in November 2007 and 150.6 in November 2008. (PX0033 (Simpson Report) at 045, *in camera*). Higher input prices do not explain Daramic’s fall 2008 price increases. (Simpson, Tr. 3218, *in camera*).

F. Entry**1. Barriers to entry****a. In general**

923. Prior to the acquisition, Microporous possessed various tangible and intangible assets. The tangible assets included: a product that worked and had been qualified by customers, a technical workforce that could troubleshoot and innovate, a business force that was effective at selling the product, a factory in the United States, and a soon-to-be-opened factory in Europe. Microporous’ intangible assets included: a favorable reputation with customers and the benefit of learning by doing, which is accumulated through having produced the product for a number of years. (Simpson, Tr. 3205-06, *in camera*). Some of these assets needed to be acquired sequentially – “you can’t test a product until you develop a product and you can’t get learning by doing until you’re actually producing the product and figuring out through producing it how to make it more efficiently.” (Simpson, Tr. 3206, *in camera*).

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924. Barriers to entry into the relevant markets include a significant capital investment, sophisticated production processes, extensive customer relationships, high customer switching costs, and patent-protected technology. (Gilchrist, Tr. 604-05; RX0741 at 015).
925. The industry standard for the cost of investing in a battery separator production line is roughly \$1 million per square meter of production capacity, but can be somewhat more or less. (PX0907 (Kung, Dep. at 34-35), *in camera*). For example, Microporous built its 11 million square meter line in Austria for approximately \$9 million. (Gaugl, Tr. 4546-47). Amer-Sil estimated it would cost **{redacted}** (RX1620 at 002, *in camera*). Microporous purchased its “turnkey” production line for PE battery separators for **{redacted}** (RX1029, *in camera*).
926. A single calender roll can cost between \$30,000 and \$64,000. (RX0146). A battery separator manufacturer needs multiple calender rolls to produce separators. (Gillespie, Tr. 3138, *in camera*). For instance, there are five calender rolls used to produce CellForce in Piney Flats, and four or five calender rolls used to manufacture PE separators in Austria. (Gaugl, Tr. 4618). Daramic has at least 80 different calender rolls that it utilizes in the production of separators. (Whear, Tr. 4778-79).
927. Additional high barriers to entry include required “know-how,” and limited market size, which detracts potential entrants. (PX1124; PX2300 (Heglie, IHT at 126-27), *in camera*). IGP viewed Microporous’ patent protection for CellForce, significant know-how, and process intellectual property in the production of its products, as company strengths when it evaluated acquiring Microporous. (PX1124; PX2300 (Heglie, IHT at 119-20), *in camera*; PX1124 at 001).

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928. Daramic recognized that scale, experience and learning effects, capital requirements, value of reputation and brand, and access to distribution constitute barriers to entry. (PX0265 at 012, *in camera*; see also Toth, Tr. 1428-29 (achieving product breadth, scale and global supply capability are barriers to entry); PX3015 at 017).
929. In its Strategy Audit, Daramic admits that barriers to entry for the sale of battery separators are high “because of the capital investment needed to achieve the scale required to supply the large battery manufacturers, plus the impact of increasing environmental regulations.” (PX0265 at 004, *in camera*). Daramic cites the following as either “very high entry barriers” or “somewhat high entry barriers”: 1) “scale-based benefits”; 2) “experience, learning effects”; 3) “capital requirements”; and 4) “value of reputation, brand.” (PX0265 at 011, *in camera*).
930. In its Corporate Strategy Workshop report, Daramic acknowledges that experience and learning effects, which are related to know-how, create a high barrier to entry, both at the time the report was prepared and in the future. (Hauswald, Tr. 804-05, *in camera*; PX0194 at 025, *in camera*). Daramic also admits that capital requirements provide a somewhat high barrier to entry for servicing large battery manufacturers, both at the time of the report and in the future. (Hauswald, Tr. 805, *in camera*; PX0194 at 025, *in camera*). In addition, Daramic states that the value of reputation and brand is a very important barrier to entry, and will continue to be somewhat important in the future. (Hauswald, Tr. 805; PX0194 at 025, *in camera*).

b. Patents

931. The patent for PE separator technology expired in the 1980s and general PE separator technology is not currently patent-protected. (Whear, Tr. 4679; Toth, Tr. 1626).

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932. CellForce technology and Daramic HD technology are patent-protected. CellForce is patent-protected until 2019. Daramic HD is patent-protected for approximately two more years. (RX0741 at 015; Gilchrist, Tr. 382; PX2300 (Heglie, IHT at 119), *in camera*; Whear, Tr. 4801). Daramic also has a patent on Daramic CL (Clean Oil). (PX2161).
933. Daramic considers its Jungfer manufacturing process technology, which has unique features related to solvent consumption and extraction, to be valuable intellectual property and a trade secret. Daramic had sued Microporous in part to try to keep it from using the Jungfer process for the automotive business, claiming that the process was a Daramic trade secret. (Hauswald, Tr. 1153-55; PX2241 at 007, *in camera*).
934. Microporous considered the design specifications for its production lines to be confidential and proprietary. These design specifications can reveal production capacities, which Microporous did not want its competitors to know. (Gaugl, Tr. 4612; PX0905 (Gaugl, Dep. at 77), *in camera*; PX0590 (Gaugl, Arb. Dep. at 158-59, *in camera*)). Microporous had its machine suppliers sign non-disclosure agreements that prevent the machine suppliers from giving the specifications of the machines that it was ordering to Microporous' competitors. (Gaugl, Tr. 4612). Daramic also protects its PE line equipment specifications and considers these specifications Daramic's intellectual property. (PX0924 (Jensen, Dep. at 024-25, *in camera*)).

2. Know-how**a. Design and construction of production lines**

935. Learning how to build a PE battery separator line is an ongoing process where you learn day-by-day. (Gaugl, Tr.

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- 4591). The process is modified as defects and problems are discovered, so that each new line should be better than the prior lines. (PX0907 (Kung, Dep. at 100), *in camera*).
936. Practical experience obtained while working at a company that manufactures PE battery separators is another source of knowledge that is helpful in learning how to develop a PE production line. (PX0907 (Kung, Dep. at 98-100), *in camera*).
937. Mr. Kung, of BFR (Baoding Fengfan Rising Battery Separator Co., Ltd.) has refined his designs for a PE separator production line over the years. (RX0050 at 004, *in camera*; PX0907 (Kung, Dep. at 100), *in camera*). Mr. Kung said, “after running for a couple of years you always can find out some kind of problem you have or defect you have. So you just modify them. That is the nature of it. So each [time] you build a new one, it’s better than the other one.” (PX0907 (Kung, Dep. at 100), *in camera*).
938. Prior to designing and starting up the line for Microporous in Piney Flats, Tennessee, Mr. Gaugl had previously designed and started up four other PE battery separator lines – two for Global Industries in South Korea; one for Baotou in the province of Inner Mongolia in China; and one for Jungfer in Jungfer’s Feistritz, Austria facility. (Gaugl, Tr. 4532-34). By the time Mr. Gaugl became responsible for the Microporous line in Piney Flats, Tennessee, he had five years’ experience setting up PE production lines. (Gaugl, Tr. 4543).
939. The manufacturing process for making PE separators “is not available to everybody.” (Gaugl, Tr. 4547). Only Mr. Gaugl, James Kung of BFR, two former Jungfer employees – Dr. Winkler and Mr. Duya – and “certain people at Daramic as well as at Entek” could also put together and design a line. (Gaugl, Tr. 4642).

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940. Creating a “turnkey PE line” involves installing all the necessary equipment, training all the personnel, then handing over control of the line to the operator. (PX0907 (Kung, Dep. at 9-10), *in camera*).
941. One person cannot create a turnkey PE line, because the process is too complicated. It requires a team of several members with prior experience in PE production. (PX0907 (Kung, Dep. at 27, 101), *in camera*). Engineers are required because the line has many different sections and many different manufacturing steps with each step needing a special technology. (PX0907 (Kung, Dep. at 101), *in camera*). For example, chemical engineering is needed for the production process, mechanical engineering for automation issues, mechanical engineering for equipment design, and environmental engineering to address environmental issues. (PX0907 (Kung, Dep. at 102), *in camera*).
942. **{redacted}** (Weerts, Tr. 4498-99, *in camera*).
943. Good engineering helps reduce PE separator manufacturing costs. (PX0907 (Kung, Dep. at 39-40), *in camera*).
944. When Daramic decided to relocate the Jungfer lines it had purchased from Austria to Thailand, it sent former Jungfer personnel from Austria who were familiar with the equipment and had experience setting up PE lines of that type. (PX0924 (Jensen, Dep. at 20, *in camera*)). This experience was important to Daramic because it allowed for efficient installation of these lines, even though the Prachinburri facility had been operating one separator line since at least 2001 with local personnel. (PX0924 (Jensen, Dep. at 21, *in camera*)).

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945. The lessons that Microporous learned from the early manufacturing of CellForce in Piney Flats, Tennessee were used when setting up the lines in Austria, so as to avoid making the same mistakes. (Gilchrist, Tr. 396-97).

b. Running a production line

946. The equipment needed to manufacture polyethylene separators includes an extruder, extractor, calender rolls, mixer, dryer and bulk handling equipment. (Gilchrist, Tr. 591-93).
947. Two to three people are required to run the assembly line. Additional personnel include supervisory personnel, lab backup, a maintenance crew and nondirect employees supporting the operation of the line. (Gilchrist, Tr. 602).
948. Workers on the line coordinate several different pieces of equipment with different functions. To ensure the product is formulated to the customer exact specifications, a worker must know how to set the proper conditions for pressures, temperatures and speeds. (Gilchrist, Tr. 395).
949. When Microporous bought the line from Jungfer for its Piney Flats plant (*see* F. 760), it sent workers over to Austria for training. Microporous also decided to hire the Jungfer engineer who designed the line, Peter Gaugl, as an “insurance policy” to get the line operating quickly and correctly. (Gilchrist, Tr. 395-96).
950. When Gaugl was setting up Microporous’ Austrian lines, he hired a few former Jungfer employees which helped shorten the start-up period for the lines. One of the reasons for choosing Austria for Microporous’ expansion plan was so that Microporous could hire former Jungfer employees who were familiar with PE battery separator production. (Gaugl, Tr. 4606).

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951. Hiring skilled employees can shorten the start-up period for a new PE battery separator production facility by six months. Hiring skilled employees is advantageous because it quickens the start-up period, by eliminating months of training time. (Gaugl, Tr. 4606).
952. On August 6, 2008, a labor strike was declared at Daramic's Owensboro, Kentucky manufacturing facility. The Owensboro strike lasted 55 days. Production stopped and there were delays in meeting customers' needs. (Hauswald, Tr. 1071).
953. During the Owensboro strike, Daramic brought its own management and employees over from Europe to help run the Owensboro manufacturing lines. Notwithstanding the use of experienced personnel to run the production lines, the separators produced on those lines during the strike had "quality issues" and the "number of defects rose significantly." (Gillespie, Tr. 2986-92).
954. During the Owensboro strike, Daramic provided a wavy separator roll to Exide. (Gillespie, Tr. 2987-88; PX1407). Exide was dissatisfied with the wavy separators, but had no other qualified source of supply. (Gillespie, Tr. 2988-90). Exide had no option but to use the wavy separators or face shutting down its battery manufacturing operations. (Gillespie, Tr. 2989-90). Using the wavy separators was a "big deal" for Exide in terms of manufacturability because the wavy separators caused variations in Exide's productivity level, costing Exide more money to run the product through Exide's battery production lines. (Gillespie, Tr. 2988-89).
955. Exide learned first hand lessons from Daramic's Owensboro strike. The strike demonstrated to Exide that manufacturing separators takes more than turning a switch, as experienced Daramic employees were unable to

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run their own product, with their own designs, without encountering considerable quality problems. (Gillespie, Tr. 2992-93).

956. EnerSys also received poor quality separators from Daramic during the Owensboro strike. A lot of material was out of specifications in a variety of ways. (Burkert, Tr. 2332). EnerSys had no choice but to accept the poor quality material, since it did not know how long it would take Daramic to replace it. (Burkert, Tr. 2332). These quality issues cost EnerSys money in terms of efficiency losses at the plants and, EnerSys anticipates, quality issues will show up through warranty returns on batteries. (Burkert, Tr. 2339). EnerSys estimates that these issues cost it \$1.4 million in costs, which amounts to approximately \$3.2 million in revenues. (Burkert, Tr. 2339).
957. Having personnel skilled in producing rubber separators was important to Daramic in its acquisition of Microporous, because the rubber market was a new market and a new technology for Daramic. (Hauswald, Tr. 784-85, *in camera*).
958. PE battery separator plants make continuous improvements in efficiency and quality. A PE battery separator producer that has gone through several steps of continuous improvement will definitely be better than a firm just starting up into the production of PE battery separators. (Gaugl, Tr. 4605).

c. Technical expertise

959. The battery separator manufacturing technology of making microporous membranes is a very complicated technology. (PX0907 (Kung, Dep. at 39-40), *in camera*).

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960. A new entrant would need a good technical team to redesign and improve PE separator products, and thereby make a cheaper and better product, in order to compete with large firms such as Daramic and Entek. (PX0907 (Kung, Dep. at 39-40, 107), *in camera*).
961. One of the reasons EnerSys declined to get involved in **{redacted}** EnerSys saw providing capital to an entity without expertise in the PE market as too high a risk. (Axt, Tr. 2305-06, *in camera*).
962. A supplier's technical expertise is important to EnerSys, for innovation, customer support, and collaborative engineering. (Axt, Tr. 2109-10).
963. Mr. Kung has been training the engineering team at BFR since 2001 and he believes they are **{redacted}** (PX0907 (Kung, Dep. at 103, 106-07), *in camera*).

3. Scale

964. Daramic recognizes the economies of scale in the battery separator industry, stating that "cost/unit declines w/scale, spreads fixed costs over more units," and that Daramic's large capacity gives it a competitive advantage. (PX0241 at 001, *in camera*). One of Daramic's strategies has been to **{redacted}** (RX1498 at 001, *in camera*).
965. At the time of the acquisition, Microporous' Piney Flats PE production line had a capacity of approximately 10 million square meters. In addition, at the time of the acquisition, Microporous had in place two more PE/CellForce lines installed and in pre-operational phase in its Austria facility, for a total capacity of approximately **{redacted}** million square meters of PE/CellForce capacity in 2008. (Gilchrist, Tr. 334-35; PX0174 at 012, *in camera*; PX0081 at 018, *in camera*). Furthermore, Microporous had purchased equipment for another PE

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line, to be added in May or June of 2008, which would have added more capacity. (F. 775-76; PX0920 (Gilchrist IHT at 58-59, *in camera*)).

966. An individual PE line with annual production capacity of 3 million square meters is “too small” to operate profitably because the profit margin of the battery separator industry is very small. (PX0907 (Kung, Dep. at 47), *in camera*) (“If you don’t have big volume, you are not going to make any profit.”).
967. When BFR was operating just two PE separator lines, its capacity of **{redacted}** because of the larger cost of investment to buy the land and to build the building and the lines. (PX0907 (Kung, Dep. at 61-62), *in camera*). **{redacted}** of its PE manufacturing operations. (PX0907 (Kung, Dep. at 68), *in camera*).
968. Daramic recognizes that its competitors and new entrants grow by adding small lines, and that they cannot earn the cost of capital on a large line due to the time needed to fill the capacity. (PX0241 at 001-02, *in camera*).

4. Reputation

969. Daramic recognizes that reputation is a barrier to entry. (PX0265 at 012, *in camera*).
970. EnerSys looks for a company with a good reputation, when evaluating a potential supplier. (Axt, Tr. 2108; Gage, Tr. 2484).
971. EnerSys was willing to try Microporous’ CellForce product because Microporous had a great reputation with EnerSys’ European and former-Hawker personnel for customer focus, competitive pricing, and technical superiority. (Axt, Tr. 2127).

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972. Exide perceived Microporous to have a very good reputation in the marketplace. (Gillespie, Tr. 3127, *in camera*).

5. Timing for entry**a. In general**

973. The overall time required to obtain tangible assets such as those possessed by Microporous, including a product that worked and had been qualified by customers, a technical workforce that could troubleshoot and innovate, a business force that was effective at selling the product, a factory in the United States, and a soon-to-be-opened factory in Europe, and intangible assets such as those possessed by Microporous, including a favorable reputation with customers and the benefit of learning by doing, which is accumulated through having produced the product for a number of years, can be assessed either by summing up the times to obtain the ones that could not be obtained simultaneously (such as product development and product testing) or by examining past instances where a firm entered a market. Under either approach, entry would take at least several years. (Simpson, Tr. 3207-08, 3395, *in camera*). Further, Daramic's use of exclusive contracts can impede entry by depriving the entering firm of sales. (Simpson, Tr. 3209, *in camera*).

b. Building and running a production line

974. On average, it takes an experienced PE line builder approximately eighteen to twenty months to install a PE separator line in an existing facility. (Gaugl, Tr. 4543).
975. The average 18-month project of setting up a PE battery separator line includes: about two months to do the generic layout of the lines and the specification of the main

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equipment; about ten months to obtain the long lead-time items; approximately four months to install the equipment; and about two months to start-up and debug the lines. (Gaugl, Tr. 4543-44).

976. The average 18-month project of setting up a PE battery separator line ends at the 24-hour test run. (Gaugl, Tr. 4595). In the 24-hour test, the line must demonstrate that it is capable of producing “in spec” material (*i.e.*, material with the tensile strength, electrical resistance, and other characteristics required by the customer) at the required daily output, or “throughput.” (Gaugl, Tr. 4539-40). The 24-hour test is to demonstrate the technical capabilities of the line. It is unrelated to whether one can make a commercial product at a competitive cost. (PX0905 (Gaugl, Dep. at 43-44)).
977. Passing the 24-hour test run does not mean that a new PE line will operate without problems. (Gaugl, Tr. 4595). Problems that occur after the 24-hour test are not always obvious at the time of the 24-hour test. (Gaugl, Tr. 4595). Any necessary debugging of new lines will continue after the 24-hour test. (Gaugl, Tr. 4594-95).
978. While two to three months is an average time for debugging, debugging can take up to four or five months. (PX0907 (Kung, Dep. at 132), *in camera*).
979. During the debugging period, PE product can be produced for sale to customers, but at a lower yield. A PE line contains many different pieces of equipment, and if one piece does not function correctly, it affects the functionality of other components. (PX0907 (Kung, Dep. at 134-35), *in camera*; Gaugl, Tr. 4585, 4594).
980. Peter Gaugl built the PE/CellForce line for Microporous in Piney Flats, Tennessee in 2000. (Gaugl, Tr. 4534). At the

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time he built the line in Tennessee, Mr. Gaugl was employed by Jungfer as a project engineer responsible for designing and starting up polyethylene battery separator lines for other companies. (Gaugl, Tr. 4531-32). Mr. Gaugl incorporated the lessons from previous lines he had designed and started up when designing and starting up later PE battery separator lines. (Gaugl, Tr. 4587).

981. In early 2001, Jungfer ran the 24-hour acceptance test for the line in Piney Flats, which showed that the equipment fulfilled the capacity and quality standards. (PX0590 (Gaugl, Arb. Dep. at 52-53), *in camera*).
982. The Piney Flats line encountered a number of problems, including machine breakdowns and electrical failures. (Gaugl, Tr. 4587-88, 4595). The Piney Flats line's electrical problems were not obvious at the time of the 24-hour test. (Gaugl, Tr. 4595). In some cases, the problems with the Piney Flats line were identified months after the 24-hour test run. (Gaugl, Tr. 4594-95). Some of the problems that Mr. Gaugl discovered with the new line installed at Piney Flats occurred after the one-year warranty period given to Microporous by Jungfer. (Gaugl, Tr. 4596-97, 4599).
983. While the new Piney Flats line was producing good material when it was working, the electrical failures prevented the line, at times, from producing any material at all. (Gaugl, Tr. 4595).
984. Mr. Kung and his team of **{redacted}** assembled a turnkey PE line for **{redacted}** (PX0907 (Kung, Dep. at 25-27), *in camera*). That line had annual production capacity of **{redacted}** million square meters of PE separator material. (PX0907 (Kung, Dep. at 27, 34-35), *in camera*). It took eighteen months for Mr. Kung and his team to build that line for **{redacted}** (PX0907 (Kung, Dep. at 28), *in camera*).

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985. Fully training a PE separator manufacturing line workforce takes approximately six months. (Gaugl, Tr. 4606-07).
986. Microporous began planning to build a new plant in Europe in early 1999. Although Microporous began working on a plan to build a stand-alone line in Europe in early 1999 to satisfy EnerSys' needs in Europe, Microporous did not pursue the plan seriously until approximately 2004 to 2005. (Gilchrist, Tr. 329-30).
987. A PE battery separator production line requires approximately 15 to 18 different pieces of equipment. Before Mr. Gaugl could order the equipment for Microporous' Austrian expansion, Mr. Gaugl had to design the layout and specifications for all the equipment for the line, including the connection points and controls between the individual machines on the line. (Gaugl, Tr. 4609-10). Mr. Gaugl designed the equipment to be installed in Austria in 2005. (PX0590 (Gaugl, Arb. Dep. at 102), *in camera*; Gaugl, Tr. 4609).
988. In January 2006, Microporous prepared a business plan detailing its planned expansion. The purpose of the business plan was to secure incentives and financing for the expansion from the Austrian government and local banks, respectively. (PX0611; PX0905 (Gaugl, Arb. Dep. at 128-29), *in camera*).
989. Microporous ordered the long lead-time items for its new lines in December 2006. These long lead-time items were those pieces of equipment that take from ten to twelve months to arrive, but are necessary to the installation. (Trevathan, Tr. 3600). The long lead-time items for a PE line include the dryers, extruders, and the calender systems. (Trevathan, Tr. 3600).

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990. The construction of the plant building began in February 2007. Prior to the construction, Microporous spent nine to ten months obtaining approvals for the plant from local government authorities and environmental agencies. Additionally, it spent time obtaining financial incentives from the Austrian government. (Gilchrist, Tr. 329-31). Thereafter, the building was completed, and the manufacturing equipment was installed and tested. Within the first week after the acquisition, in March 2008, commercial product was being produced from the Feistritz plant. (Gilchrist, Tr. 333-35; Gaugl, Tr. 4603).
991. The Feistritz plant started operations on a regular schedule, reaching optimum efficiency in June 2008. (Gaugl, Tr. 4603-04).
992. However, as of January 2009, the Austrian facility was still going through a learning curve. (Gaugl, Tr. 4605).

6. Product development

993. Daramic's development of a deep-cycle separator took many years. (PX0433 at 001; PX0950 at 064, *in camera*). Daramic began testing different additives for a new deep-cycle separator as early as 1999. This project evolved over time, beginning with the development of Daramic DC, which went to market in 2002, and culminated in the development of Daramic HD. (F. 145; Whear, Tr. 4777-78). Daramic began testing Daramic HD in 2003, but it was not until 2005 that Daramic made its first commercial sales of Daramic HD. (F. 145; Whear, Tr. 4778).
994. In 2005, Daramic was making very little gross margin on Daramic HD because of the manufacturing costs and the market price it had to set in order to get customers to switch from Microporous' deep-cycle battery separators to Daramic HD. (PX0433 at 001).

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995. The development of the CellForce product also took many years. (Gilchrist, Tr. 323). CellForce was initially developed by Microporous in 1995 to 1996 and the first samples were given to Trojan Battery in 1996 to 1997. (Gilchrist, Tr. 316-17, 324-25). Microporous installed its “turnkey” production line for PE battery separators that it obtained from Jungfer in 1999. (RX1029, *in camera*; Gilchrist, Tr. 391; Hauswald, Tr. 772, *in camera*; *see also* PX2235 at 004, *in camera*). Beginning in early 2001, Microporous began producing CellForce on a production line at its Piney Flats facility. (Gilchrist, Tr. 321-22).
996. Microporous began making profits on its investment in CellForce in 2004, approximately two to three years after it began selling commercial quantities of CellForce to Hawker/EnerSys. (Gilchrist, Tr. 393; F. 1002).
997. In the late 1990’s, U.S. Battery had discussions with Daramic about Daramic developing a deep-cycle battery separator. (Qureshi, Tr. 2014-15). U.S. Battery engaged Daramic in these discussions because there was no other competition to Microporous and U.S. Battery believed the product could be produced at a lower cost. (Qureshi, Tr. 2016-17).
998. U.S. Battery’s Nawaz Qureshi helped Daramic develop a deep-cycle battery separator. (Qureshi, Tr. 2015). He gave some technical suggestions and built test batteries for Daramic that contained Daramic separators and Flex-Sil separators, which both Daramic and U.S. Battery tested at their own facilities. (Qureshi, Tr. 2015-18).
999. Daramic recognized that U.S. Battery was “a key development partner” with respect to Daramic HD and its predecessor, Daramic DC. (PX0326 at 001; *see also* PX0681 at 001 (“a valuable partner in the qualification of

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Daramic products in the past – notably Daramic DC and Daramic HD”; PX0950 at 064, *in camera*).

1000. Amer-Sil attempted to develop a PVC separator known as “Amersleeve,” which was a multilayer separator that could potentially be used in sleeve form. (PX0916 (Dauwe, Dep. at 46-47), *in camera*). Amer-Sil work on the Amersleeve development project lasted five or six years. (PX0916 (Dauwe, Dep. at 157-58), *in camera*). Amer-Sil discontinued work on the Amersleeve project in 2008 because the separator did not work and no customers were interested in purchasing it. (PX0916 (Dauwe, Dep. at 47), *in camera*).

7. Product testing**a. In general**

1001. Testing typically involves testing both the separator material and battery performance using the material. Battery manufacturers generally provide customers with a warranty against material, workmanship and manufacturing defects for a period of time. If a battery has a bad component such as a separator, the warranty may require the manufacturer to replace the defective battery with a new battery. Failing to test a battery separator in the battery prior to sale is risky, since doing so increases the risk of warranty claims for quality issues. (PX0320 at 001; Whear, Tr. 4788-90; Benjamin, Tr. 3505; Wallace, Tr. 1965).
1002. Microporous began producing CellForce on the new production line at its Piney Flats facility beginning in early 2001. (Gilchrist, Tr. 321-22). Interested customers tested the product from Microporous’ new PE/CellForce line before purchasing commercial quantities. It took more than a year for Hawker/EnerSys, the first CellForce customer, to complete its testing and approval process and

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begin buying commercial quantities. Trojan Battery, the second CellForce customer, began buying commercial quantities in 2002. (Gilchrist, Tr. 321-23, 325).

1003. Trojan Battery began testing CellForce in mid-1999 and qualified it in March 2001, but experienced shrinkage issues with the product and stopped ordering it in August 2001. Ordering resumed in March 2002, when a solution to the shrinkage problem was found. (Gilchrist, Tr. 321-23, 325, 358-61; PX0450 at 005).
1004. At EnerSys, the process for testing and validating a new separator product involves preliminary material tests of separator samples, which are typically made in a laboratory, and final tests of production samples in actual batteries. The preliminary tests involve testing the separator material in puncture, shrinkage and electrical resistance tests, as well as analyzing its brittleness and composition, *i.e.*, particularly oil. (Gagge, Tr. 2484-87). If the separator samples pass these preliminary tests, EnerSys will request the potential supplier to provide production samples, *i.e.*, separators made on the supplier's production line. (Gagge, Tr. 2484-86).
1005. After receiving production samples from a potential separator supplier, EnerSys builds test batteries with the new separators. These test batteries undergo performance and battery life tests. The performance tests essentially analyze whether the battery with the new separator will generate the electrical current specified for the battery. The battery life tests are time-consuming because they are designed to determine whether the battery will perform well for the duration of the battery's warranty period. These tests involve placing the test batteries in a box that has an elevated temperature, which helps age the battery. (Gagge, Tr. 2484-89).

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1006. After a separator is qualified by testing, a battery manufacturer must also make sure the separator can run on the battery manufacturing lines. (Gillespie, Tr. 2936; *see also* Gagge, Tr. 2488). Use of a new separator requires the battery manufacturer to understand and tweak the battery manufacturing machines to be able to run a different product. (Gillespie, Tr. 2936).
1007. Life-cycle testing and production testing can be conducted concurrently. (Gagge, Tr. 2507-08, *in camera*).
1008. A battery manufacturer will also test and qualify a separator when it switches the backweb thickness. (Leister, Tr. 4025).
1009. The process for qualifying product changes coming from an existing supplier takes less time than the process, such as that described in F. 1004-07, for qualifying the initial product. For example, after Daramic decided to switch HD production to Piney Flats from Owensboro in the spring of 2008, the product was first qualified by a customer less than one year later in February or March of 2009. (Trevathan, Tr. 3715-16). Similarly, when Daramic requested JCI in Europe to accept separators made in Daramic's United States facility, when there was a strike at Daramic's Potenza plant, JCI noted that OE qualification and approval would take "several months." (RX1150 at 003; *see also* RX0014 (Exide stating that OE's would require eight to twelve months to qualify European-made product for United States car batteries); RX1148 at 002 (noting qualification of Daramic HD being produced out of Piney Flats would require only three to four weeks); RX1144 at 001-02 (testing of CellForce manufactured for EnerSys out of Festriz, in comparison to CellForce produced out of Piney Flats)).
1010. A battery manufacturer may be able to shorten battery life-cycle testing if it pays an outside firm to do the testing.

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(RX0007 (Exide expected to shorten original time-line of two years by sending industrial batteries out for testing)).

b. Motive and UPS product testing

1011. Full testing of battery separators in motive batteries takes two to three years to complete. (Whear, Tr. 4798; PX0568; *see also* Whear, Tr. 4813, *in camera*; PX0564, *in camera*).
1012. Motive and UPS battery separators undergo life-cycle testing for a period of two and a half years at EnerSys. This period is necessary for EnerSys to assure itself and be able to show its customers objective data that the battery will fulfill its warranties and perform as represented. EnerSys also needs data to show its customers to validate a switch in materials. (Gagge, Tr. 2490-91).
1013. Exide expects testing of industrial separators to take approximately two years. (Gillespie, Tr. 2973-74; RX0013 at 009; PX1090 at 004).
1014. Daramic believes that the costs associated with switching suppliers is “much higher” for customers purchasing industrial (motive or stationary) separators than it is for customers purchasing automotive separators. (PX0482 at 003).

c. Deep-cycle testing

1015. Life-cycle tests for deep-cycle batteries are conducted a few different ways. The Battery Council International (“BCI”) sets testing standards for the rate of discharge. At Trojan Battery, life-cycle testing in the lab involves putting the battery on a discharge machine in a laboratory that runs automatically so that the battery cycles until the end of its life. Trojan Battery’s machine gets one cycle

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per day. (Godber, Tr. 158-59). A cycle is the period between charge/discharge. (Qureshi, Tr. 2005-06).

1016. The time required to complete lab testing for deep-cycle batteries depends on how many cycles per day the battery goes through, and how many cycles are required before the battery will be approved. (Godber, Tr. 159-60 (six to seven-hundred cycles, with once per day cycling); Qureshi, Tr. 2067-68 (can cycle two to four times per day, and battery can be approved after 750 cycles)). Trojan Battery completed lab testing and qualified Daramic HD for its low-line Pacer golf cart battery in approximately nine months. (Godber, Tr. 170-71).
1017. Exide's testing and qualification of deep-cycle battery separators typically takes between eighteen and twenty-four months. (Gillespie, Tr. 2934).
1018. Trojan Battery tests separators for use in its batteries in order to understand the life-cycle characteristics due to original equipment warranty requirements and to protect its brand. (Godber, Tr. 158). Trojan Battery conducts lab testing and also duplicates tests of the different OEMs to which it sells batteries. Trojan Battery also conducts field testing, which has been a requirement of its OEMs. (Godber, Tr. 158-59).
1019. In field testing, Trojan Battery will build a battery with a particular separator and then will go to a golf course and put the batteries in the golf carts at the course and follow the batteries during the course of their life. (Godber, Tr. 160). A field test for a separator generally is a two-year time frame to understand how the battery is going to perform in the field. (Godber, Tr. 159, 163). On a severe hilly course, field testing may be done in eighteen months because the discharge of the battery will be faster and the battery will degrade sooner. (Godber, Tr. 163).

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1020. Field testing is expensive. Trojan Battery will typically conduct lab testing first and proceed to field testing or not, depending on the results of the lab tests. For example, Daramic DC was not put out for field testing by Trojan Battery. (Godber, Tr. 164-65). Trojan Battery began testing the CellForce separator in June 1999 for approval for a lower capacity golf cart, the T-605, and for a marine battery line. (Godber, Tr. 166). These two product lines were for aftermarket products. (Godber, Tr. 166). The field test was started after the life-cycle testing began, once Trojan Battery began seeing good results in the lab. The qualification process finished in March 2001. (Godber, Tr. 166-67).
1021. Trojan Battery ran into a shrinkage problem with CellForce on its marine product lines, shortly after it began selling the product. (Godber, Tr. 167-68). Trojan Battery decided to pull products with CellForce separators from the market. (Godber, Tr. 168). Microporous was able to resolve the shrinkage problem and the product was returned to market after some additional testing. (Godber, Tr. 168; F. 1003).
1022. Trojan Battery tested CellForce for aftermarket floor scrubber, scissor lift and boom lift batteries, and completed the testing for those applications in approximately twenty to twenty-two months. (Godber, Tr. 169-70).
1023. Daramic expected that testing of its separators for deep-cycle applications at Trojan Battery would take approximately two years. (PX2248 at 001, *in camera*, (“Trojan is 100% [Microporous], this is where we push our HD product, but qualification will take almost 2 years.”)).

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1024. Daramic understood that battery manufacturers would require testing and qualification of its HD separator before HD would be accepted for commercial use. Daramic expected customer qualification of HD for use in deep-cycle batteries to take more than eighteen months. (PX0262 at 003).

d. SLI testing

1025. In general, completing testing for SLI separators takes less time than for other applications. Life-cycle testing for transportation battery separators can be expected to take up to nine months, and field testing to take one year. (RX0013 at 009; PX1090 at 003).

e. PVC testing

1026. Amer-Sil's PVC separators are not currently being tested by any battery manufacturer for use in North American battery manufacturing plants. (PX0916 (Dauwe, Dep. at 132)). Qualification of Amer-Sil's PVC separators for use in North America would take at least two years, as testing typically takes two years. (PX0916 (Dauwe, Dep. at 163-64), *in camera*).

8. Actual and potential entrants**a. Entek**

1027. Entek is not currently selling separators in the deep-cycle, motive or UPS markets. (F. 382-83, 392-93, 403, 421, 1029-30, 1040). Entek has essentially exited the industrial side of the business. (Balcerzak, Tr. 4097; Burkert, Tr. 2311).
1028. Entek is unlikely to expand to enter these markets in North America within the next two years. (F. 1029-48).

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1029. Entek is principally a producer of SLI. (Weerts, Tr. 4492, *in camera*). Entek used to sell separators for industrial applications in the 1990's. Entek's strategy **{redacted}** Less than 1% of Entek's business is in the industrial segment. (Weerts, Tr. 4502-03, 4526-27, *in camera*).
1030. Entek believes it is more difficult to run industrial product than SLI because of the thicker backweb profiles, leading to problems such as blisters and pinholes. In addition, Entek believes that the profile of industrial material, including the rib height in relation to the backweb, requires a slower extraction process, which decreases output. (Weerts, Tr. 4515-16, *in camera*).
1031. Crown Battery asked Entek to provide material for Crown's golf cart batteries. At the time of the adjudicative hearing, Entek had yet to provide any samples to Crown Battery. (Balcerzak, Tr. 4130-31, 4138-39).
1032. Entek declined a request by Bulldog Battery that Entek supply Bulldog Battery with separators for motive application. Entek has never approached Bulldog Battery about supplying Bulldog Battery with separators for motive application. Bulldog Battery did not follow up with Entek because it believed it was pointless to do so. (Benjamin, Tr. 3519-21).
1033. It is Exide's understanding that Entek has little interest in making separators for motive or stationary applications. If Entek were to enter these markets, **{redacted}** (Gillespie, Tr. 3037, 3040, *in camera*; Weerts, Tr. 4488-90, *in camera*).
1034. Entek did not **{redacted}** (Weerts, Tr. 4505, *in camera*).
1035. In November 2008, **{redacted}** These caveats constitute big issues for Exide. (Gillespie, Tr. 3129-30, *in camera*)

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(the caveats are “not molehills; these are mountains”); Weerts, Tr. 4509, *in camera*; PX1902 at 001, *in camera*). For example, Exide does not have problems with black scum on the separators that it purchases from Daramic. (Gillespie, Tr. 3136, *in camera*).

1036. **{redacted}** (Weerts, Tr. 4488-99, *in camera*). **{redacted}** (Gillespie, Tr. 3126-27, *in camera*).
1037. As of the time of trial, **{redacted}** (Gillespie, Tr. 3040, *in camera*; Weerts, Tr. 4507-09, *in camera*). **{redacted}** (Weerts, Tr. 4509, 4527, *in camera*).
1038. **{redacted}** (Gillespie, Tr. 3037-38, *in camera*).
1039. **{redacted}** (Weerts, Tr. 4521, *in camera*).
1040. Entek used to supply EnerSys with motive separators during the 1990’s, but Entek exited that business. (Burkert, Tr. 2311).
1041. As part of EnerSys’ ongoing effort to find additional suppliers for industrial separators, it approached Entek at the 2008 BCI conference that took place soon after the acquisition. EnerSys believed the best approach to obtaining another supplier was to find a supplier that was already making separators and try to convince them to get into the industrial market. Entek expressed interest, so while Mr. Burkert of EnerSys was at the Entek booth at the BCI conference, he had his office email the Entek representative a draft Non-Disclosure Agreement (“NDA”) for his signature as a prelude to discussions. (Burkert, Tr. 2351-52, *in camera*). Despite numerous emails and telephone calls by EnerSys to follow up with Entek, EnerSys never received a signed NDA back from Entek. When Mr. Burkert approached an Entek representative in another industry conference in Europe,

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he got the impression that Entek was not interested. (Burkert, Tr. 2352-53, *in camera*).

1042. Shortly before the adjudicative hearing, **{redacted}** (Burkert, Tr. 2446-48, 2354-55, *in camera*).
1043. EnerSys does not have any plans to order PE separators for its batteries from **{redacted}** (Burkert, Tr. 2357, *in camera*).
1044. If EnerSys received preproduction samples of **{redacted}** material today, it would do **{redacted}** preliminary testing. (Gagge, Tr. 2522, *in camera*). If those samples worked, EnerSys would get production samples and test those on the motive side for **{redacted}** (Gagge, Tr. 2522, *in camera*).
1045. JCI has had discussions with Entek about possibly supplying deep-cycle separators. As of the time of the adjudicative hearing, Entek had not yet provided any samples to JCI. (Balcerzak, Tr. 4130-31, 4138-39).
1046. **{redacted}** (Hall, Tr. 2747, 2874, *in camera*; RX0072, *in camera*).
1047. To enter the deep-cycle battery separator market at a level sufficient to restore the pre-acquisition competitive environment, **{redacted}** would need to develop a reliable product, modify its production line, get qualified by customers, and then gain the learning by doing necessary to be efficient. (Simpson, Tr. 3408, *in camera*).
1048. Entek is unlikely to enter either the deep-cycle or industrial markets in a way that would counter anticompetitive effects of the acquisition. (Simpson, Tr. 3195-96, *in camera*).

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1049. {redacted} (Hall, Tr. 2749, 2825, *in camera*; Weerts, Tr. 4480, *in camera*). {redacted} (Hall, Tr. 2820, *in camera*).
1050. {redacted} (Gillespie, Tr. 3024-25, *in camera*; Simpson, Tr. 3442, *in camera*).

b. Amer-Sil

1051. Amer-Sil produces PVC separators for European flooded motive and stationary batteries, and does not produce PE separators. (F. 443). It is not a participant in the relevant markets. (F. 350, 352). Amer-Sil is not likely to enter the relevant markets in North America within the next two years. (F. 351, 353, 1052-56).
1052. PVC is generally not used as separators for motive batteries in North America. (Axt, Tr. 2102).
1053. Amer-Sil has {redacted} (PX0916 (Dauwe, Dep. at 115, 117, *in camera*)). {redacted} (RX1620 at 002).
1054. {redacted} (PX0916 (Dauwe, Dep. at 89-90), *in camera*; Burkert, Tr. 2451, 2355-56, *in camera*; RX1621). {redacted} (Burkert, Tr. 2356, *in camera*). {redacted} (Burkert, Tr. 2355-56, *in camera*).
1055. Amer-Sil ultimately concluded that {redacted} (PX0916 (Dauwe, Dep. at 94-95), *in camera*; RX1620 at 002). Amer-Sil's owners thought {redacted} (PX0916 (Dauwe, Dep. at 94), *in camera*).
1056. EnerSys does not have any plans to order PE separators for its batteries from Amer-Sil. (Burkert, Tr. 2357, *in camera*).

c. Asian manufacturers**(i) In general**

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1057. Most Chinese battery manufacturers are “very small” and their PE separator order volumes are similarly very small. (PX0907 (Kung Dep. at 69-71, *in camera*)). The manufacturing costs involved in serving smaller customers and making multiple tooling changes make it disadvantageous to construct a high-volume (*e.g.*, 20 million square meter annual production capacity) PE line in China. (PX0907 (Kung, Dep. at 116-17, *in camera*)).
1058. Asian battery separator manufacturers have been expanding their capacity. (Thuet, Tr. 4333). Demand for battery separators within Asia is also expanding. Daramic estimated that demand in the Asian Pacific market was growing at the rate of 10% per year. (RX1050 at 005, 007, 015, *in camera*; *see also* PX0907 (Kung, Dep. at 143), *in camera*). Asia is a net purchaser of battery separators. (PX0907 (Kung, Dep. at 147), *in camera*).
1059. It would take approximately six to eight weeks for separators from China to arrive in the United States by ship. (F. 289). The longer supply chain from China to North America means more potential points of disruption, and potentially longer resulting delays in delivery. With local supply, disruptions are dealt with in “hours and days,” as opposed to potentially longer delays when dealing with a supply chain stretching halfway around the world. This potentially amounts to the difference between shutting a plant down for an hour or for a month. The shorter length of the supply chain is a factor giving Microporous an advantage over Asian suppliers. (Gillespie, Tr. 3034-35, *in camera*).
1060. Exide typically compensates for the risk of a lengthy supply chain by seeking cost savings from offshore suppliers. Exide has a general rule that it will only outsource supply offshore if it can get the outsourced

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product for **{redacted}** than local supply. The **{redacted}** compensates Exide for the “risk or headache that you have to go through by elongating that supply chain.” (Gillespie, Tr. 3036, *in camera*). Exide found that the cost of obtaining products from Asian suppliers was higher than Exide’s current suppliers. (F. 1084; Gillespie, Tr. 3031, *in camera*).

1061. Exide has **{redacted}** (Gillespie, Tr. 5823, *in camera*).
1062. Daramic knows of no Asian manufacturer that has ever supplied PE or PE/rubber separators for flooded batteries to any North American battery manufacturer. (Roe, Tr. 1236).
1063. It is unlikely that the Asian suppliers, including Anpei, Baotou, NSG and BFR, discussed in F. 1064-78, *infra*, would enter the North American market within two years. (F. 1064-1112; PX0033 (Simpson Report) at 022-23, *in camera*).

(ii) Anpei

1064. Anpei does not currently make either UPS or motive separators. (Axt, Tr. 2217-18, *in camera*).
1065. Daramic rated Anpei as **{redacted}** for technology performance, technology processibility, and technology quality, whereas it considered itself **{redacted}** in those three categories. (PX0265 at 016, *in camera*).
1066. Mr. Kung is familiar with the engineering capabilities at Anpei because he trained the engineers who are still there. (PX0907 (Kung, Dep. at 279, *in camera*). He also maintains contact with **{redacted}** (PX0907 (Kung, Dep. at 51-53, *in camera*)). Anpei’s technical team is **{redacted}** when judged by American standards. (PX0907 (Kung, Dep. at 49-50, *in camera*)).

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(iii) Baotou

1067. Baotou had a PE manufacturing line in Mongolia. Its remote location far from any battery manufacturer customers is a “big disadvantage,” creating difficulties in shipping its product. (PX0907 (Kung, Dep. at 110, *in camera*)). Baotou **{redacted}** (PX0907 (Kung, Dep. at 120, *in camera*)). At that time, **{redacted}** (PX0907 (Kung, Dep. at 119-20, *in camera*)).

(iv) NSG

1068. Nippon Sheet Glass (NSG) is a separator manufacturer located in Japan. (Gillespie, Tr. 2963). In July 2006, NSG had expressed interest in supplying PE separators to Exide. (PX1073 at 001).
1069. NSG declined to quote on Exide’s RFP. In July 2007, NSG informed Exide that it did not have capacity to service new customers of PE separators from its Japanese facility. NSG stated that it had sold a majority interest of its PE separator facility in Tianjin, China to Daramic, in order to focus NSG’s business on its core competency in AGM separators. With the sale, “Daramic has the management authority to decide product mix and customer pricing” for Tianjin, and NSG suggested that Exide contact Daramic for a quote on supply from Tianjin. Since declining to quote, NSG has not approached Exide about possible supply of PE separators. (Gillespie, Tr. 2963-65; PX1079).

(v) BFR

1070. BFR manufactures PE separators for use in automobiles, motorcycles and trucks. (PX0672 at 002, *in camera*; PX0907 (Kung, Dep. at 85-86, *in camera*)). **{redacted}** (RX0061, *in camera*).

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1071. BFR's first line was constructed in 2001, with a capacity of between 3 and 4 million, at a cost of approximately \$1 per square meter. (PX0907 (Kung, Dep. at 54, 61), *in camera*).
1072. Currently, BFR operates four production lines. (Hauswald, Tr. 1033-34). BFR currently has approximately {redacted} square meters of capacity. (RX0032, *in camera*; PX0672 at 001, *in camera*; Hall, Tr. 2769, 2837-38, 2860, *in camera*).
1073. To date, BFR has {redacted} The BFR Board has {redacted} Nor has the BFR Board {redacted} (Hall, Tr. 2880-81, *in camera*).
1074. BFR {redacted} (PX0907 (Kung, Dep. at 263, *in camera*)). BFR has not had {redacted} (Hall, Tr. 2880-81, *in camera*).
1075. {redacted} (Hall, Tr. 2771-74, *in camera*).
1076. Variability in elongation causes runnability issues at battery manufacturing plants by jamming up machines. (Hall, Tr. 2772, *in camera*). Problems related to elongation add extra costs for battery manufacturers. (Hall, Tr. 2774-76, *in camera*).
1077. JCI's Shanghai production facility also {redacted} (Hall, Tr. 2774, *in camera*).
1078. Daramic has never competed with BFR for business in North America. (Roe, Tr. 1807; PX0907 (Kung, Dep. at 186-187, *in camera*)).

(vi) Views of North American customers**(a) Exide**

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1079. Exide has “extensively looked around the world” for alternative suppliers of automotive battery separators. (Gillespie, Tr. 2962). Exide’s search for alternate suppliers has included the hiring of a third party to help find potential suppliers in Asia, issuing a request for proposal (“RFP”), and trips by Exide personnel around the world. (Gillespie, Tr. 2962, 3022-23, *in camera*).
1080. Exide has not found any manufacturers in China or elsewhere in Asia that could make the motive and stationary separators that Exide needs for its flooded lead-acid batteries. (Gillespie, Tr. 3041, 3049, *in camera*).
1081. Exide identified **{redacted}** as the **{redacted}** most promising Asian suppliers that could potentially supply PE SLI separators to Exide in the future. (Gillespie, Tr. 3023, 3041, *in camera*). Exide has conducted some preliminary lab tests on swatches of material produced by the **{redacted}** Asian suppliers it identified as potential suppliers. (Gillespie, Tr. 3023, *in camera*).
1082. Exide’s understanding of both **{redacted}** based upon complete company profiles it obtained, is that neither company has the technology necessary to produce six millimeter separators. Exide also believes that **{redacted}** Exide would need. One of the profiles Exide procured reported that **{redacted}** defective rate, which is “pretty bad.” “Defective,” in this context, means the separators do not conform to the buyer’s specifications. (Gillespie, Tr. 3025-27, *in camera*; RX0306 at 004, *in camera*).
1083. Based on preliminary lab testing of material swatches, Exide narrowed its list of **{redacted}** potential Asian suppliers, **{redacted}** down to **{redacted}** and ordered a sample roll for the purpose of conducting performance testing for SLI battery applications. Exide believes that the amount of testing that would need to be done is such

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that it would be more than a year before it had an indication of whether the separators could be put into production. (Gillespie, Tr. 3023-24, 3041, *in camera*).

1084. Even if the **{redacted}** qualify for use at Exide, there are a number of other issues that would need to be resolved before Exide would use **{redacted}** (Gillespie, Tr. 3024-25, *in camera*). The pricing that Exide has received from **{redacted}** higher than the prices Exide is currently paying Daramic, including transportation, but not including taxes. (Gillespie, Tr. 3024-25, 3029, *in camera*).
1085. In considering **{redacted}** as a potential supplier, Exide considers **{redacted}** to pose a risk. Exide is concerned that **{redacted}** Exide also considers **{redacted}** as adding risk to the supply chain. (Gillespie, Tr. 3024-25, *in camera*).
1086. Exide is concerned also because **{redacted}** (Gillespie, Tr. 3024, *in camera*).
1087. Exide does not foresee buying **{redacted}** in the next two years. (Gillespie, Tr. 3025, *in camera*).
1088. Based upon its evaluation of Asian suppliers, Exide does not see any of the Asian suppliers as being on equal footing competitively with what Exide knew Microporous to be before it was acquired by Daramic. (Gillespie, Tr. 3028-30, *in camera*). In Exide's view, Microporous was better situated than all of the potential Asian suppliers in terms of cost, quality, proximity of manufacturing facilities, and technology. (Gillespie, Tr. 3028-36, *in camera*).
1089. It has been Exide's observation when visiting Asian manufacturing operations that the infrastructure,

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technology and “know-how” is not present in the manufacturing operations of Asian suppliers. (Gillespie, Tr. 3031-32, *in camera*). The majority of separators manufactured in Asia are manufactured for batteries in the Chinese market. Asian manufactured separators do not meet the standards of American consumers for American cars, or the standards for Europe. (Gillespie, Tr. 3032, *in camera*).

(b) EnerSys

1090. EnerSys has had discussions **{redacted}** about supplying industrial separators. EnerSys requested and received **{redacted}** (RX0222, *in camera*; Axt, Tr. 2217-18, 2272, *in camera*). **{redacted}** (Axt, Tr. 2218-19, *in camera*).
1091. EnerSys has also found there to be language barriers to dealing with **{redacted}** (Gagge, Tr. 2500, *in camera*).
1092. EnerSys is currently in discussions with **{redacted}** about getting production tooling in order for them to generate production samples for testing. (Gagge, Tr. 2499-2500, *in camera*). **{redacted}** has been unable to find calender rolls. EnerSys wants to go forward with **{redacted}**. EnerSys is working to locate a source of **{redacted}** (Burkert, Tr. 2360, *in camera*).
1093. If **{redacted}** gets a calender roll, it will be a minimum of two and a half to three years before **{redacted}** could actually supply EnerSys with product. (Burkert, Tr. 2360, *in camera*).
1094. EnerSys and **{redacted}** (Hall, Tr. 2849-50, *in camera*; RX0059, *in camera*). **{redacted}** (Hall, Tr. 2881-82, *in camera*).
1095. EnerSys has conducted preliminary materials testing on automotive separator samples provided by **{redacted}**.

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The materials passed this preliminary materials testing. (Burkert, Tr. 2388, *in camera*).

1096. {redacted} initial pricing to EnerSys was approximately {redacted} higher than Daramic's. When shipping and tax are added in, the prices would be approximately {redacted} higher than those of Daramic. Based on EnerSys' research, "the pricing out of Asia would still be higher than the proposed Daramic increase {redacted} (Axt, Tr. 2217-18, 2220, *in camera*).
1097. Because {redacted} do not have experience making motive or UPS separators, EnerSys anticipates that it will take at least six months for these companies to get the necessary calender rolls in place. (Axt, Tr. 2218, *in camera*; see also Gagge, Tr. 2499, *in camera*).
1098. {redacted} estimated that it would cost {redacted} million to build an industrial PE line with the {redacted} million square meter capacity needed by EnerSys, and that it needed to acquire land and have a building to house the line. {redacted} estimated that it would cost from {redacted} million to modify an old line to an industrial separator line that could produce about {redacted} million square meters of separators per year. (RX0027, *in camera*).
1099. {redacted} (Axt, Tr. 2218, *in camera*). If {redacted} appropriate calender roll, {redacted} before {redacted} could begin ordering industrial product from {redacted} (Burkert, Tr. 2443, 2360-62, *in camera*; Gagge, Tr. 2498-99, *in camera*).
1100. EnerSys does not consider {redacted} or {redacted} to be on the same footing as Microporous was prior to the acquisition. (Burkert, Tr. 2362-63, *in camera*). In addition, EnerSys is concerned about supply chain with

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{redacted} including the distance, the amount of material it would have to stock, potential for interruptions in shipments, weather delays and other interruptions in supply. (Burkert, Tr. 2364-65, *in camera*).

1101. EnerSys perceives there to be “no comparison” between Microporous, and **{redacted}** and **{redacted}**. **{redacted}** and **{redacted}** are Chinese automotive PE suppliers that support the Chinese automotive market. While these Chinese companies are developing and improving, “it’s like comparing a Chevy to a Cadillac. [Microporous] was . . . state of the art, very innovative, with a strong management team.” (Axt, Tr. 2221, *in camera*).
1102. EnerSys had qualified Microporous’ motive product, and was working with Microporous regarding UPS, although Microporous was not totally qualified. **{redacted}** are just “getting started” with the qualification process for EnerSys. (Axt, Tr. 2222, *in camera*). In addition, because **{redacted}** are located in **{redacted}** there are logistical issues for EnerSys such as additional transportation costs and times, duties, and extra inventory. (Axt, Tr. 2223, *in camera*).
1103. EnerSys believes that, other than **{redacted}** does not have the technical expertise in making separators, setting up lines, and handling technical issues. If **{redacted}** EnerSys would consider **{redacted}** to be on “shaky ground.” (Burkert, Tr. 2363-64, *in camera*). **{redacted}** **{redacted}** at 92, *in camera*)).
1104. EnerSys does not consider **{redacted}** to be on the same footing as Microporous was prior to the acquisition, and considers **{redacted}** “shaky at best as far as options.” (Burkert, Tr. 2363, *in camera*). Among EnerSys’ concerns are the logistical problems arising from the long distance, that **{redacted}** technical personnel do not speak English, that **{redacted}** lacks technical expertise, and that

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{redacted} was unable on its own to find someone to make the necessary calender rolls. (Burkert, Tr. 2363, 2366, *in camera*).

1105. EnerSys is not planning on buying PE separators for flooded lead-acid batteries for North America from {redacted}. After doing research and engaging in further discussions, EnerSys came to the conclusion that {redacted} (Burkert, Tr. 2359, *in camera*).
1106. EnerSys made attempts to contact a company {redacted} by mail, email, and phone, for potential supply, but never received any response from the company. (Burkert, Tr. 2359, *in camera*). EnerSys is not planning on doing business with {redacted} (Burkert, Tr. 2360, *in camera*).
1107. EnerSys does not know of any company that is on an equal footing with the pre-acquisition Microporous or Daramic today, with respect to UPS and motive battery separators, and does not know of any entity that will be the equivalent of the pre-acquisition Microporous or Daramic in the next two years. (Burkert, Tr. 2366-67, *in camera*).

(c) East Penn Battery

1108. East Penn Battery requested and obtained a quote for the sale of PE separators from Anpei. (Leister, Tr. 3992). East Penn Battery has tested PE material samples from Anpei. (Leister, Tr. 3992; RX0079). East Penn Battery approved an Anpei separator for use in a small-engine battery, similar to a lawn mower battery. (Leister, Tr. 4032-33).
1109. If the PE separator industry were to change such that East Penn Battery could not obtain supply from its current PE suppliers, East Penn Battery would consider Anpei as an alternative supplier. (Leister, Tr. 3993).

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1110. East Penn Battery is not currently seeking to obtain PE separators from any Asian PE separator manufacturers. East Penn Battery does not know if Anpei has the available capacity to supply East Penn Battery with separators. (Leister, Tr. 4032, 4035-36). East Penn Battery believes that obtaining PE separator supply from Anpei in Asia would be a logistical challenge that is even greater than what East Penn Battery is experiencing with its current supply situation with Entek. Obtaining supply from Entek's West Coast manufacturing facility creates problems for East Penn Battery, with long lead-times and added freight charges. (Leister, Tr. 4008-09, 4035).

(d) JCI

1111. JCI considers **{redacted}** (Hall, Tr. 2745-46, 2862, *in camera*; RX0043, *in camera*; PX1509 at 004-09, *in camera*). JCI has not **{redacted}** (PX0672 at 006, *in camera*). JCI is **{redacted}** (Hall, Tr. 2862, *in camera*).

(e) Douglas Battery

1112. It is unlikely Douglas Battery would look to offshore separator supply, even if the domestic price of motive separators were to increase by 5%. Douglas Battery has a preference for local supply. (F. 309; Douglas, Tr. 3080, 4082).

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9. Vertical integration

1113. JCI has not considered building its own separator manufacturing lines to manufacture separators for internal use. (Hall, Tr. 2703). Nor does JCI believe it has the competency to build and run a separator manufacturing line on its own. (Hall, Tr. 2703).
1114. **{redacted}** (RX0073, *in camera*; Hall, Tr. 2826-28, *in camera*).
1115. **{redacted}** (Weerts, Tr. 4479-80, *in camera*; Hall, Tr. 2819-20, *in camera*). The purpose of **{redacted}** (Hall, Tr. 2749, *in camera*; Weerts, Tr. 4480, *in camera*).
1116. Exide used to manufacture separators at a facility it owned in Corydon, Indiana. In 1999, Exide sold that facility to Daramic. (RX0899; Gillespie, Tr. 2983). Exide does not intend to go back into the business of manufacturing battery separators, which it considers outside its “core competency.” (Gillespie, Tr. 2983-84).
1117. Trojan Battery investigated installing a Flex-Sil line near Trojan Battery’s manufacturing facility in Sandersville, Georgia. It began its consideration before the acquisition, but investigated it much more after the acquisition. Trojan Battery determined that the equipment would cost approximately \$8 million. Trojan Battery determined that it did not have the right personnel for the manufacturing process, which it believes is unique. After it considered the cost, the resources required to run the line, as well as the current economic situation, Trojan Battery chose not to pursue vertical integration. (Godber, Tr. 229-31).
1118. Bulldog Battery believes that it is not practical for it to manufacture its own motive separators. Based on internal discussions and discussions with sales representatives

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from Microporous and Daramic over the years, Bulldog Battery has concluded that it lacks know-how needed to manufacture separators, including knowledge of the compounds used and the methodologies for controlling porosity and curing the separator material. Additionally, Bulldog Battery believes that the equipment and tooling needed to manufacture separators would require a big investment, which would be difficult for it to justify. (Benjamin, Tr. 3527-29).

1119. After the acquisition, Mr. Craig of EnerSys had a brief conversation with {redacted} EnerSys {redacted} (Craig, Tr. 2625, 2643-45, *in camera*). {redacted} (Craig, Tr. 2644, *in camera*; see also Burkert, Tr. 2365-66, *in camera* ({redacted})). EnerSys would not put money in to {redacted} (Burkert, Tr. 2463, *in camera*).
1120. Sebang is located in Korea. It has two lines with approximately {redacted} square meters of capacity. Sebang primarily produces separators for its mother company through a vertical integration arrangement. However, Sebang also sells to the general marketplace. (Seibert Tr. 4264-65, *in camera*; Thuet, Tr. 4331).

10. Sponsored entry

1121. {redacted} (PX0907 (Kung, Dep. at 59), *in camera*; RX0053, *in camera*). {redacted} (RX0050 at 004, *in camera*). {redacted} (RX0053, *in camera*; RX0052, *in camera*; Hall, Tr. 2715-16). {redacted} (Hall, Tr. 2716). {redacted} (RX0032, *in camera*).
1122. {redacted} (RX0073 at 001; Hall, Tr. 2826-28, *in camera*).
1123. {redacted} (F. 734).

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1124. EnerSys considered **{redacted}** (Axt, Tr. 2113, 2305-06, *in camera*; Burkert, Tr. 2450-51, *in camera*).
1125. East Penn Battery has never considered investing capital in an Asian supplier of PE. (Leister, Tr. 4036). East Penn Battery does not have any current plans to enter a joint venture with any battery separator manufacturer or to sponsor the entry of any battery separator manufacturer. (Leister, Tr. 4036-38). Nor does East Penn Battery have any plans to vertically integrate and manufacture separators in-house. (Leister, Tr. 4038).
1126. Exide has never considered entering a joint venture with any separator manufacturer. (Gillespie, Tr. 2984). Nor is Exide interested in investing money into a battery separator manufacturer. (Gillespie, Tr. 2984-85). Exide's discussions with Microporous regarding Microporous' supplying Exide with SLI separators required that Microporous would shoulder the investment costs. (Gillespie, Tr. 3088).

G. Microporous' financial position prior to the acquisition

1127. Over the three years prior to the acquisition, Microporous' sales had been growing. Net sales grew **{redacted}** from 2004 to 2005; **{redacted}** from 2005 to 2006; and **{redacted}** from 2006 to 2007. Microporous' net sales in 2007 of **{redacted}** yielded EBITDA of **{redacted}**. Daramic's presentations to the Polypore Board prior to the acquisition adjusted Microporous' figures downward and projected EBITDA profits of **{redacted}** for 2007; **{redacted}** for 2008; **{redacted}** for 2009; and **{redacted}** for 2010. (PX0078 at 019, *in camera*; PX0203 at 083, *in camera*).
1128. Four days before the acquisition, Polypore reported to its Board that the Microporous acquisition would have

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positive impacts on its EBITDA of approximately {redacted} (PX0824 at 002, *in camera*).

1129. As of December 31, 2007, Microporous had outstanding debt of approximately \$46 million, which included debt for the purchase of the Jungfer line for the Piney Flats expansion in 2001, and for the 2007 Feistritz expansion. (PX0078 at 021, *in camera*; Gilchrist, Tr. 549-50).
1130. Although it was profitable, Microporous was not meeting some of its budget projections in 2007. (Trevathan, Tr. 3652).
1131. The Board of Microporous was supportive of a long-term strategy of business growth. However, it was also looking to management to control costs and keep on budget. It also wanted management to be more focused on return on investment, numbers, and the risk associated with those numbers. (RX0401; PX2300 (Heglie IHT, 60, 219-20), *in camera*).
1132. There was a restructuring plan within Microporous to address deteriorating margins at Microporous. (Trevathan, Tr. 3773-74; RX0283).
1133. Microporous had not been for sale on the open market, but instead had been approached by Daramic. (PX2300 (Heglie, IHT at 217-18), *in camera*).
1134. If the acquisition had fallen through, IGP's plan was to continue to own Microporous; to continue evaluating growth opportunities; and to try to grow cash flow, improve margins, and generate cash to pay down Microporous' debt. IGP saw plenty of opportunities for growth "on the radar screen." (PX2300 (Heglie IHT, 219-20)).

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1135. Had the deal with Daramic fallen through, Microporous would have continued negotiations to expand to supply Exide. Mr. Trevathan thought that if the deal fell through, he could keep things on track to improve Microporous' profitability. (Trevathan, Tr. 3750, 3753-54).
1136. At the time of the acquisition, Microporous had a contract for all of the EnerSys volumes in North America and Europe. (RX0207, *in camera*). EnerSys is a significant customer, with 38 to 40% market share in motive battery sales worldwide. (Axt, Tr. 2227). **{redacted}** (Axt, Tr. 2151, *in camera*).
1137. At the time of the acquisition, Microporous had multiple offers for backfilling its CellForce production line at Piney Flats, including offers from C&D for a UPS application, and from EnerSys, Trojan Battery, Crown Battery, and East Penn Battery. (Gilchrist Tr. 397-98, 402-03, 467, *in camera*; RX0207, *in camera*). The contract with EnerSys/Hawker filled one line at Feistritz, while Microporous was making "a very concentrated effort" to sell PE separators from the second Feistritz line to several SLI battery manufacturers. (*See F. 780-81*). In addition to Exide and JCI, there were 35 to 40 smaller SLI battery manufacturers in Europe. Many of these European manufacturers were good customer prospects because they liked Microporous' PE technology, which was based on Jungfer's technology. Some of these manufacturers had formerly purchased separators from Jungfer when it was still in business. (Gilchrist Tr. 344-47).
1138. Although the **{redacted}** were set to be switched to Piney Flats in March or April 2008, after the acquisition Daramic requested that the volumes remain at Daramic's Owensboro, Kentucky plant, where they remain today. Absent the acquisition, **{redacted}** (Axt, Tr. 2210-11, *in camera*).

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H. Efficiencies

1139. The acquisition has enabled Daramic to include Microporous in its purchasing contracts. This volume purchasing power since the acquisition has achieved savings on raw material costs, in the annualized amount of approximately **{redacted}** (RX1603; RX0071; Riney, Tr. 4972, *in camera*; PX0912 (Riney, Dep. at 46), *in camera*; Hauswald, Tr. 904, *in camera*).
1140. Daramic did not discuss with Trojan Battery potential cost savings from its acquisition of Microporous. At no time did Daramic offer to pass on any cost savings from its acquisition of Microporous to Trojan Battery. (Godber, Tr. 220-21).
1141. After the acquisition, Daramic eliminated some positions that, with the acquisition, it deemed to be redundant, including some in sales and technical services. (Riney, Tr. 4972, 5025-26, *in camera*; PX0912 (Riney, Dep. at 44, 93), *in camera*).
1142. Prior to the acquisition, the CellForce line had a yield of approximately 76%. Since the acquisition, through the efforts of the Daramic task force, the CellForce line has increased to a yield of approximately 90%. (Hauswald, Tr. 1062).
1143. Since the acquisition, Daramic has focused on **{redacted}** (Riney, Tr. 4972, *in camera*). Daramic has sought to **{redacted}** (Riney, Tr. 4973, *in camera*). Daramic has also sought to **{redacted}**. These production efficiencies have not been quantified. (Riney, Tr. 4973, *in camera*; PX0912 (Riney, Dep. at 71, 77, 87), *in camera*).
1144. Since the acquisition, Daramic has seen some, unquantified, cost savings from implementing procedures

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at Microporous facilities to reduce waste and to recycle. (Hauswald, Tr. 1065-67).

1145. Daramic's expert Dr. Kahwaty did not analyze whether any efficiencies gained since the acquisition have been passed on to consumers. (Kahwaty, Tr. 5249-50, *in camera*).
1146. Dr. Kahwaty's opinion that Microporous was a high-cost producer applied only to Microporous' production of roll-stock PE material for SLI. The opinion did not apply to production of Flex-Sil, and Dr. Kahwaty could not say whether Microporous was a high-cost producer of CellForce. Dr. Kahwaty did not compare the production cost of CellForce with Daramic HD. Dr. Kahwaty's opinion is not adequately supported by data. (PX00945 (Kahwaty Report at 66); Kahwaty, Tr. 5255-56, 5259, *in camera*).
1147. The post-acquisition efficiencies that Respondent asserts were gained by the merger do not offset the anticompetitive effects of the merger. (F. 1139-48; Simpson, Tr. 3240, *in camera*).

I. Monopolization**1. Challenged monopolistic conduct**

1148. The monopolization charge, as framed in Complaint Counsel's post-trial brief, is that Daramic engaged in a pattern of coercive and exclusionary behavior to obtain or maintain monopoly status in several relevant markets, with the purpose of weakening Microporous. CCB at 50, 55. Complaint Counsel's post-trial brief centers on four key examples of what Complaint Counsel charges is exclusionary conduct: (a) that in September 2006, Daramic used its market power in motive separators to

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force EnerSys to sign a contract with a higher price than EnerSys would have received from Microporous; (b) that Daramic implemented the “MP Plan,” to respond to Microporous’ threat to Daramic’s automotive and motive power business in the United States and Europe, culminating in exclusive or nearly exclusive supply contracts with Crown Battery, Douglas Battery, and East Penn Battery; (c) that Daramic refused to provide a bid to Exide for 50% of Exide’s PE supplies; and (d) that Daramic used the same tactics as it did in the “MP Plan” with Fiamm to secure a contract with Fiamm. CCB at 55-59.

1149. The share of the motive battery separator market covered by Daramic’s exclusive contracts with Exide, East Penn Battery, EnerSys Mexico, EnerSys United States, Crown Battery, and Douglas Battery rose from roughly **{redacted}** in 2007 to roughly **{redacted}** in the first quarter of 2008. (Simpson, Tr. 3230, 3236, *in camera*; PX0033 (Simpson Report) at 047).

a. September 2006 contract with EnerSys in the motive separators market

1150. EnerSys is one of the largest industrial battery manufacturers in the world, with plants in North America, Europe, and Asia. (Axt, Tr. 2108; PX1204 at 002-03, *in camera*). EnerSys produces about 38% of the motive batteries in the North American market. (Axt, Tr. 2129).
1151. EnerSys manufactures motive power batteries in North America at facilities in Richmond, Kentucky; Ooltewah, Tennessee; and Monterrey, Mexico. (Axt, Tr. 2099-2100).
1152. On May 21, 2004, EnerSys entered into a supply contract with Daramic. (RX0964, *in camera*; PX1204 at 001, *in camera*; Axt, Tr. 2122). Daramic was designated as the **{redacted}** supplier of battery separators for all EnerSys

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plants in North America. (RX0964 at 002, *in camera* {redacted}). (See also RX0208; RX0209; Axt, Tr. 2122, 2134, *in camera*).

1153. The expiration date for the {redacted} EnerSys/Daramic agreement was {redacted} (RX0964 at 001, *in camera*; Axt, Tr. 2122-23, 2134, *in camera*). During this period, EnerSys also purchased separators from Microporous for its battery plants located in China and Europe. (PX1200 at 002, *in camera*; Axt, Tr. 2118, 2125-27, 2141-42, *in camera*).
1154. In late 2005 and early 2006, EnerSys and Microporous discussed the potential for Microporous to construct a new factory in Austria, and to displace Daramic as a supplier for most of the EnerSys plants in Europe. (Axt, Tr. 2123-24, 2129, 2166, *in camera*; Gilchrist, Tr. 309-10, 416).
1155. On February 10, 2006, Microporous and EnerSys executed a memorandum of understanding (“MOU”). (PX1200 at 001-05, *in camera*; Axt, Tr. 2140, 2145, *in camera*).
1156. The MOU provided for Microporous to supply all of EnerSys’ battery plants in Europe and China, and most of its plants in North America, beginning in 2007. (Axt, Tr. 2141-44, *in camera*). The EnerSys volumes would convert from Daramic to Microporous on a plant-by-plant basis as the then current contract with Daramic expired. (PX1200, *in camera*; RX0206; Axt Tr. 2148-49, *in camera*).
1157. The MOU specified that EnerSys and Microporous would “begin negotiation and drafting of the {redacted} agreement with the good faith objective of completing the agreement no later than May 1, 2006.” (PX1200 at 004, *in camera*).

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1158. During early 2006, EnerSys was also in negotiations with Daramic concerning the future relationship between the companies. Daramic wanted to supply all of EnerSys' PE separator needs worldwide. (Axt, Tr. 2118, 2164, *in camera*). Daramic's Pierre Hauswald and Tucker Roe visited EnerSys' Vice President of Global Procurement, Larry Axt in January 2006 to convey Daramic's "desire to regain a sizable portion" of the EnerSys motive power business in Europe while "maintaining [its] current position here in the States" as **{redacted}** PE provider to EnerSys. (PX1289 at 001, *in camera*; Axt, Tr. 2160-61, *in camera*).
1159. Daramic followed up on the January 2006 discussions by submitting a written proposal to EnerSys on February 26, 2006. (PX1289 at 001-03, *in camera*). The proposal outlined the terms of a "Global Agreement" under which EnerSys **{redacted}** (PX1289 at 001, *in camera*).
1160. In February 2006, EnerSys compared the competing proposals from Daramic and Microporous, and concluded that the Microporous offer "was significantly better to [EnerSys'] bottom line" by approximately **{redacted}** (Axt, Tr. 2166, *in camera*). EnerSys then informed Daramic that the numbers in its proposal "weren't attractive and there was a high probability" that EnerSys would not select Daramic as its primary PE supplier for the upcoming contract period. (Axt, Tr. 2166, *in camera*).
1161. EnerSys did not completely reject Daramic's February 2006 proposal. In the following months, EnerSys continued to have additional conversations with Daramic because Microporous' management had not completed the process of obtaining Board approval for its capital investment in the Austrian plant. (Axt, Tr. 2166-67, *in camera*).

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1162. In May 2006, the MOU between Microporous and EnerSys expired. (Axt, Tr. 2256, *in camera*; PX1200 at 004, *in camera*).
1163. On May 17, 2006, Tucker Roe of Daramic forwarded an email message to EnerSys requesting a decision on the Daramic proposal before the end of the month. (PX1201 at 002, *in camera*; Axt, Tr. 2251-52, *in camera*).
1164. **{redacted}** (Axt, Tr. 2253, *in camera*). **{redacted}** (Axt, Tr. 2253, *in camera*).
1165. In a July 6, 2006 meeting, EnerSys informed Daramic that certain battery plants then supplied by Daramic would, beginning in 2007, be transferred to Microporous. Specifically, Daramic would lose business at Monterrey, Mexico and Ooltewah, Tennessee, as well as Montecchio, Italy. (PX0986 at 001; Axt, Tr. 2128-29, 2148, 2159, 2169-70, *in camera*; *see also* PX1203, *in camera*; PX1240; Roe, Tr. 1701).
1166. EnerSys also advised Daramic that EnerSys would move to Microporous **{redacted}** (PX1203, *in camera*; PX1240; *see also* Roe, Tr. 1701-02).
1167. **{redacted}** (Roe, Tr. 1770-71, *in camera*; PX1240; PX1203, *in camera*).
1168. Daramic maintained that EnerSys' **{redacted}** (Roe, Tr. 1770-71, *in camera*; PX1240; PX1203, *in camera*).
1169. In July 2006, Daramic advised EnerSys that, **{redacted}** (PX1203, *in camera*; Axt, Tr. 2172, *in camera*).
1170. Daramic continued to pursue a contract extension with EnerSys, despite what EnerSys had told them in July 2006. (Axt, Tr. 2260, *in camera*). On August 8, 2006, Daramic

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executives met with EnerSys at its headquarters in Reading, Pennsylvania. (PX1204 at 001, *in camera*; PX1205; Axt, Tr. 2255-56, 2260, *in camera*).

1171. Following the meeting, Daramic **{redacted}** (PX1204, *in camera*). **{redacted}** (PX1204 at 001, *in camera*; Axt, Tr. 2258, *in camera*). **{redacted}**
1172. Daramic gave EnerSys a deadline to respond of August 31, 2006. (PX1205; Axt, Tr. 2259, *in camera*). The deadline was later extended to September 15, 2006. (PX1205).
1173. EnerSys informed Daramic that **{redacted}** (Axt, Tr. 2176, 2260, *in camera*).
1174. **{redacted}** (Axt, Tr. 2256, *in camera*).
1175. The September 15, 2006 deadline for EnerSys to respond to Daramic's proposal issued in February 2006 passed without a formal response from EnerSys. (Roe Tr. 1699-1701; PX1289, *in camera*).
1176. When informed of this development, Polypore CEO Robert Toth decided that Daramic "should pull our offer and force a decision. Unless I don't know or understand something, we should play hardball here." (PX0456 at 001).
1177. In October 2006, Daramic declared a force majeure event. Daramic had been notified by one of its key raw suppliers, Ticona, that Ticona had experienced a force majeure event caused by an extensive fire in Ticona's production facility. (PX1207).
1178. By letter dated October 6, 2006, Daramic advised EnerSys that it would need to allocate its separator production among its customers. (Hauswald, Tr. 889-90, *in camera*;

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Axt, Tr. 2146-47, *in camera*; PX1207 (“[E]ffective immediately EnerSys will receive most likely 10 to 20%, if possible up to 50% of your normal material requirements for the next six to eight weeks. Based on the timing communicated to us by our vendor, our current best estimate is that this event will likely impact our ability to supply you with your full allocation of products through at least the middle of November.”).

1179. Daramic represented to EnerSys that this disruption in supply was necessary because of a force majeure event outside of Daramic’s control. Specifically, “an extensive fire in the production facility of [Daramic’s] key raw material supplier” would, going forward, “severely limit the amount of raw material available to Daramic.” (PX1207).
1180. **{redacted}** is the primary raw material used by Daramic. Ticona makes approximately **{redacted}** (Hauswald, Tr. 884-85, *in camera*). In 2006, **{redacted}** (Hauswald, Tr. 885-86, *in camera*).
1181. Ticona had notified Daramic in September 2006 that it was experiencing a force majeure and Ticona anticipated that it would not be able to supply more than 50% of Daramic’s demand for several months. (RX1077, *in camera*; Hauswald, Tr. 885, *in camera*; RX1598; Toth, Tr. 1404-05).
1182. The Ticona force majeure occurred shortly after Hurricane Katrina, which had impacted adversely Daramic’s inventory of **{redacted}** (Hauswald, Tr. 884, 890-91, *in camera*).
1183. At the time of Ticona’s declaration of force majeure in September 2006, Daramic anticipated, based on information received from Ticona that its separator

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production would be impacted in the amount of approximately **{redacted}** square meters. (Hauswald, Tr. 886, *in camera*).

1184. Following Ticona's announcement of the force majeure in September 2006, Daramic attempted to find alternative supply of **{redacted}** (Hauswald, Tr. 887, *in camera*; Roe, Tr. 1707). Representatives of Daramic worked long hours, traveling around the world trying to locate alternate supply of **{redacted}** and to move some of its existing supply of **{redacted}** from Daramic's facilities in North America to Asia and Europe. (Hauswald, Tr. 891-92, *in camera*; RX1054).
1185. **{redacted}** (Hauswald, Tr. 887-88, *in camera*; RX0698 at 005, *in camera*).
1186. At the time of Ticona's declaration of force majeure, Daramic could not supply all of its customers with PE separators with the reduced supply of **{redacted}** from Ticona. (Hauswald, Tr. 890, 1143-46, *in camera*).
1187. EnerSys confirmed from Microporous that Ticona had suffered a production disruption. (Axt, Tr. 2284-85; PX1209). In addition, EnerSys learned **{redacted}** (RX0235, *in camera*; Craig, Tr. 2617-18, *in camera*).
1188. Daramic's Tucker Roe attempted to reach EnerSys over the telephone before sending the letter notifying EnerSys of the force majeure situation. (Roe, Tr. 1707-11). Bob Toth sent emails to John Craig telling EnerSys that Daramic was doing what it could to handle the situation and apprising EnerSys of the status of deliveries. (PX1287; PX1288; Craig, Tr. 2577-82). Roe developed a plan with Axt whereby they would talk daily about the supply situation during this force majeure period. (Roe, Tr. 1711). Toth told every customer with whom he spoke,

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including Craig, that Daramic was doing what it could to get separators to them. (Toth, Tr. 1406).

1189. Daramic employees worked 12 hour days during this force majeure period trying to manage the situation, juggling schedules and verifying inventories in an effort to meet the customer requirements. (Roe, Tr. 1704-05).
1190. Daramic felt the impact of Ticona's force majeure more acutely than Microporous because Daramic's purchases of **{redacted}** from Ticona were approximately ten times greater than those of Microporous and Microporous had PE deliveries from the Ticona facility in Texas, not Europe, where the force majeure event occurred. (Trevathan, Tr. 3646).
1191. Supply resumed to EnerSys and other Daramic customers in October 2006, after **{redacted}** (Hauswald, Tr. 887-88, *in camera*; RX0698 at 005, *in camera*).
1192. After a short period of negotiations, EnerSys and Daramic agreed to a new supply contract orally on or about October 16, 2006, and officially executed the contract extension on October 31, 2006. (Axt, Tr. 2193, *in camera*; PX1211, *in camera*; PX1224, *in camera*).
1193. Under this new contract, EnerSys agreed to purchase 90% of its separator requirements for its North America facilities from Daramic, and would be permitted to contract with any company, including Microporous, to provide battery separators to EnerSys for each of its plants as its contractual commitment to Daramic for those plants expired. (Burkert, Tr. 2426-27, *in camera*).
1194. At the end of 2006, EnerSys was still unsure if the Microporous product would work in the EnerSys North American plants and qualification was uncertain. (Axt, Tr.

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- 2127-28). In addition, EnerSys had concerns about whether Microporous possessed enough capital to enable it to supply other EnerSys plants. (Axt, Tr. 2166-67, *in camera*).
1195. EnerSys was interested in moving forward with Microporous, if Microporous had two plants. (Axt, Tr. 2129; 2143, *in camera*). **{redacted}** (Axt, Tr. 2260, 2303-04, *in camera*).
1196. In January 2007, EnerSys entered into a contract with Microporous for motive separators. (RX0207, *in camera*; RX0953, *in camera*). Under this contract, EnerSys agreed to purchase and Microporous agreed to sell battery separators to EnerSys' facilities in Europe; Ooltewah, Tennessee; and Monterey, Mexico. (RX0207 at 001-02, *in camera*).
1197. The January 2007 contract was amended in August 2007, to provide for Microporous to supply separators to EnerSys' remaining North American facility located in Richmond, Kentucky. (RX0207 at 010, *in camera*).
1198. In its Purchasing Outlook Economic Assumptions Fiscal Year 2009, EnerSys set forth EnerSys' schedule to transition its PE separator purchases from Daramic to Microporous and stated as one of its assumptions for fiscal year 2009: "All steps are in place to move all PE business to CellForce as Daramic's contract expires for each location." (RX0220 at 008, *in camera*; Burkert, Tr. 2428, *in camera*).
1199. EnerSys projected that by 2010, EnerSys would not purchase any PE type separators from Daramic. (Burkert, Tr. 2429, 2431, *in camera*; RX0221, *in camera*).

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b. The “MP Plan”⁴**c. Daramic’s 2007 bid to Exide**

1200. In 2007, Exide issued a Request for Proposal (“RFP”) to battery separator manufacturers around the world including Daramic, Microporous, Entek, Amer-Sil and Nippon Sheet Glass (“NSG”). (Gillespie, Tr. 2962-63).
1201. The 2007 Exide RFP called for each separator manufacturer to bid on all PE supplies globally (including motive, automotive SLI, industrial, golf cart, and specialty) at volumes of 25%, 50%, 75% and 100%. Exide did not define in the RFP how the supplier was to bid a lower percentage, whether by plant, product mix or otherwise. (Gillespie, Tr. 2967-68; 3015, *in camera*).
1202. Exide gave the suppliers to whom it issued the RFP the “choice to quote on part or all or whatever they felt comfortable with” Exide “left it up to [the separator manufacturers] to decide what or any portion they wanted to quote on.” (Gillespie, Tr. 2965).
1203. Daramic responded to Exide’s 2007 RFP by quoting prices for 100%, 75% and 25% supply, but did not provide bidding as to 50% supply. (Gillespie, Tr. 3011, *in camera*; PX1028 at 058-60, *in camera*; Roe, Tr. 1360, 1785-86, *in camera*).
1204. Exide was Daramic’s highest volume customer in 2007, and loss of volume from Exide would necessitate Daramic realigning its sourcing strategy. (Roe, Tr. 1306, 1717-20).
1205. At the time Daramic submitted its response to Exide’s 2007 RFP, Daramic was exploring other business

⁴ Findings of fact on the MP Plan are set forth in F. 820-52.

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opportunities which made offering a quote at 50% difficult. Daramic believed that it had the opportunity to pick up incremental volume from JCI; was considering a modification to its line at Corydon (which supplies Exide) in order to manufacture a synthetic paper material known as Artysin; and was considering modification of several of its PE lines for a project involving the production of filtration applications. (Roe, Tr. 1716-17).

1206. Daramic explained to Exide that it did not provide Exide with a quote for 50% because “they needed to evaluate which lines they would shut down and which plants that they would close because of the significant volume drop.” (Gillespie, Tr. 3017, *in camera*). As Exide’s Gillespie recognizes, running a plant at 100% of its capacity is more economical than running a plant at 50% of its capacity. (Gillespie, Tr. 3122, *in camera*).
1207. The exclusive supply offer from Daramic provided the best pricing option for Exide. (Gillespie, Tr. 3011-12, *in camera*; PX1028 at 041-46, 058-60, *in camera*). Under Daramic’s proposal, Exide’s pricing, payment terms, credit limit and other terms degraded in each supply scenario less than 100% supply. (Gillespie, Tr. 3016, *in camera*; PX1028 at 058-59, *in camera*).
1208. Of the five companies to which the RFP was submitted, only Daramic provided a quote that covered all of Exide’s needs as set out in the RFP. (PX1036, *in camera*).
1209. NSG did not submit a quote in response to Exide’s RFP. (Gillespie, Tr. 2963-64; PX1079 at 001-03).
1210. Amer-Sil submitted a bid for a portion of Exide’s European motive power requirements. (Gillespie, Tr. 2967). Amer-Sil is viewed by Exide as a small player, only capable of supplying limited applications in Europe.

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(Gillespie, Tr. 2968-69). Amer-Sil did not bid on Exide's automotive requirements. (Gillespie, Tr. 2968).

1211. After the issuance of the RFP, Microporous and Exide engaged in negotiations and entered into a MOU September 28, 2007 (F. 697-98), which stated: "Also to be agreed to by both parties is whether the individual lines . . . will produce SLI separators or industrial separators." (PX0056 at 002-03).
1212. In a September 7, 2007 summary document, Exide set out quotes received from Entek, Daramic, Amer-Sil and Microporous after the issuance of Exide's RFP. The September 28, 2007 MOU between Exide and Microporous does not identify specific products by part number and individual prices. (PX1047; PX1036, *in camera*; PX0056).
1213. At the time of Exide's RFP, Exide had not even considered testing Microporous' CellForce. (PX0679).
1214. When Exide compared the proposals of Entek, Microporous, Amer-Sil and Daramic, many of the prices Daramic offered were on par, or below the prices offered by others. (PX1036, *in camera*). Further, the same analysis shows that Exide would have paid **{redacted}** more for its separators by sourcing from a combination of Microporous and Daramic, as opposed to sourcing solely from Daramic, and **{redacted}** more than the current prices that Exide was paying to Daramic. (Gillespie, Tr. 3106-09, *in camera*; PX1036, *in camera*).
1215. Daramic offered Exide "annual savings of more than **{redacted}**" and "incentives that generate an additional **{redacted}** million in annual savings." (PX2296 at 002, *in camera*).

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1216. While Exide claims it was not satisfied with the proposal it received from Daramic, it never made a counterproposal to Daramic's offer, asked Daramic to submit a new proposal, or specified the parts of the proposal which it considered insufficient. (Roe, Tr. 1718-19).
1217. At the time the 2007 proposal was being discussed, Exide was approximately \$14 million dollars over its significant \$19 million credit line with Daramic. (Bregman, Tr. 2908-09, *in camera*; RX1285). Exide repeatedly exceeded this credit limit with Daramic in violation of its contract and in violation of the order of the court after Exide emerged from bankruptcy. (Bregman, Tr. 2909-11, *in camera*).

d. Daramic's 2007 contract negotiations with Fiamm

1218. Fiamm is the third largest automotive battery manufacturer in Europe and was one of Daramic's top ten customers in 2007. (Roe, Tr. 1306-07, 1345, *in camera*; PX0215 at 002, *in camera*).
1219. In late 2007, Daramic was involved in contract negotiations with Fiamm for SLI separators. (Roe, Tr. 1306-08, 1345-46, *in camera*). Daramic's **{redacted}** agreement with Fiamm was expiring at the end of 2007. (Roe, Tr. 1346, *in camera*).
1220. Daramic's sales personnel learned that Fiamm's automotive business was at risk of loss to Microporous. (Roe, Tr. 1352, *in camera*; PX0222 at 004, *in camera*). Daramic grew concerned because Fiamm would be "a key customer for [Microporous] and pave the way for others to follow." (PX0215 at 003, *in camera*).
1221. Daramic understood from Fiamm that Microporous and "the Chinese (Anpei?) are making a strong run [at Fiamm]

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with low prices. Fiamm wanted a price reduction perhaps [half]way to the competition prices. We will probably have to play hard to force a new 100% agreement.” (PX0214, *in camera*).

1222. Daramic believed that “Fiamm would be a fantastic communication tool for [Microporous’] automotive products with other customers” and that Fiamm “would be a key-customer for [Microporous] and pave the way for others to follow.” (PX0215, *in camera*, Roe, Tr. 1345-46, *in camera*).
1223. After several negotiations, Fiamm gave Daramic a “take it or leave it” proposal, of a **{redacted}**. The lower prices represented a loss of **{redacted}** in contribution margin for Daramic. However, Daramic believed it was worth it, to capture a guarantee of **{redacted}** and a **{redacted}** “lock” on the “3rd largest battery manufacturer in Europe.” (PX0214, *in camera*; PX0215, *in camera*; Roe, Tr. 1345, *in camera*).
1224. Daramic decided to accept Fiamm’s proposal described in F. 1223. (PX0215, *in camera*; Roe, Tr. 1350-51, *in camera*).
1225. During the negotiations between Daramic and Fiamm, Fiamm had told Daramic that Microporous had proposed a price of **{redacted}** After the acquisition, Daramic learned that the price that the Microporous’ bid was **{redacted}** which was in line with Daramic’s proposal. Daramic also learned that, although Fiamm had indicated that it might split its supply between Microporous and Asian PE suppliers, in fact only a small amount was contemplated for Asia. (Roe, Tr. 1346, 1348-49, 1782, *in camera*).

J. Daramic’s Agreement with Hollingsworth & Vose

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1226. Hollingsworth & Vose (“H&V”) manufactures absorptive glass mat (“AGM”) separators for sealed lead-acid batteries. (PX0094 at 001, *in camera*). It is the dominant AGM producer in North America, and is one of the largest AGM manufacturers worldwide. (PX0035 at 004; Roe, Tr. 1745; PX0011, *in camera*; RX1101 at 004).
1227. H&V has “look[ed] for opportunities to provide types of separator [in addition to AGM] to the industry,” including PE battery separators. (PX0925 (Porter, Dep. at 37), *in camera*).
1228. In 1999, Exide owned and operated a PE separator manufacturing facility in Corydon, Indiana. (PX0726; PX0925 (Porter, Dep. at 35), *in camera*; PX0917 (Cullen, Dep. at 11), *in camera*). Exide manufactured separators at Corydon for some of its North American battery plants. (Gillespie, Tr. 2983-84).
1229. In 1999, Exide engaged the services of Bowles Hollowell Conner (“BHC”), a financial advisory firm, to assist it with selling the Corydon plant. (PX0724 at 002).
1230. In June 1999, BHC contacted H&V to invite H&V to submit a “non-binding indicative offer” to purchase the Corydon plant from Exide. (PX1368 at 001).
1231. H&V was interested in purchasing the Corydon PE facility from Exide and received information from BHC that enabled it to evaluate the Corydon opportunity. (PX0925 (Porter, Dep. at 35), *in camera*; PX0917 (Cullen, Dep. at 11), *in camera*).
1232. Daramic, Microporous, and Entek each placed bids on Exide’s Corydon facility in June 1999. (PX0726 at 006-08).

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1233. Daramic was aware that H&V was interested in the Corydon facility. (PX0169 at 001).
1234. H&V explored the possible purchase of the Corydon facility from Exide because it was interested in opportunities to diversify its separator product offerings and to “provide other types of separator to the industry.” (PX0925 (Porter, Dep. at 37-38), *in camera*).
1235. In addition to an opportunity to diversify its separator product offerings, H&V was also interested in purchasing the Corydon plant from Exide because Exide was purchasing AGM separators from H&V at the time Exide was selling the Corydon plant. H&V believed that the acquisition “could provide an opportunity to bundle flooded PE separator and [AGM separator] into a contract” with Exide. (PX0925 (Porter, Dep. at 37), *in camera*). Likewise, H&V believed that purchasing Corydon “might provide an opportunity to supply other [battery] customers in a similar manner which could – it could provide additional financial return.” (PX0925 (Porter, Dep. at 37), *in camera*).
1236. On July 1, 1999, H&V submitted to BHC a proposal to acquire the Corydon plant for \$26,000,000 in cash, and to enter into a series of five-year agreements to supply PE and AGM battery separators to Exide. (PX1368 at 001-02).
1237. Ultimately, Exide did not accept the H&V acquisition proposal. Instead, Exide agreed to sell the PE separator assets to Daramic. (PX0727 at 002; Gillespie, Tr. 3070; PX0922 (Roe, IHT at 224), *in camera*). Daramic closed the transaction to purchase the Corydon facility from Exide on December 15, 1999. (PX2050 at 034, *in camera*).

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1238. Daramic remained concerned that H&V would pursue an alternative strategy for entering the PE separator market. (PX0169 at 001; PX0035 at 005).
1239. Daramic approached H&V and proposed an alliance between the two companies. (PX0169 at 001; PX2143 at 001, *in camera*). The core of this arrangement was a set of mutual promises to stay out of one another's markets. (PX0169 at 001; PX0094 at 002-03, *in camera*; PX0035 at 005-06; PX2150 at 001, *in camera*; PX1356 at 001).
1240. Daramic's intentions in entering into an agreement with H&V are described in an internal Daramic email written by Pierre Hauswald, General Manager and Vice President of Daramic, on April 2, 2005:

[Every time we] meet investors they ALL ask:
what about AGM? Aren't you missing the
boat? What do you do?

Just a few words of history..
A few years ago, H&V announced that they
want to go [in]to the PE business, and plan to
make acquisition (it was Exide) or build their
own plant.
In order to stop them, we made an (sic) written
agreement with them, through a partnership,
saying that:
- we will work together where ever possible
- they will not go in the PE business
- we will not go in the glass business (AGM).
(PX0169 at 001).

1241. In a subsequent letter to Tucker Roe, dated July 22, 2005, Hauswald characterized the agreement between Daramic and H&V as follows: "Because H&V threatened us of going in the PE separator business, we made a strategic

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alliance with them. We will not produce AGM, and they will not produce PE separator.” (PX0035 at 005).

1242. Another motivation for the agreement between Daramic and H&V was to aid Daramic and H&V in competing with a joint venture between Entek and Dumas (an AGM producer). (Roe, Tr. 1745; RX0151). Entek and Dumas “appeared at trade shows together and were putting a unified front together.” (PX0925 (Porter, Dep. at 110), *in camera*). According to H&V, responding to Entek/Dumas was “one of the primary benefits to forming the alliance [with Daramic]. So they provided a stronger competitive entity against us so we thought it was a good idea to also respond in the manner that we did.” (PX0925 (Porter, Dep. at 110), *in camera*). Likewise, Daramic felt that it needed an alliance with H&V in order to effectively compete against Entek/Dumas. (Roe, Tr. 1745).
1243. The written agreement between Daramic and H&V was entered into on April 5, 2001 and titled “Cross Agency Agreement.” (PX0094, *in camera*). Among other provisions in the agreement, Daramic agreed therein not to sell AGM battery separators in the United States or anywhere in the world. In return, H&V agreed not to sell PE battery separators in the United States or anywhere in the world. (PX0094 at 002-03, *in camera*).
1244. Covenant 4(a) of the Cross Agency Agreement states:
- Daramic shall not, during the period that this Agreement is in effect, and for a period of 5 years after termination of this Agreement, either directly or indirectly, including without limitation, through its distributors or agents, manufacture, develop, solicit, sell, market or handle any absorptive glass mat separators within the Territory, or participate in or with or

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assist any individual, company, corporation or other entity, in the manufacture, development, solicitation, sale, marketing or handling within the Territory of any absorptive glass mat separators. A breach of the foregoing shall be grounds for termination pursuant to Section 8.

(PX0094 at 002, *in camera*).

1245. Covenant 4(b) of the Cross Agency Agreement states:

H&V shall not, during the period that this Agreement is in effect, and for a period of 5 years after termination of this Agreement, either directly or indirectly, including without limitation, through its distributors or agents, manufacture, develop, solicit, sell, market or handle any microporous polyolefin separators within the Territory, or participate in or with or assist any individual, company, corporation or other entity, in the manufacture, development, solicitation, sale, marketing or handling within the Territory of any microporous polyolefin separators. A breach of the foregoing shall be grounds for termination pursuant to Section 8.

(PX0094 at 002, *in camera*).

1246. Pursuant to the Cross Agency Agreement, H&V was authorized to act as a non-exclusive sales agent for Daramic products; and Daramic was authorized to act as a non-exclusive sales agent for H&V products. (PX0094 at 002, *in camera*).

1247. The parties contemplated that there would be no cross-selling in any area or to any customer where a party already had sales representation. (PX0094 at 002, 003, 013-022, *in camera*).

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1248. Because both H&V and Daramic already had full sales coverage of “the known customer base in the United States,” at the time they entered their agreement, they looked abroad to “remote parts of the world” for potential joint sales opportunities. (PX0917 at 015-16 (Cullen, Dep. at 59-60), *in camera*; PX0094 at 013, *in camera* (all customer accounts in North America had current sales representation from Daramic, H&V or both at the time the Cross Agency Agreement was entered); PX1325 at 001 (virtually all potential customers in the Americas had 100% supply relationships with Daramic and/or H&V at the time the Cross Agency Agreement was entered); PX0925 (Porter, Dep. at 95-97, 126-127), *in camera* (North America was not a subject of parties’ discussions about “areas of geographic opportunity for either company.”)).
1249. H&V contemplated “the use of Daramic salespeople in remote parts of the world where” it was not represented. PX0925 (Porter, Dep. at 126-27), *in camera*. H&V also hoped Daramic would be helpful to the sale of its products in Europe and Southeast Asia. (PX0917 (Cullen, Dep. at 14), *in camera*).
1250. Daramic contemplated sales opportunities in “new markets, new territories” such as Eastern Europe or Asia, where H&V “may have better representation.” (Roe, Tr. at 1746, 1811).
1251. Under the Cross Agency Agreement, Daramic represented H&V primarily in India and Brazil. (Roe, Tr. 1747-48). Daramic representatives have made a small volume of sales on behalf of H&V in Brazil and India, **{redacted}** over five years. (PX0014, *in camera*; PX2145 at 001-02).

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1252. Daramic never paid any commissions to H&V because H&V never made any sales of PE separators during the course of the Cross Agency Agreement. (Roe, Tr. 1810).
1253. As part of the Cross Agency Agreement, H&V and Daramic hosted joint “hospitality event[s]” for customers at industry conventions.” (PX0925 (Porter, Dep. at 127-28), *in camera*; PX0923 (Hauswald, IHT at 280, 282), *in camera* (“[W]e share some evenings, customer appreciation evenings [at] conventions. That’s basically it, what we do together.”)).
1254. Daramic acknowledges that the Cross Agency Agreement is not needed to put on customer appreciation events jointly. (Roe, Tr. 1811-12; RX0370 at 002).
1255. H&V and Daramic looked at joint research and development opportunities for new products, exchanged raw materials, and collaborated on what materials would work well together. (PX0917 (Cullen, Dep. at 123), *in camera*). However, such activity never progressed past the initial “concept.” (Roe, Tr. 1747; PX0917 (Cullen, Dep. at 119-23, 314-15), *in camera*; PX0925 (Porter, Dep. at 156-57, 167-68), *in camera*). Daramic and H&V did not develop any new separator product for a battery application as a result of the Cross Agency Agreement. (PX0925 (Porter, Dep. at 107-08), *in camera*).
1256. As part of their joint activity, Daramic and H&V shared product marketing and customer information. (PX0925 (Porter, Dep. at 65-66), *in camera*). Exchanged confidential information was protected by non-disclosure provisions and other restrictions against improper use, which were included in the Cross Agency Agreement. (PX0094 at 007-08, *in camera*; PX1356 at 001 (noting “[a] Confidentiality Agreement exists between [H&V/Daramic] and each of its employees” that covers exchanges between the companies and communications

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with customers in connection with activities contemplated by the Cross Agency Agreement)).

1257. The original Cross Agency Agreement took effect on March 23, 2001 and continued for five years. (PX0094 at 002, 006, *in camera*). It was extended in 2006 for an additional three years, expiring in March 2009. (PX0158, *in camera*; PX2147). The parties agreed and understood that the restrictions on competition in Section 4 would survive for an additional five years following the expiration of the Cross Agency Agreement (*i.e.*, until March 2014). (PX0094 at 002, *in camera*; RX1014; PX2150 at 001, *in camera*; PX0158, *in camera*).
1258. At the time that the parties renewed the Cross Agency Agreement, Mr. Hauswald was unaware of any customers or potential customers of Daramic that the company could not reach efficiently without the assistance of H&V. (PX0923 (Hauswald, IHT at 286), *in camera*).
1259. In considering whether to renew the Cross Agency Agreement, Mr. Hauswald discussed with Mr. Nasisi, the former CEO of Daramic, the importance of the mutual restriction on competition. (PX0923 (Hauswald, IHT at 290), *in camera*). That restriction was the reason Daramic “[had] an agreement with H&V. They will not go in the PE business. We will not go in the AGM business.” (PX0923 (Hauswald, IHT at 292), *in camera*).
1260. Each party has honored its undertaking not to compete in the other’s market. (PX2150 at 001, *in camera*). *See also* RX0095 at 001, *in camera* (battery product mix in five year strategic plan of H&V reflects no PE separator sales). Daramic has not developed its own AGM separator and has been relegated to having to develop what it calls a “me too” product. (PX0035 at 002). Daramic also has been prevented by the Cross Agency Agreement from

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purchasing an AGM separator manufacturer to compete in the market. (PX0169 at 001).

K. Remedy

1261. To restore the competition lost through Daramic's acquisition of Microporous, a remedy needs to recreate a firm similar to the Microporous that would have existed, but for the acquisition. At a minimum, this would require recreating a firm: with production facilities in both the United States and Europe; with intellectual property, comparable to that of Microporous; a technical staff, comparable to that of Microporous; a product mix comparable to that of Microporous, and intangible assets (knowledgeable and skilled workforce, and industry reputation) comparable to that of Microporous. (Simpson, Tr. 3262-63).
1262. The Piney Flats, Tennessee plant, acquired from Microporous in the acquisition (F. 9-10, 43), comprises two buildings, a building for the manufacture of Flex-Sil and Ace-Sil, and a building for the manufacture of CellForce. At the Piney Flats plant, Microporous operated three production lines – one line for each of its three products, Flex-Sil, Ace-Sil and CellForce. (Gilchrist, Tr. 311-12; *see* PX0078 at 012, *in camera*).
1263. At the time of the acquisition, the Piney Flats plant had one overall operations manager, and one set of administrative offices. There was no time when the two buildings were operated independently of one another. (Gilchrist, Tr. 311, 539; Gaugl, Tr. 4641).
1264. The Feistritz, Austria plant was also acquired through the acquisition. (F. 6, 10; RX1227 at 089-91, *in camera*; PX0078 at 012 *in camera*, PX0162 at 019-20, 062, *in camera*). The plant comprised two lines, for the production of CellForce and/or SLI. (F. 778).

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1265. At the time of the acquisition, the Feistritz plant was not yet operational. There were 15 employees on the ground at the Feistritz plant, including engineers that were in the process of completing the Feistritz plant, and operators and mechanics that were testing components of the line. (Gilchrist, Tr. 333-34).
1266. Microporous' plan was to have the Feistritz plant operational in March 2008. (Gilchrist, Tr. 312, 332, 558-59; Trevathan, Tr. 3714; Gaugl, Tr. 4551; PX 0078 at 025, *in camera*). Within the first week after the acquisition, in March 2008, commercial product was being produced from the Feistritz plant. (Gilchrist, Tr. 333-35; Gaugl, Tr. 4603).
1267. Prior to the acquisition, Microporous had no contracts in place committing use of the second line in Austria. (Trevathan, Tr. 3631).
1268. The Microporous expansion plan contemplated construction of a third line. As part of that plan, design and planning work had been done, and long-lead time equipment items had been acquired. However, the third line had not been installed prior to the acquisition. (F. 774-77; Gaugl, Tr. 4561-64).
1269. Part of the equipment Microporous ordered for the purpose of building a third production line remains in boxes in Austria. Part of that equipment is in Piney Flats. (Gaugl, Tr. 4565).
1270. The pinhole detector purchased by Microporous as part of its expansion plan is being used in Piney Flats in production. The extruder purchased by Microporous is in a semifinished stage at the supplier. (Gaugl, Tr. 4565).

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1271. Prior to constructing lines at the Feistritz plant, approximately 60% of the capacity produced on the CellForce line in Piney Flats was being shipped to Europe. Constructing lines in Europe would have enabled Microporous to shift that production to Europe and to expand its business by opening capacity in the United States to serve more customers. (Trevathan, Tr. 3721, 3774).
1272. Sufficient scale to supply a large business is important to large battery manufacturers. At the time of the acquisition, Microporous was supplying large battery manufacturers. (Gillespie, Tr. 3052, *in camera*; Axt, Tr. 2129; Hauswald, Tr. 934, *in camera*).
1273. Multiple plants from which to supply customers is important to help ensure continuity of supply, in the event of a disruption at one plant. (Godber, Tr. 225-26; Gaugl, Tr. 4602; Axt, Tr. 2109).
1274. Daramic recognized the competitive advantages of scale, including cost advantages due to economies of scale, breadth of product, and different locations. (F. 928-29, 964; Hauswald, Tr. 726-27, 821-22, *in camera*; PX0194, *in camera*).
1275. Microporous embarked upon its expansion plans in order to be more competitive. (F. 768-72).
1276. As battery manufacturers become global suppliers, they seek out separator suppliers who have opened plants in other countries. For example, {redacted} (Gilchrist, Tr. 309-10, 456-57, *in camera*; RX0207 at 010-12, *in camera*).
1277. When Microporous was operating just out of Piney Flats, EnerSys could not give Microporous more volume unless Microporous had another manufacturing facility. EnerSys

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would not commit to additional volume for a manufacturer with only one operation. (Axt, Tr. 2143, *in camera*). It was crucial for EnerSys that its suppliers have more than one plant. (Axt, Tr. 2129).

1278. EnerSys does more business in Europe than in the United States. (Axt, Tr. 2129).
1279. When Microporous and Exide entered into their MOU in 2007 for 22 million square meters (F. 697-98), it was important to Exide that Microporous had locations in the United States and Europe, because Exide had just as much business in Europe as it did in North America. (Gillespie, Tr. 2969-70).
1280. Prior to the acquisition, Trojan Battery had wanted to switch from Flex-Sil to CellForce, which is about 10% cheaper. Microporous' moving of production to the Feistritz plant would better enable Microporous to meet Trojan Battery's United States demand for CellForce. (Godber, Tr. 224-28).
1281. At present, the Feistritz plant is operating at approximately 70% capacity. (Gaugl, Tr. 4569).
1282. The Feistritz plant is presently producing CellForce for EnerSys and is also producing standard PE SLI separators for automotive use. (Gaugl, Tr. 4569-70).
1283. Approximately 30% of Feistritz' production is CellForce. The remaining 70% is devoted to pure PE separators for automotive applications. The main customer for the CellForce is EnerSys, with smaller quantities being sold to TAB, a small company in Slovenia. (Gaugl, Tr. 4570-71; Hauswald, Tr. 923, *in camera*).

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1284. Daramic closed its Potenza, Italy plant in December 2008. The majority of the orders were **{redacted}**. The amount that was transferred from Potenza to Feistritz is approximately **{redacted}** square meters per year. Without the Potenza orders, the capacity being utilized at Feistritz would be very low. A “rough guess” of that utilization is **{redacted}** (Gaugl, Tr. 4572-73; Riney, Tr. 4962, *in camera*; Hauswald, Tr. 922-23, *in camera*).
1285. Prior to the transfer of Potenza orders to Feistritz, EnerSys and TAB together were filling approximately **{redacted}** of one line. The other line was empty. (Hauswald, Tr. 923-24, *in camera*).
1286. Without the Potenza orders, the 2009 forecasts were that Feistritz would have net income of **{redacted}** (Riney, Tr. 4969, *in camera*).
1287. At present, 60 to 70% of the CellForce product being produced in Piney Flats is being exported for EnerSys to Europe. (Gaugl, Tr. 4573).
1288. The CellForce line at Piney Flats is presently utilized at approximately 35 to 40% capacity, which includes production of CellForce and a small amount of HD. (Trevathan, Tr. 3647).
1289. In addition to the manufacturing plants and line in boxes, Microporous’ assets obtained through the acquisition include intangible assets such as contracts and other receivables, intellectual property, technology and know-how, and other intangible assets related to the product lines acquired from Microporous. (PX0162, *in camera*).

III. ANALYSIS**A. Jurisdiction**

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The Complaint charges Respondent with violations of Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45, and of Section 7 of the Clayton Act, 15 U.S.C. § 18.

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). Respondent is a corporation engaged in the interstate sale of battery separators for flooded lead-acid batteries. F. 1-4, 9-10, 37-42. Respondent’s challenged activities relating to the sale of battery separators have an obvious nexus to interstate commerce. F. 11. Respondent admits the jurisdictional allegations in this case. Complaint ¶ 3; Answer ¶ 3. Thus, the Commission has jurisdiction over Respondent and the subject matter of this proceeding, pursuant to Section 5 of the FTC Act.

Section 7 of the Clayton Act prohibits acquisitions, the effect of which “may be substantially to lessen competition, or tend to create a monopoly.” 15 U.S.C. § 18. “Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), expressly vests the Commission with jurisdiction to determine the legality of a corporate acquisition under Section 7 and, if warranted, to order divestiture.” *In re R.R. Donnelley & Sons Co.*, No. 9243, 120 F.T.C. 36, 140, 1995 FTC LEXIS 450, at *11 (July 21, 1995); *see also Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986) (noting Commission’s concurrent jurisdiction with the federal courts to enforce Clayton Act).

The February 28, 2008 purchase of Microporous by Respondent was a corporate acquisition. F. 9. The Commission’s jurisdiction includes adjudicating the lawfulness of acquisitions that have already been completed. *In re Coca-Cola Co.*, No. 9207, 117 F.T.C. 795, 911, 1994 FTC LEXIS 327, at *205-06 (June 13, 1994); *see, e.g., In re Chicago Bridge & Iron Co.*, No. 9300, 138 F.T.C. 1024, 2005 FTC LEXIS 215 (Jan. 6, 2005),

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aff'd, 534 F.3d 410 (5th Cir. 2008). Therefore, the Commission has jurisdiction over Respondent and the subject matter of this proceeding, pursuant to Sections 7 and 11 of the Clayton Act.

B. Burden of Proof and Statutory Framework

The parties' burdens of proof are governed by Federal Trade Commission Rule 3.43(a), Section 556(d) of the Administrative Procedure Act ("APA"), and case law. Pursuant to Commission Rule 3.43(a), "[c]ounsel 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, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). The APA, "which is applicable to administrative adjudicatory proceedings unless otherwise provided by statute, 'establishes . . . [the] preponderance-of-the evidence standard.'" *In re Rambus Inc.*, No. 9302, 2006 FTC LEXIS 101, at *45 (Aug. 20, 2006) (quoting *Steadman v. SEC*, 450 U.S. 91, 95-102 (1981)), *rev'd on other grounds*, 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (2009). See *In re Automotive Breakthrough Sciences, Inc.*, No. 9275, 1998 FTC LEXIS 112, at *37 n.45 (Sept. 9, 1998) (holding that each finding must be supported by a preponderance of the evidence in the record); *In re Adventist Health System/West*, No. 9234, 1994 FTC LEXIS 54, at *28 (Apr. 1, 1994) ("Each element of the case must be established by a preponderance of the evidence.").

The Complaint challenges the acquisition under both Section 7 of the Clayton Act and Section 5 of the FTC Act. The allegation that the acquisition is a Section 5 violation, as well as a Section 7 violation, "does not require an independent analysis." *In re Chicago Bridge*, 2005 FTC LEXIS 215, at **8 n.23; *aff'd*, *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 n.5 (5th Cir. 2008) ("The appeal at issue primarily concerns section 7 of the Clayton Act as section 5 of the FTC Act is, as the Commission determined and the parties do not contest, a derivative violation

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that does not require independent analysis.”). *Accord FTC v. PPG Indus., Inc.*, 798 F.2d 1500, 1501 n.2 (D.C. Cir. 1986) (stating that Section 5 of the FTC Act “may be assumed to be merely repetitive of [Section] 7 of the Clayton Act.”); *In re R.R. Donnelley & Sons*, 1995 FTC LEXIS 450, at *34 n.32.

Section 7 of the Clayton Act prohibits acquisitions, “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.” 15 U.S.C. § 18. *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 355 (1963) (“The statutory test is whether the effect of the merger ‘may be substantially to lessen competition’ ‘in any line of commerce in any section of the country.’”). “Congress used the words ‘*may be* substantially to lessen competition’ to indicate that its concern was with probabilities, not certainties.” *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962); *accord FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 35 (D.D.C. 2009). “Thus, to establish a violation of Section 7, the FTC need not show that the challenged merger or acquisition *will* lessen competition, but only that the loss of competition is a ‘sufficiently probable and imminent’ result of the merger or acquisition.” *CCC Holdings*, 605 F. Supp. 2d at 35 (quoting *United States v. Marine Bancorp.*, 418 U.S. 602, 623 n.22 (1974)).

The first step in analyzing a Section 7 case is to determine the “line of commerce” and the “section of the country.” 15 U.S.C. § 18. In other words, the first step is to determine the relevant product and geographic markets. *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1110 (N. D. Cal. 2004); *In re R.R. Donnelley & Sons*, 1995 FTC LEXIS 450, at *37-38. *See United States v. General Dynamics Corp.*, 415 U.S. 486, 510 (1974) (stating that the “delineation of proper geographic and product markets is a necessary precondition to assessment of the probabilities of a substantial effect on competition within them”). Complaint Counsel bears “the burden of proving a relevant

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market within which anticompetitive effects are likely as a result of the acquisition.” *In re R.R. Donnelley & Sons*, 1995 FTC LEXIS 450, at *38.

The second step in analyzing a Section 7 case is to determine whether the effect of the acquisition “may be substantially to lessen competition, or to tend to create a monopoly.” 15 U.S.C. § 18. In *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 982-83 (D.C. Cir. 1990), the D.C. Circuit adopted an analytical approach to Section 7 cases which has been followed in subsequent cases. That analytical framework, by which the government can establish the probable effect of an acquisition, has traditionally consisted of a burden shifting exercise with three parts.

First, the government must establish a prima facie case that an acquisition is unlawful. *Baker Hughes*, 908 F.2d at 982; *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). Typically, the government establishes a prima facie case by showing that the transaction in question will significantly increase market concentration, thereby creating a presumption that the transaction is likely to substantially lessen competition. *Heinz*, 246 F.3d at 715; *Chicago Bridge*, 534 F.3d at 423.

Second, once the government establishes the prima facie case, the respondent may rebut it by producing evidence to cast doubt on the accuracy of the government’s statistical evidence as predictive of future anticompetitive effects. *Baker Hughes*, 908 F.2d at 982; *Chicago Bridge*, 534 F.3d at 423. This second step of the analysis requires that the merger be “functionally viewed, in the context of its particular industry.” *Brown Shoe*, 370 U.S. at 321-22; *In re Weyerhaeuser Co.*, No. 9150, 106 F.T.C 172, 1985 FTC LEXIS 26, at *215 (Sept. 26, 1985). “Nonstatistical evidence which casts doubt on the persuasive quality of the statistics to predict future anticompetitive consequences may be offered to rebut the prima facie case made out by the statistics.” *Kaiser Aluminum*, 652 F.2d at 1341.

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Factors which may be considered to rebut a prima facie case include “ease of entry into the market, the trend of the market either toward or away from concentration, and the continuation of active price competition.” *Id.* In addition, courts and the Commission typically consider “efficiencies, including quality improvements, after the government has shown that the transaction is likely to reduce competition.” *In re Evanston Northwestern Healthcare Corp.*, No. 9315, 2007 FTC LEXIS 210, at *191 (Aug. 6, 2007) (citing *Heinz*, 246 F.3d at 715, 720). “The defendant has the burden of production to show that efficiencies offset any likely anticompetitive effects of the increase in market power produced by the merger.” *Id.* (citing *Heinz*, 246 F.3d at 715, 720; *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1088-89 (D.D.C. 1997)).

Third, and finally, if the respondent successfully rebuts the prima facie case, the burden of production shifts back to the government and merges with the ultimate burden of persuasion, which is incumbent on the government at all times. *Baker Hughes*, 908 F.2d at 983; *Chicago Bridge*, 534 F.3d at 423; *FTC v. University Health, Inc.*, 938 F.2d 1206, 1218-19 (11th Cir. 1991); *Kaiser Aluminum*, 652 F.2d at 1340.

The courts recognize, however, that in practice, evidence is often considered all at once and the burdens are often analyzed together. *Chicago Bridge*, 534 F.3d at 424-25 (citing *University Health*, 938 F.2d at 1218-19). “The Ninth and Eleventh Circuits interpret *Baker Hughes*’ burden-shifting language as describing a flexible framework, rather than an air-tight rule.” *Chicago Bridge*, 534 F.3d at 424. As a practical matter, the distinction between the burden of production and the ultimate burden of persuasion can be elusive. *Baker Hughes*, 908 F.2d at 991. Thus, in *Chicago Bridge*, where the government’s prima facie case addressed why the respondent’s rebuttal evidence was not sufficient or not credible, the court held that the Commission could conclude that the respondent’s burden of production on rebuttal had not been satisfied, without having to formally switch

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the burden of production back to the government. *Chicago Bridge*, 534 F.3d at 424.

The Commission also recognizes a more flexible approach to the evidentiary analysis, stating: Although the courts discuss merger analysis as a step-by-step process, the steps are, in reality, interrelated factors, each designed to enable the fact-finder to determine whether a transaction is likely to create or enhance existing market power. *In re Evanston*, 2007 FTC LEXIS 210, at *141-42 (citing *Baker Hughes*, 908 F.2d at 984 (Section 7 inquiry is of a “comprehensive nature”)).

This more flexible approach accommodates the practical difficulties in separating the burden to persuade and the burden to produce, and “allows the Commission to preserve the *prima facie* presumption if the respondent . . . fails to satisfy the burden of production in light of contrary evidence in the *prima facie* case.” *Chicago Bridge*, 534 F.3d at 425. *See also Oracle*, 331 F. Supp. 2d at 1111 (noting that the Supreme Court and appellate courts acknowledge the need to adopt a flexible approach in determining whether anticompetitive effects are likely to result from a merger, and that the Merger Guidelines view statistical and non-statistical factors as an integrated whole, avoiding the burden shifting presumptions of the case law).

C. Relevant Product Markets

1. Relevant product markets in general

Proper definition of the product market is “a necessary precondition to assessment” of the effect of a merger or acquisition on competition. *General Dynamics*, 415 U.S. at 510; *see Brown Shoe*, 370 U.S. 294, 324 (1962) (interpreting the phrase “any line of commerce” in Section 7 of the Clayton Act to require determination of the product market). A properly defined or relevant product market identifies the products with which the defendants’ products compete and should include those producers that have the actual or potential ability to take significant business

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from each other. *CCC Holdings*, 605 F. Supp. 2d at 37; *SmithKline Corp. v. Eli Lilly & Co.*, 575 F.2d 1056, 1063 (3d Cir. 1978).

In a relevant product market (“relevant product market” or “product market”), the producers could exercise market power – in other words, profitably raise price substantially above the competitive level, for a significant period of time, by restricting output – if they were united through a cartel or merger. IIB Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (hereinafter “Antitrust Law”) ¶¶ 501, 530a, at 109-11, 225-27 (3d ed. 2007). The major constraint on their ability to exercise market power is the availability of substitutes for their products. *H.J., Inc. v. Int’l Tel. & Tel. Corp.*, 867 F.2d 1531, 1537 (8th Cir. 1989); see *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986).

The principal factors that the courts and the Commission consider in defining a relevant product market are set forth below.

a. Reasonable interchangeability of use and cross-elasticities of demand

The two factors that courts have traditionally emphasized in defining a product market are “the reasonable interchangeability of use and the cross-elasticity of demand between the product itself and substitutes for it.” *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004) (quoting *Brown Shoe*, 370 U.S. at 325). These factors address the question of “whether two products can be used for the same purpose, and if so, whether and to what extent purchasers are willing to substitute one for the other.” *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1074 (D.D.C. 1997) (quoting *Hayden Publ’g Co. v. Cox Broad. Corp.*, 730 F.2d 64, 70 n.8 (2d Cir. 1984)).

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If products can be used for the same purpose, the products are deemed “functionally interchangeable.” *United States v. Chas. Pfizer & Co.*, 246 F. Supp. 464, 468 (E.D.N.Y. 1965); *accord Arch Coal*, 329 F. Supp. 2d at 119. Courts generally place functionally interchangeable products in the same product market. *Arch Coal*, 329 F. Supp. 2d at 119. However, products are only included in the same market if they are both functionally and reasonably interchangeable. *Pfizer*, 246 F. Supp. at 468 n.3. “Whether one product is reasonably interchangeable for another depends not only on the ease and speed with which customers can substitute it and the desirability of doing so, but also on the cost of substitution, which depends most sensitively on the price of the products.” *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1037 (D.C. Cir. 2008) (citing *United States v. Microsoft Corp.*, 253 F.3d 34, 53-54 (D.C. Cir. 2001) (en banc)). *See, e.g., United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 399, 404 (1956) (recognizing not only “a very considerable degree of functional interchangeability” between cellophane and other flexible packaging materials but also “reasonable interchangeability for the purposes for which they are produced -- price, use and qualities considered”).

Customer preferences for one product versus another do not negate reasonable interchangeability. *Oracle*, 331 F. Supp. 2d at 1131. “[T]he issue is not what solutions the customers would like or prefer for their . . . needs; the issue is what they could do in the event of an anticompetitive price increase by [the merged entity].” *Id.*; *see also Arch Coal*, 329 F. Supp. 2d at 122 (finding that the type of coal some customers preferred was not in a separate relevant market when customers with that preference could and did use other types of coal and benefited from the competition). In addition, even though the court must evaluate the extent to which customers treat products as interchangeable, it need not find that all customers will substitute one product for another. *Arch Coal*, 329 F. Supp. 2d at 122.

The change in the demand for one product in response to a change in the price of another product – the products’ cross-price

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elasticity of demand (or “cross-elasticity of demand”) – is an important consideration in market definition, because it reveals the ability of substitute products to constrain prices and maintain competition. *See, e.g., Du Pont*, 351 U.S. at 400 (deciding that the “great sensitivity” of customers of flexible packaging materials to changes in the materials’ relative prices prevented the cellophane maker’s monopoly control over price); *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000) (stating that if moist snuff were “sufficiently similar” to loose-leaf tobacco to induce “adequate substitution to defeat” loose-leaf price increases, it should be included in the same product market); *In re R.R. Donnelley*, 1995 FTC LEXIS 450, at *44 n.44 (observing that “[c]ross-price elasticity of demand between the product in question and other products is used as the best indicator of own[-]price elasticity of demand for the product in question, which is the ultimate concern of market definition”).

The higher the cross-elasticity of demand between two products, the more likely it is that the products will be counted in the same market. *Rothery Storage*, 792 F.2d at 218; *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 46 (D.D.C. 1998). However, “[t]he 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.” Phillip Areeda & Louis Kaplow, *Antitrust Analysis* ¶ 340(b) (4th ed. 1988), *quoted in Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 471 (1992). Therefore, “[c]ourts should be wary of defining markets so broadly that a seller’s existing market power is missed.” *Oracle*, 331 F. Supp. 2d at 1121.

“The cross-elasticity of production facilities may also be an important factor in defining a product market . . .” *Brown Shoe*, 370 U.S. at 325 n.42. The greater the cross-elasticity of supply or production – the change in the supply of, or in the use or capacity of production facilities for, one product in response to a change in the price of another product – the more likely it is that the

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products will be placed in the same relevant market. *Rothery Storage*, 792 F.2d at 218; *Cardinal Health*, 12 F. Supp. 2d at 46.

Respondent in this case claims a “high degree of supply-side substitution.” RB at 11. Supply substitution (or “supply-side substitution”) – the likely responses of sellers to price changes – may appropriately be considered in defining a product market. *Kaiser Aluminum*, 652 F.2d at 1330. See *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1436 (9th Cir. 1995) (ruling that the ease with which full-serve gasoline stations could be converted to self-serve required full-serve sales to be included in the relevant market); *New York v. Kraft Gen. Foods, Inc.*, 926 F. Supp. 321, 360-61 (S.D.N.Y. 1995) (finding that line extensions of existing cereal brands, or switches in the production of companion brands (such as Frosted Flakes and Corn Flakes), could be sufficiently “swift and . . . competitively significant” to reinforce or support the court’s conclusion, based on demand considerations, that the relevant market comprised all ready-to-eat cereals); *Frank Saltz & Sons, Inc. v. Hart Schaffner & Marx*, No. 82 Civ. 2931, 1985 U.S. Dist. LEXIS 16243, at *14 (S.D.N.Y. Sept. 5, 1985) (concluding that “[t]he interchangeability of better quality suits with other suits on both the supply and demand side, as well as the inherent weakness of a relevant market definition that is described only by price, preclude a finding that the relevant market consists [only] of better quality suits”).

At the same time, “any test ‘which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful’ in determining a relevant product market,” *Beatrice Foods Co. v. FTC*, 540 F.2d 303, 307 (7th Cir. 1976) (quoting *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576, 592 (S.D.N.Y. 1958)), at least outside the realm of economic theory. *Kaiser Aluminum*, 652 F.2d at 1330 & n.5. “Deviation from an exclusive demand-side focus is rarely employed when markets are defined for the purpose of analyzing mergers” Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* 489-90 (2d ed. 2008).

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Demand substitution will, accordingly, remain the focus, though not the exclusive focus, of market definition in this case. Supply substitution is, however, sufficiently important in principle and so central to Respondent's theory of the case that it is considered.

b. The approach of the Merger Guidelines

The Horizontal Merger Guidelines set forth the approach and the standards that the federal antitrust agencies "normally" use in analyzing the merger or acquisition of a competitor. U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 0 (1992), as revised (1997) ("Merger Guidelines"). In evaluating antitrust issues, such as market definition and competitive effects, a number of courts have applied or considered the Merger Guidelines. *California v. Sutter Health Sys.*, 130 F. Supp. 2d 1109, 1120 (N.D. Cal. 2001); *In re R.R. Donnelley*, 1995 FTC LEXIS 450, at *38 n.36. The Merger Guidelines are not, however, binding on the courts. *PPG Indus.*, 798 F.2d at 1503 n.4; *Sutter Health*, 130 F. Supp. 2d at 1120; *In re R.R. Donnelley*, 1995 FTC LEXIS 450, at *38 n.36.⁵

In defining a product market, the Merger Guidelines focus solely on the likely responses of buyers to a price increase (*i.e.*, demand substitution). *In re R.R. Donnelley*, 1995 FTC LEXIS 450, at *42; *Merger Guidelines* § 1.0. The likely responses of sellers to a price increase (*i.e.*, supply substitution) are considered in identifying firms that participate in the relevant market and in analyzing entry. *In re R.R. Donnelley*, 1995 FTC LEXIS 450, at *42; *Merger Guidelines* § 1.0.

⁵ The *Merger Guidelines* are, after all, only guidelines and acknowledge that "mechanical application of [their] standards may provide misleading answers to the economic questions raised under the antitrust laws." *Merger Guidelines* § 0. The *Merger Guidelines* are, thus, to be applied "flexibly." *Id.*

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The Guidelines generally define a product market as the smallest “group of products such that a hypothetical profit-maximizing firm that was the only present and future seller of those products (‘monopolist’) likely would impose at least a ‘small but significant and nontransitory’ increase in price.” *Merger Guidelines* § 1.11. If a “‘small but significant and nontransitory’ increase in price” (“SSNIP” or “small price increase”) would induce enough buyers to switch to substitute products, the price increase would be unprofitable and the tentatively identified product group would be too narrow. *Id.* The product group should expand to include “the next-best substitute for the merging firm’s product” until a group of products is identified that satisfies the hypothetical monopolist’s small price increase or SSNIP test. *Id.*

Under the Merger Guidelines’ approach, the question, simply put, is whether a hypothetical monopolist could profitably impose a small price increase or a SSNIP. *Whole Foods*, 548 F.3d at 1038; *Oracle*, 331 F. Supp. 2d at 1111-12; *United States v. SunGard Data Sys.*, 172 F. Supp. 2d 172, 190 (D.D.C. 2001). “If a small price increase would drive consumers to an alternative product, then that product must be reasonably substitutable for those in the proposed market and must therefore be part of the market, properly defined.” *Whole Foods*, 548 F.3d at 1038 (citing *Merger Guidelines*); see *Arch Coal*, 329 F. Supp. 2d at 120 (noting that the Merger Guidelines present an analytical framework for considering product interchangeability and cross-elasticity of demand). Product market definition “is based on the ‘narrowest market’ principle.” *Arch Coal*, 329 F. Supp. 2d at 120 (record citation omitted).

A product market may also be defined on the basis of sellers’ ability to exercise price discrimination in sales to particular customers. *Merger Guidelines* § 1.12. A hypothetical monopolist could profitably impose a discriminatory SSNIP on sales to targeted buyers if those buyers would not defeat the SSNIP by switching to other products, and if other buyers would not undermine the discrimination by purchasing the product at a lower

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price and reselling it to the targeted buyers. *Id.* The relevant market could, in such a case, consist of “a particular use” of a product by a customer group. *Id.*

c. *Brown Shoe*’s “practical indicia”

The boundaries of a product market (or of a submarket that may also, if properly defined, amount to a product market for antitrust purposes) may, in addition, “be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.” *Brown Shoe*, 370 U.S. at 325. These “practical indicia,” as Judge Bork commented, “seem to be evidentiary proxies for direct proof of [demand and supply] substitutability. . . . When submarket indicia are viewed as proxies for cross-elasticities they assist in predicting a firm’s ability to restrict output and hence to harm consumers.” *Rothery Storage*, 792 F.2d at 218-19 (citing J. Von Kalinowski’s statement that *Brown Shoe* “does not provide ‘a new test’ for determining the relevant market, but merely provides ‘several new factors’ in discovering ‘interchangeability between different products’”).

Numerous courts have applied, and continue to apply, *Brown Shoe*’s “practical indicia” in determining the relevant market. *See, e.g., Beatrice Foods*, 540 F.2d at 308-09 (limiting the relevant market to paint brushes and rollers, and excluding aerosol and other paint sprayers, based on industry recognition of separate markets and on the products’ peculiar characteristics, different production processes, and distinct prices); *CCC Holdings*, 605 F. Supp. 2d at 43 (finding that “practical indicia – particularly industry recognition of a separate market; TLV’s [automobile total loss valuation software’s] peculiar characteristics . . . ; and sensitivity to price changes only against other TLV products – support the conclusion that TLV software products represent a relevant product market”). As *Brown Shoe*’s factors are “practical

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indicia” and not requirements, courts have found markets or submarkets even when only some of these factors are present. *Staples*, 970 F. Supp. at 1075; *see id.* at 1075-80 (noting pricing evidence corresponding to the “sensitivity to price changes” factor, the uniqueness of office superstores, and documents showing how the merging parties evaluated their competition).

Proper market definition “is a matter of business reality . . . of how the market is perceived by those who strive for profit in it.” *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128, 1132 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C. Cir. 1987). Thus, the merging parties’ documents may reveal how they evaluate their “competition,” and may be highly probative of what the relevant market is. *See, e.g., Cardinal Health*, 12 F. Supp. 2d at 49 & n.10; *Staples*, 970 F. Supp. at 1079; Commentary on the Horizontal Merger Guidelines, at 11. The views of other industry participants may also help to delineate the market. *See, e.g., CCC Holdings*, 605 F. Supp. 2d at 42 n.18; *Swedish Match*, 131 F. Supp. 2d at 164-65. “[T]he apt warning” may nonetheless be noted that “separate markets are not indicated by documents within A firms that are preoccupied with other A firms [if] a hypothetical monopolist of product A firms would focus entirely on the price of a close substitute B.” *CCC Holdings*, 605 F. Supp. 2d at 42 n.18 (internal quotation omitted).

With these general principles in mind, the relevant product markets in this case are analyzed.

2. Relevant product markets in this case

For the reasons set forth below, the evidence supports the four relevant product markets alleged in the Complaint that Complaint Counsel sought to prove at trial: deep-cycle; motive; uninterruptable power supply (“UPS”), and starting, lighting, and ignition (“SLI” or “automotive”) battery separators for flooded lead-acid batteries. Complaint ¶ 5. The evidence does not support the alternative markets proposed by Respondent: a market

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of an all polyethylene (“PE”) battery separators for flooded lead-acid batteries⁶ and a Flex-Sil market.

This analysis first addresses aspects of the separator industry for flooded lead-acid batteries as a whole. The deep-cycle, motive, UPS, and SLI separator markets are then analyzed in turn. Finally, Respondent’s opposition to Complaint Counsel’s proposed markets, together with Respondent’s proposed all PE separator and Flex-Sil only markets, are examined.

a. The separator industry for flooded lead-acid battery separators as a whole

All flooded lead-acid battery separators perform certain basic functions and share certain basic characteristics. F. 81-82. Flooded lead-acid batteries are different from, and more expensive than, valve-regulated lead-acid (“VRLA”) batteries, which use an absorbed (or absorptive) glass mat (“AGM”) separator and are also referred to as AGM batteries. F. 83-84.

Battery separators are differentiated by various characteristics, including their base material, the additives to their base material, their formula, rib spacing, backweb and overall thickness, border areas, and finishing. F. 85-87. As Respondent’s expert economist concedes, battery separators are “highly differentiated products.” Kahwaty, Tr. 5132-33; F. 85; *see, e.g.*, F. 118-19.

Separators with different backweb thicknesses perform differently. F. 88. It is possible, but atypical, to use separators with the same backweb thickness in different applications. F. 89. Since separators vary in electrochemical properties and other respects besides thickness, the battery’s performance, including its

⁶ The Complaint also alleges an all PE market, Complaint ¶ 6, but Complaint Counsel declined to pursue this allegation at trial. *See, e.g.*, Complaint Counsel’s Pre-Trial Br. at 8-13 (Apr. 20, 2009) (positing only four rather than five relevant product markets).

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life, would probably be affected if separators of the same backweb thickness were swapped from one application into another. F. 90-91, 97.

A particular type of battery, made for a particular application in accordance with particular specifications for performance, often requires unique features or properties for the separator. F. 92. Battery separator manufacturers, thus, make different separator products, each of which may be especially suited to a specific application or end use. F. 92; *see, e.g.*, F. 96.

Daramic categorizes its separator sales by broad categories of end uses or applications, F. 93, 120, and its different separator types are tailored to provide the particular functionality that is sought for particular applications. F. 94. Although there are some exceptions or overlaps, the following applications for flooded lead-acid batteries generally use different types of separators: deep-cycle, motive, UPS, and SLI applications. F. 95.

PE separator manufacturers typically know the end use applications for the separators that they sell. F. 98-113. Separators for different end use applications return different gross margins for Daramic and sell in different price ranges. F. 114-16. Arbitrage of separators – in the sense of resale by customers charged lower prices to customers charged higher prices – is unlikely, because separators are, for the most part, differentiated products, manufactured with customer-specific designs. F. 117; *see generally* F. 85, 92.

Dr. John Simpson, Complaint Counsel's expert economist, opined that deep-cycle, motive, UPS, and SLI battery separators are each a relevant product market. F.121; *see* F. 122-23. He based his opinion, in part, on an analysis of "critical loss": The largest amount of sales that a hypothetical monopolist in each of these markets could lose before a 5 to 10% price increase would become unprofitable. F. 176. Critical loss analysis has become "a standard tool" for economists in defining relevant markets. *CCC Holdings*, 605 F. Supp. 2d at 40 n.16. Economists perform a

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critical loss analysis to calculate the “critical loss”: the percentage of sales that would have to be lost to make a price increase unprofitable for a hypothetical monopolist. *Arch Coal*, 329 F. Supp. 2d at 121 n.7. If the actual loss – the percentage of sales that would actually be lost in response to a given price increase – is less than the critical loss, the price increase would be profitable and the product market need not be broadened to include other products. IV Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 914a1, at 80-81 (3d ed. 2009). However, critical loss analysis suffers from a “widely recognized flaw . . . that such analysis often overstates actual loss when a company has high profit margins” *Whole Foods*, 548 F.3d at 1048 (Tatel, J., concurring).

Dr. Simpson, like respondent’s expert in *Whole Foods*, did not provide sufficient quantitative evidence for the magnitude of the actual loss, or sufficient methodology for calculating the actual loss. Dr. Simpson’s basis for his statement as to actual loss seems to be his conclusion, for each of the separator markets he found, that other “evidence in this case indicates that . . . a [hypothetical] monopolist [of production in North America] would lose essentially no sales to products outside the product market and very little, if any, sales to products outside the geographic market.” PX0033 (Simpson Report) at 007, *in camera*.

While Dr. Simpson’s critical loss analysis may not be completely persuasive, such analysis is not necessary to support his overall product market analysis, which is persuasive and supported by the record. His opinion, for each of the alleged markets, took into account the “unique need[s]” that each of those types of separators met, as well as company documents that analyzed competition in the context of each of those alleged markets. See PX0033 (Simpson Report) at 12, 14-18, *in camera*. In addition, for each of the alleged markets, “the main thing [that Dr. Simpson] was relying on in implementing the hypothetical monopolist test was the statements by the buyers that they had very little options to substitute, and hence, that the demand curve

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was very inelastic.” (Simpson, Tr. 3414, *in camera*; see PX0033 (Simpson Report) at 12-18, *in camera*). While the record does not indicate clearly which buyer statements Dr. Simpson considered, there is considerable evidence in the record of no, or of very few, “reasonable” alternatives, weighing “price, use, and qualities,” *Du Pont*, 351 U.S. at 404, to Daramic’s products. See F. 167-73 (regarding deep-cycle separators); F. 206-13 (regarding motive separators); F. 238-40 (regarding UPS separators); F. 262-64 (regarding SLI separators).

The specific product markets are analyzed below.

b. Separators for deep-cycle flooded lead-acid batteries: a relevant product market

“Deep-cycle” batteries are batteries that deeply discharge, such as those used in golf carts, floor scrubbers, scissor lifts, and boom lifts. F. 128, 162. Deep-cycle batteries are typically more deeply discharged than motive batteries, and are designed to run at lower amperage, for a longer period of time, than SLI batteries. F. 130-31. The construction of deep-cycle batteries differs from that of other types of batteries, particularly automotive batteries. F. 132. Deep-cycle batteries are made with thicker and more durable grids or plates, which can better withstand deep discharges and corrosion, and high-density active material that take longer to fall apart. F. 132.

Deep-cycle batteries typically use a lead alloy plate with relatively high antimony content. F. 133. SLI batteries, in contrast, typically have much lower antimony content, or no antimony content at all. F. 133. Antimony aids in the construction of deep-cycle batteries and facilitates their cycle of charges and discharges. F. 136-37, 151. However, “antimony poisoning” takes place when traces of antimony are released through corrosion, and antimony deposits onto the negative plate. F. 138. Antimony poisoning shortens the life of the battery and requires the battery user to add water to the battery more often. F. 139. Battery separators that are made of rubber, such as Flex-Sil,

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or that are made of PE and incorporate a rubber additive, such as Daramic HD and CellForce, reduce antimony poisoning in deep-cycle batteries. F. 140-48, 151.

On the other hand, separators that are made of pure PE are not able to suppress antimony poisoning. F. 150. Pure PE separators do not perform as well as separators that are made of rubber, or that incorporate a rubber additive, in deep-cycle applications. F. 150-56; *see* F. 184. Separators made of polyvinyl chloride (“PVC”) also fail to suppress antimony poisoning and pose certain risks. F. 157-58, 184. Sealed batteries, using AGM or silica gel separators, also do not perform well in deep-cycle applications, and are considerably more expensive than flooded batteries. F. 159-60.

For the reasons noted in the preceding paragraph, separators that are made of pure PE, PVC, AGM, or silica gel do not generally have “reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered,” *Du Pont*, 351 U.S. at 404 – with separators that are made of, or that incorporate, rubber. For the reasons noted above regarding deep-cycle separators’ distinctive characteristics, as well as in Section III C 2 a, regarding flooded lead-acid battery separators as a whole, separators that are made for motive, UPS, SLI, and other applications are also not typically interchangeable with separators that are made for deep-cycle applications such as golf carts and floor scrubbers. *See generally* Sections III C 1 a, III C 3 c, *supra*.

Since Daramic’s acquisition of Microporous, there has been only a single source of flooded lead-acid batteries for deep-cycle applications. F. 167-68, 170. As of mid-2009, there was no switching by Daramic’s customers to separators that do not include rubber in response to its post-acquisition price increases on deep-cycle separators. F. 170-71. There was also no switching to separators that do not include rubber in response to the limited supply of Daramic HD during the strike at Daramic’s Owensboro plant in 2008. F. 172-73.

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Dr. Simpson correctly concluded that deep-cycle battery separators are a relevant product market. F. 179. In support of his conclusion, Dr. Simpson observed that for the deep-cycle batteries that are used in golf carts and floor scrubbers, battery manufacturers would not switch to products other than Flex-Sil, CellForce, or Daramic HD, even with a 5% increase in their price, because there are no close substitutes for those three products. F. 179. As Dr. Simpson observed, “both producers and customers note that rubber or PE/rubber deep-cycle battery separators meet a unique need that other battery separators cannot meet.” F. 174. Even Respondent’s own economic expert, Dr. Kahwaty, described the demand for separators in the golf cart and floor scrubber market as “inelastic.” F. 175.

The boundaries of the deep-cycle separator market are also shown by “such practical indicia as industry or public recognition of the [market or] submarket as a separate economic entity, [and] the product[s’] peculiar characteristics and uses.” *Brown Shoe*, 370 U.S. at 325. These indicia, as Judge Bork explains,

represent[] observations about what one ordinarily observes when a market is distinct. The “industry or public recognition of the submarket as a separate economic” unit matters because we assume that economic actors usually have accurate perceptions of economic realities. The “product’s peculiar characteristics” refers to the general truth that substitutes in a market often have a strong physical and functional relationship.

Rothery Storage, 792 F.2d at 219.

In this case, deep-cycle batteries, and deep-cycle battery separators, have distinctive characteristics and distinctive uses or functions. F. 128-56, 162-66, 180. “[C]ompany documents,” do, as Dr. Simpson stated, “analyze competition in the context of a market for deep-cycle battery separators.” F. 174. The merging

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parties viewed deep-cycle separators as a separate product market. F. 181-87. Each saw only the other as a competitor in this market. F. 184, 186-87. Only Daramic and Microporous bid in response to the request for proposal (or “RFP”) to supply golf cart battery separators to Exide. F. 189. Only Daramic and Microporous have supplied deep-cycle separators to U.S. Battery, which presents itself as the leading manufacturer worldwide of deep-cycle batteries. F. 188.

Deep-cycle battery separators are, for all of these reasons, a relevant product market.

c. Separators for motive flooded lead-acid batteries: a relevant product market

“Motive” batteries are also referred to as “traction” or “industrial traction” batteries. F. 190. Motive batteries are typically very large; they can, thus, serve as counterweights in industrial vehicles (especially material-handling equipment) to help to make those vehicles stable. F. 193. Motive batteries, which are used primarily in forklift trucks, F. 204, are generally much larger, and much more robustly built, than deep-cycle batteries. F. 193; *see* F. 194. The insulation that is used in motive batteries is very expensive and is not a cost-effective option for deep-cycle batteries. F. 194.

Motive separators generally have thicker backwebs than other separators, particularly SLI separators. F. 195. Motive separators have higher requirements with respect to mechanical properties and chemical stability, and lower requirements with respect to electrical resistance, than SLI separators. F. 196.

Respondent sells Daramic Industrial CL (“Daramic CL”) for motive batteries. F. 197. Daramic CL is a standard PE separator. The CL stands for clean oil and signifies the use of clean oil as an ingredient. F. 197. CellForce, a PE-based separator that includes rubber in the form of ground up Ace-Sil, is also used in motive

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batteries. F. 198. Daramic HD, too, has been sold to certain motive customers, “pri[m]arily as a defensive move against [Microporous’] CellForce.” F. 199.

North American battery manufacturers have shied away from using PVC in lieu of PE separators in motive batteries. F. 200-03. While PVC has greater resistance to oxidation, it has lower electrical resistance, {redacted} PE. F. 200. Due to its stiffness and brittleness, PVC, unlike PE, cannot be used in industrial applications in which the separator is sleeved or enveloped. F. 200. The use of PVC separators is also associated {redacted} F. 201. EnerSys uses some PVC separators, manufactured by Amer-Sil, in Europe. F. 203. In North America, where the applications are more heavy-duty, EnerSys does not use, or allow the use of, PVC separators in its batteries. F. 203.

For the reasons noted in the above paragraph, separators that are made of PVC do not generally have “reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered,” *Du Pont*, 351 U.S. at 404 – with pure PE or PE-based separators. In addition, for the reasons noted above regarding motive separators’ distinctive characteristics, as well as in Section III C 2 a, separators that are made for deep-cycle, UPS, SLI, and other applications are also not typically interchangeable with separators that are made for motive applications, such as forklifts. *See generally* Sections III C 1 a, Section III C 3 c, *supra*.

Prior to the acquisition, Exide searched worldwide for alternative suppliers to Daramic for motive separators. F. 210. For the United States market, Exide received responses to its RFP for motive separators only from Daramic and Microporous. F. 210. Amer-Sil had limited capacity and gave a quote to Exide only for European applications. F. 210.

After Daramic declared a force majeure event in 2006, EnerSys established a team to search worldwide for an alternative source of supply for its industrial, including motive, separators.

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F. 207. EnerSys reported that it was unable to find an alternative supplier that currently makes motive separators anywhere in the world. F. 207-08. During this period of Daramic's force majeure, the PVC separators from Amer-Sil that EnerSys used in Europe were around 20% more expensive than the PE separators that EnerSys had been purchasing from Daramic. F. 209.

The evidence demonstrates that Daramic could profitably impose a 5% price increase for motive separators. If Daramic demanded a {redacted} higher price for its motive separators, {redacted} testified that it would have no choice but to pay that higher price, because it has no alternative source to Daramic for industrial PE or PE-based separators. F. 206-08.

"Practical indicia," as well as the lack of reasonable substitutes for Daramic's products, also point to a separate motive separator market. Motive batteries, and motive battery separators, have distinctive characteristics and distinctive uses or functions. F. 193-96, 204, 215. Further, Daramic's documents analyze a "market," or a "market segment" as part of a broader "industrial" market, for motive separators. F. 216. Microporous also viewed motive power as a distinct market. F. 217-20. Microporous identified only Daramic, to which it assigned a market share of 91%, as its competitor in the United States motive power market. F. 220. In the European motive power market, Microporous identified Daramic and Amer-Sil, to which it assigned market shares of 58% and 9%, respectively, as its competitors. F. 220.

In support of his conclusion that motive battery separators constitute a relevant product market, Dr. Simpson observed the following: (1) motive separators have different characteristics than deep-cycle and automotive separators, with both customers and producers noting that motive separators fill a unique need; (2) a 5 to 10% price increase by a hypothetical monopolist of motive separators "would prompt very little shifting, at most, to other products"; and (3) a motive separator market is a context in which Daramic and Microporous documents analyze competition. F.

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214. These bases for Dr. Simpson's conclusion find support in the record.

Accordingly, motive battery separators are a relevant product market.

**d. Separators for UPS flooded lead-acid batteries:
a relevant product market**

Uninterruptable power supply ("UPS") batteries are a type of reserve power battery for stationary, as opposed to moving or motive, products. F. 224. In the event of a power shortage or failure, UPS batteries provide standby or backup power for products or facilities that include computers and computer systems, telecommunications networks, and data centers. F. 225, 235.

As more fully explained below, *Brown Shoe's* "practical indicia" – the products' "peculiar characteristics and uses" and "industry . . . recognition . . . as a separate economic entity," 370 U.S. at 325 – support the conclusion that battery separators for flooded lead-acid UPS batteries constitute a separate market. In addition, the preponderance of the evidence shows that Daramic could profitably impose a 5% price increase for UPS separators.

UPS batteries, and UPS battery separators, have certain distinctive characteristics, uses and/or functions. F. 224-30, 235, 243. Classic reserve power batteries generate a lower current over a longer period of time than UPS batteries, which generate a higher current over a shorter period of time. F. 224. UPS batteries are designed to provide a short burst of power, typically of between five to thirty minutes in duration. F. 225. These batteries need to be very dependable and generally last between 15 and 20 years. F. 225. In addition, flooded UPS batteries have thick plates and tend to be built with a clear case, which facilitates inspection of the battery's acid level. F. 226.

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Moreover, although battery separators for flooded, lead-acid UPS batteries are typically made of microporous polyethylene, not all PE separator products are well-suited for flooded UPS battery applications. F. 227, 231. Separators for flooded stationary battery applications, including UPS, generally require a lower residual oil content than separators for other flooded battery applications, in order to reduce the problem of “black scum.” F. 227-29. Black scum interferes with the maintenance of a flooded UPS battery by obscuring the indicators for the acid level in the battery, making it harder to detect the formation of lead sulfate on the surface of the plates. F. 228. In UPS and other battery applications in which an automatic watering system is used, black scum may also interfere with a valve, causing the battery to overflow and spill acid. F. 228-29.

Daramic CL was specifically designed for industrial applications, such as UPS, where black scum is a problem. F. 232. Daramic’s Darak separator, with a base not of PE, but of cross-linked phenolic resin, could also be used in UPS batteries because it contains no oil. F. 234. In addition, CellForce, which includes rubber in the form of ground-up Ace-Sil, can be used in UPS batteries. F. 233. Use of a separator like Daramic HP in a UPS application, in contrast, rather than the automotive application for which Daramic HP was designed, would yield a greater black scum problem than the use of Daramic CL. F. 231-32. The fact that Darak is more expensive than PE-based material used today, F. 234, does not necessarily mean Darak is not reasonably interchangeable with PE-based separators in flooded lead-acid UPS battery applications. *See, e.g., Du Pont*, 351 U.S. at 401, 403-04; *Beatrice Foods*, 540 F.2d at 309-10.

In addition, the evidence shows industry recognition of a UPS market. Microporous sought to enter what it called the “UPS market,” in which Microporous identified only Daramic as its competition. F. 244. Daramic also views UPS separators as part of a broader “market segment,” which it calls “reserve power,” of “industrial” separators. F. 245.

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The evidence further supports the conclusion that Daramic could profitably impose a {redacted} price increase for UPS separators. EnerSys testified that if Daramic demanded a {redacted} higher price for its UPS separators, EnerSys would have no choice but to pay that higher price, because it has no alternative source to Daramic for UPS separators. F. 238-60. After Daramic declared force majeure in 2006, EnerSys established a team to search worldwide for an alternative source of supply of separators for its industrial, including flooded UPS, batteries. F. 238. EnerSys recounted that it was unable to find an alternative supplier that currently makes flooded UPS battery separators anywhere in the world. F. 238.

Finally, expert opinion supports the conclusion that separators for UPS batteries are a separate market. F. 242. Dr. Simpson correctly concluded that UPS battery separators are a relevant product market. F. 242. He adduced the following in support of this conclusion: (1) statements by market participants that UPS separators meet a unique need; (2) EnerSys' indication that it would not switch to other types of separators in response to a {redacted} price increase for UPS separators; and (3) Microporous documents that analyzed competition in the context of a UPS separator market. F. 242. The record amply supports the bases for Dr. Simpson's conclusion.

For all the foregoing reasons, battery separators for flooded, lead-acid UPS batteries constitute a relevant product market.

e. Separators for SLI or automotive flooded lead-acid batteries: a relevant product market

The term "SLI," which stands for starting, lighting, and ignition, is basically synonymous with "automotive." F. 259. However, SLI batteries are not only used in automobiles, but are also used in other motorized vehicles. F. 260. SLI separators must have relatively low electrical resistance to allow for the surge in current that is needed to start a car, for example. F. 249.

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Puncture resistance and mechanical strength are other particularly important properties for SLI separators. F. 252. The battery fails if the thin membrane of an SLI separator is punctured during automotive assembly or other processes. F. 252.

SLI separators must also be very thin. F. 250. A very high percentage – perhaps 90% – of the automotive separators that are produced in North America, and virtually all of the automotive separators that Daramic sells, have a backweb thickness of between six and ten mils (150 to 250 microns, or .150 to .250 millimeters). F. 250. The typical backweb thickness of the automotive separators that are used in the United States is .15 millimeter. F. 250. The backweb thickness of SLI separators has been reduced in recent years to lower the separators' cost. F. 251.

Daramic HP, which is made from polyethylene, amorphous silica, and specially formulated oil, represents the majority of Daramic's sales of automotive separators. F. 253. Daramic HP has largely replaced Daramic Standard, which is formulated from polyethylene, silica, and oil. F. 254. The goal in developing Daramic HP was to provide a product with substantially greater puncture and oxidation resistance than Daramic Standard. F. 256. With HP, Daramic could offer the thinner and less expensive product that competitors were seeking to bring to market and that customers wanted, while maintaining the puncture and oxidation resistance of a thicker separator like Daramic Standard. F. 256.

The CellForce separator, which includes rubber in the form of ground-up Ace-Sil, could potentially be used in SLI batteries, and was tested by JCI in Europe for this application. F. 257. CellForce would have certain advantages in SLI batteries because it inhibits acid stratification and may permit the battery manufacturer to remove some lead from the battery and, thereby, reduce cost. F. 257. Daramic's Strategy Audit states as part of its "industry summary" of the flooded lead-acid battery separator business that there are "[n]o substitutes for PE separators on the horizon." F. 258.

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Accordingly, separators that are not made of pure PE, with the possible exception of CellForce, do not generally have “reasonable interchangeability for the purposes for which they are produced – price, use and qualities considered,” *Du Pont*, 351 U.S. at 404 – with PE separators for automotive applications. For the reasons noted above regarding automotive separators’ distinctive characteristics, as well as in Section III C 2 a, separators that are made for deep-cycle, motive, UPS, and other applications are also not typically interchangeable with SLI separators. *See generally* Sections III C 1 a, III C 3 c, *supra*.

Prior to the acquisition, Exide conducted an extensive global search for alternative suppliers to Daramic for automotive separators. F. 264. As part of this search, in the summer of 2007, Exide sent out an RFP to Daramic, Entek, Nippon Sheet Glass, Amer-Sil, and Microporous. F. 264, 694. Exide received bids for its automotive separator requirements only from Daramic, Entek, and Microporous. F. 264.

Mr. Kung, who has considerable technical and managerial experience in battery separator production, testified that he knows of only three companies in the world – Daramic, Entek, and BFR in China – that produce automotive PE separators as thin as the .15 millimeter that is standard in the United States industry. F. 262. A manufacturer that has not been producing an automotive PE separator as thin as .15 millimeter would find it very difficult to decrease the thickness of its separator. F. 263. A reduction in the thickness of an automotive PE separator from .25 or .2 to .15 millimeter would, according to Mr. Kung, involve a “different technology, different process condition[s, and] different equipment,” as well as greater engineering capability. F. 263.

Three of *Brown Shoe’s* “practical indicia,” 370 U.S. at 325, also support a separate SLI separator market. First, SLI batteries, and SLI battery separators, have distinctive characteristics and distinctive uses or functions. F. 114, 131-33, 152-54, 195-96, 231-32, 250-53, 257, 262-64, 266. Second, SLI separators have

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distinct and relatively low prices. F. 114. “Distinct prices” could suggest a low cross-elasticity of demand with other types of separators. *Rothery Storage*, 792 F.2d at 219. *See Swedish Match*, 131 F. Supp. 2d at 165 (taking into account, in finding distinct markets, price determinations that paid little regard to, and price movements that displayed little correlation with, the prices of purported substitutes). Here, as in *Swedish Match*, 131 F. Supp. 2d at 161 n.8, “it does appear implausible” that SLI customers would substitute other types of separators in response to a 5 to 10% increase in the price of SLI separators. Stationary, deep-cycle, and motive separators would remain significantly more expensive than SLI separators, *see* F. 114, and those other types of separators would continue to lack, or have less of, properties that are particularly important in SLI separators. *See e.g.*, F. 249-50, 252.

Third, several of Daramic’s documents analyze a “market,” or a “market segment” of the battery separator market, for SLI and/or “automotive SLI” battery separators. F. 268. Daramic analyzed “[m]arket segment offerings and competition” in SLI and “[m]arket segments and current [product] positioning” in “[a]utomotive SLI” at its “Strategic Planning Session: Products and Markets” in April 2008. F. 268. Mr. Whear, Daramic’s Vice President of Technology, states that at the time Daramic HP was developed, in the mid-1990’s, Daramic’s “competitors [in SLI] at the time were two, Entek and a company called Evanite.” F. 269. As President of Microporous, Mr. Gilchrist identified “[t]hree primary market segments in [the] lead-acid battery industry”: automotive, specialty, and industrial. F. 270.

Finally, Dr. Simpson correctly concluded that SLI battery separators are a relevant product market. F. 265. In reaching this conclusion, Dr. Simpson observed: (1) both customers and producers indicate that PE SLI separators, for which there are no foreseeable substitutes, “meet a unique need”; (2) customers state that they would not switch to other separators in response to a 5% price increase for SLI separators; and (3) company documents

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analyze competition in the context of an SLI separator market. F. 265. All of these bases for his conclusion are supported by the evidence in the record.

Therefore, SLI battery separators are appropriately considered a relevant product market.

3. Respondent's relevant product market arguments are not persuasive

As more fully set forth below, Respondent's argument for an all PE separator market is unconvincing. Moreover, even if Respondent had proved such a broad product market, that finding would not have disproved narrower product submarkets that could themselves amount to relevant markets. "[W]ithin [a] broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Brown Shoe*, 370 U.S. at 325 (citing *United States v. E. I. Du Pont de Nemours & Co.*, 353 U.S. 586, 593-95 (1957)).

Product markets should not, however, be defined so narrowly that they obscure, rather than illuminate, the area of effective competition. It is for this reason that Flex-Sil, also, does not, as Respondent contends, *e.g.*, RB at 12-14, constitute a relevant product market. "[T]he boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists." *Brown Shoe*, 370 U.S. at 326. In failing to recognize the competition that Flex-Sil faces from other products, Respondent fails to show, as discussed further below, that Flex-Sil constitutes a separate market for antitrust purposes.

a. The purported all polyethylene battery separator market

Respondent argues that Complaint Counsel has "ignored the smallest market principle . . . established in the FTC/Department

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of Justice Horizontal Merger Guidelines.” RB at 8. However, Dr. Kahwaty aggregates all PE and PE-based products, and all of Complaint Counsel’s particular product markets, into a single large product market. Kahwaty, Tr. 5158, *in camera*; *see id.* at 5145-55. All of those narrower product markets are, from Dr. Kahwaty’s perspective, subject to the same competitive influences and the same competitive analysis. *See id.* at 5148-54, *in camera*. Dr. Kahwaty justifies his conclusion that the competitive influences are the same, and that the narrower markets may appropriately be aggregated, on the basis of the “easy supply-side substitution” he finds. *See id.* at 5152-55, *in camera*. “[T]he only way that it makes sense to [Dr. Kahwaty] to aggregate [smaller markets into an all PE market] is if we acknowledge that if you make one product, you can make any of them, [through] very simple supply-side substitution.” *Id.* at 5155, *in camera*. This “very simple supply-side substitution” contention is without merit, and will be discussed further below.

Respondent also contends that Complaint Counsel “wholly ignore[s] both business and economic realities” in delineating particular product markets. RRB at 13. “[T]he confusion and blurring of lines between these alleged product market[s],” RRB at 14, is, Respondent claims, demonstrated by the following: (1) lack of agreement in the industry as to what the product markets are; (2) customers’ testimony about their preferences for one product over another, rather than about their lack of competitive alternatives; (3) overlap in the characteristics and uses of separators “across the spectrum of the FTC’s product categories”; and (4) a “high degree of supply-side substitution.” RB at 9-10, RRB at 13-14. This four prong argument will be examined in detail.

In support of the first prong of its argument regarding “business and economic realities” – a supposed lack of agreement in the industry as to the product markets – Respondent states that the “evidence . . . clear” that Daramic “does not focus on separate product markets for SLI, motive power, deep-cycle and reserve

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power. For example, in analyzing the merger, Daramic focused on PE vs. Non-PE separators.” RRFF No. 60 (citing to PX0055 at 082, *in camera*; PX0174 at 009, *in camera*; and PX0275 at 011, *in camera*).

But the documents that Respondent cites do not bear out, let alone make clear, that Daramic does not focus on such separate markets, or focused on PE versus non-PE separators, in analyzing the acquisition. *See* PX0055 at 082, *in camera* (referring to “Acquisition Benefits / Synergies” that included “[a]ccess to deep cycle separator technology,” a “5% price increase to non-contract customers on industrial [motive] products,” and cost savings from a reallocation of industrial (motive) capacity); PX0174 at 003, *in camera*; PX0275 at 007, 009, *in camera* (estimating, in both of the latter documents, lost sales to specific customers, absent the acquisition, in separate “automotive” and “industrial” categories); *see also* PX0275 at 004, *in camera* (suggesting that Daramic’s supposed focus on PE versus non-PE separators might simply reflect Microporous’ product portfolio, which featured rubber (Ace-Sil and Flex-Sil) and rubber/polyethylene (CellForce) separators, as well as the standard PE separators that Daramic made). Even if Daramic did, in fact, focus on PE versus non-PE separators, that would not compel a conclusion that PE separators constitute a relevant product market. *See CCC Holdings*, 605 F. Supp. 2d at 42 n.18; Commentary on the Horizontal Merger Guidelines at 11, *discussed in* Section III C 1 b, *supra*.

Respondent makes much of the varying nomenclature that may be used in describing or categorizing batteries and battery separators. *See* RRB at 15-17. Respondent points, as one example, to Mr. Brilmyer’s testimony that “a golf cart battery is a type of a traction battery or motive power battery. It’s deep-cycle.” Brilmyer, Tr. 1831, *quoted in* RRB at 15. Any confusion about the product market boundaries for battery separators seems more contrived than real. The record, in fact, indicates analysis of the competitive landscape and conduct by market participants that is consistent with the contours of the product markets that Complaint Counsel posits. *See* F. 181-89 (regarding the deep-

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cycle market); F. 216-20 (regarding the motive market); F. 244-45 (regarding the UPS market); F. 268-70 (regarding the SLI market).

Accordingly, the evidence does not support Respondent's claim that there is a lack of industry agreement as to the relevant product markets, and therefore, does not support Respondent's purported all PE market.

b. Product preferences: Flex-Sil as a product market

For the second prong of Respondent's argument regarding "business and economic realities" – customers' purported testimony about their preferences for one product over another, rather than about their lack of competitive alternatives – Respondent relies on *United States v. Oracle*, 331 F. Supp. 2d 1098. RRB at 13. In *Oracle*, the testimony of the customer witnesses was "largely unhelpful to plaintiffs' effort to define a narrow market of high function" software because "[c]ustomer preferences towards one product over another do not negate [reasonable] interchangeability." 331 F. Supp. 2d at 1130-31. "There was little, if any, testimony by these witnesses about what they would or could do or not do to avoid a price increase from a post-merger Oracle. . . . [N]one gave testimony about the cost of alternatives to the hypothetical price increase a post-merger Oracle would charge." *Id.* at 1131.

In this matter, by contrast, there is testimony by customers and others revealing not simply preferences for Daramic's separators but a lack of any – or of any "reasonable," looking to "price, use and qualities," *Du Pont*, 351 U.S. at 404 – alternatives. See F. 167-73 (regarding deep-cycle separators); F. 206-13 (regarding motive separators); F. 238-40 (regarding UPS separators). Regarding SLI separators, "reasonable" alternatives to Daramic's products are quite limited for United States battery manufacturers. See F. 262-64.

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Respondent argues that Flex-Sil belongs in its own separate product market because it is “clear[ly] . . . a superior product to PE and PE/rubber separators, [with] very different technical capabilities compared to those separators because it is made of pure rubber,” and with special appeal in applications such as original equipment golf cart batteries to “customers that position their products as high end and unique.” RB at 12; *see id.* at 13. Respondent argues that continued purchases predominantly of Flex-Sil, despite its appreciably (**{redacted}**) higher price than Daramic HD (“HD”) – a price premium magnified, in Exide’s case, by a long-term supply agreement offering significant economic incentives to purchase HD in lieu of Flex-Sil – “preclude any argument that Flex-Sil and HD are economic substitutes.” *Id.* at 12-13; *see also* RRB at 17 (reaching the same conclusion since “even when the price of Flex-Sil has increased substantially over the years, customers have not switched to HD, or Cell-Force”).

Respondent’s argument with respect to Flex-Sil suffers from the same problem that the court identified for the customer witnesses in *Oracle*, the case upon which Respondent relies. “Customer preferences towards one product over another do not negate [reasonable] interchangeability.” 331 F. Supp. 2d at 1130-31. There is considerable evidence of reasonable interchangeability between Flex-Sil and Daramic HD. *E.g.*, F. 502-05, 508-10, 512-14, 522-26, 531-32.

The major purchasers of deep-cycle separators – Trojan Battery, U.S. Battery, and Exide – concur that HD and Flex-Sil, or HD, CellForce, and Flex-Sil, are functional substitutes. F. 502, 505, 529. Even Respondent’s expert agrees that HD, CellForce, and Flex-Sil are functional substitutes. Kahwaty, Tr. 5328-29, *in camera*. In addition, all of those customers, prior to the acquisition, successfully used Daramic HD as leverage, or as a competitive threat, to obtain a better price on Flex-Sil. *E.g.*, F. 521, 522, 529. Microporous did, in fact, lose business to HD which competed against both Flex-Sil and CellForce. F. 511. *See*

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generally IIB Areeda, Hovenkamp & Solow, Antitrust Law ¶ 534e, at 271 (observing that “buying and selling patterns over time may indicate the proper market definition”).

Neither Flex-Sil’s unique or superior attributes, nor Flex-Sil’s premium price, places it in a separate product market. After all, cellophane was part of a broader market for flexible wrapping materials, even though it “combine[d] the desirable elements of transparency, strength and cheapness more definitely than any of the others,” and even though it cost two or three times more, by surface measure, than its chief competitors. *Du Pont*, 351 U.S. at 398, 401, 403. Although it is possible that Flex-Sil, like cellophane, may have occupied a narrower, or even its own, market had its prices been lower, that cannot be determined on this record. “[P]rice/quality distinctions in products may play a role in market definitions where articles are sold in clearly separate price groupings that have little or no price sensitivity between them . . . [or where] they are clearly indicative of such quality distinctions that articles of different prices are not interchangeable for particular purposes.” *Beatrice Foods*, 540 F.2d at 309.

Even if some customers prefer Flex-Sil to HD and will purchase only Flex-Sil for certain of their requirements, as contended by Respondent, *see* RB at 12-13, the evidence showed that some customers in *Arch Coal* preferred 8800 to 8400 BTU coal, and would purchase only a particular type of coal, “regardless of the economics.” *Arch Coal*, 329 F. Supp. 2d at 122. However, “[i]n determining interchangeability, . . . the court must consider the degree to which buyers treat the products as interchangeable, but need not find that all buyers will substitute one commodity for another.” *Id.* As shown above, here, as in *Arch Coal*, customers who prefer a particular product “nonetheless can use and have used other [products], and benefit from the competition.” *Id.*

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Separate product markets are not indicated, either, simply because a separator for one customer's application may not work for another customer in the same application. *E.g.*, F. 119. Certain separator profiles, for instance, are unique to individual customers, and certain batteries require a separator of an unusual width. F. 89-92. But this would not result, as Respondent suggests, in "two separators produced for different customers but used in the same application becoming their own product markets because they are not functionally substitutable." RB at 10-11. Such contentions have been made, and consistently rejected, since the *Brown Shoe* decision more than a half-century ago. The Supreme Court in *Brown Shoe* upheld the district court's finding that men's, women's, and children's shoes were relevant markets, in part because those "product lines are recognized by the public," and "each [line] has characteristics peculiar to itself rendering it generally noncompetitive with the others." 370 U.S. at 326. *Brown Shoe* had contended that further "age/sex" distinctions should have been drawn since, to cite one example, a "male baby cannot wear a growing boy's shoes." *Id.* at 327. The Supreme Court agreed with the district court that a further subdivision of the shoe market would be "impractical" and "unwarranted." *Id.* at 328. "Further division does not aid us in analyzing the effects of this merger." *Id.* at 327; *see also* Simpson, Tr. 3174-75 (observing that "[i]t makes sense to aggregate . . . up . . ." "for tractability" when "things like the market participants are the same . . . and entry conditions are the same)."

Flex-Sil does not, therefore, occupy a separate product market.

c. Product overlap and supply-side substitution

In an effort both to support an all PE separator market and to discredit the product markets advocated by Complaint Counsel, Respondent claims, as the third prong of its business and economic realities argument, that "there was significant evidence at trial that separators among the categories advocated by the FTC overlap significantly." RB at 9. While Respondent does not specify just what it means by "overlap," it appears to mean that

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separators of a particular backweb thickness may be used, and actually are used, in more than one of the alleged deep-cycle, motive, UPS, and SLI markets. *See* RB at 10. Respondent goes on to say:

[A] so-called ‘UPS’ separator might well be effectively used in a ‘motive’ application, or . . . an ‘SLI’ separator may be used in a ‘deep cycle’ application. In fact, the evidence not only shows that this ‘could’ happen, but that it does happen every day in the reality of the PE battery separator market. This is true in all of the FTC’s alleged product categories.

Id. (citations omitted).

There was in fact, as Respondent claims, “evidence at trial that separators among the categories advocated by the FTC overlap” in their backweb thickness. There was not, however, evidence at trial that any such overlap was so extensive or so typical as to have “significant” implications for market definition. *See* F. 89-91, 95-97. Respondent claims, for instance, that “an ‘SLI’ separator may be used in a ‘deep cycle’ application.” *Id.* “Within the 12 mil backweb range, for example, one would find separators used in automobiles (SLI), golf carts (deep-cycle) and telecom batteries.” RFF No. 74 (citing Hauswald, Tr. 984-85). But telecom separators are not at issue here, and any “overlap” between separators of that thickness for automobiles and for golf carts would be slight. Moreover, ninety-five to ninety-nine percent of the SLI separators that Daramic sells have a backweb thickness of 10 mils or less, while none of the deep-cycle separators that it sells have a backweb thickness of less than 12 mils. F. 149, 250.

As the court observed in *United States v. Oracle*, “defining the relevant market in differentiated product markets is likely to be a difficult task due to the many non-price dimensions in which sellers in such markets compete.” 331 F. Supp. 2d at 1121. Part

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of the problem with Respondent's argument as to "overlaps" is that it oversimplifies the characteristics of battery separators. These characteristics are reduced "primarily [to] backweb thickness and overall product thickness" with the aim of showing that "it is impossible to classify [separators] into distinctive 'buckets.'" RB at 10.

Respondent's assertion regarding the singular importance of backweb thickness is not borne out by other facts presented in the case. *Compare, e.g., id.* (asserting that "the only real difference between industrial [such as motive] and automotive separators is thickness") with PX1790 (Daramic marketing flyer) at 001, *quoted in* F. 196 (describing "considerably higher" requirements for motive batteries than for SLI batteries with respect to mechanical properties and chemical stability). Separators are differentiated by various characteristics and even separators of the same thickness are not necessarily functionally, let alone reasonably, interchangeable. *See* F. 85-87, 89-91. To quote Respondent's own economic expert: "Here, the products are highly differentiated So there's numerous different products here to think through when talking about PE separators, with potentially very complex . . . substitution patterns . . . in response to a . . . small but significant and nontransitory price increase" (Kahwaty, Tr. 5133-34).

Based on the above facts and legal authorities, Respondent's product overlap claim is unpersuasive.

Finally, the fourth prong of Respondent's business and economic realities argument, that there is a "high degree of supply-side substitution," RB at 11, is not supported by the evidence. If it were so "easy to shift between production of different kinds of PE separators," RB at 11, there would be evidence that such shifts have been made. In fact, however, the evidence shows that switching is not easy. For example, even though Entek has been faced with decreasing demand for automotive separators, the evidence does not indicate that it has reallocated its excess productive capacity from SLI into deep-

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cycle, motive, or stationary (such as UPS) products. F. 1027, 1031-33. The evidence further shows that suppliers such as Microporous and Daramic took years to enter new markets. F. 457-501, 617-28, 638-722. In addition, the evidence shows that entry is greatly delayed by, among other reasons, the time that is required for testing of new products, and of new applications of existing products. See Section, III E 1, *infra*. See generally, F. 923-1126. In summary, supply-side substitution is not as swift or as sure as Respondent suggests.

For all the foregoing reasons, Respondent's arguments in opposition to the relevant markets advocated by Complaint Counsel, and for an all PE market and a Flex-Sil market, are rejected.

4. Relevant geographic markets in general

Proper definition of the relevant geographic market, like proper definition of the relevant product market, is "a necessary precondition to assessment" of the effect of a merger or acquisition on competition. *General Dynamics*, 415 U.S. at 510; see *Brown Shoe*, 370 U.S. 294, 324 (1962) (interpreting the phrase "any section of the country" in Section 7 of the Clayton Act to require determination of the geographic market).

"[T]he relevant geographic market must be sufficiently defined" to indicate the area in which "competition is threatened." *Cardinal Health*, 12 F. Supp. 2d at 49. This includes the area within which "the effect of the merger on competition will be direct and immediate." *Philadelphia Nat'l Bank*, 374 U.S. at 357. The boundaries of the geographic market need not be delineated "by metes and bounds as a surveyor would lay off a plot of ground," because proof of the locus of any anticompetitive effect "is entirely subsidiary to the crucial question in this and every § 7 case[,] which is whether a merger may substantially lessen competition anywhere in the United States." *United States v. Pabst Brewing Co.*, 384 U.S. 546, 549-50 (1966).

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A properly defined geographic market charts “the area of effective competition . . . [*i.e.*,] the market area 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 geographic market is the “area to which consumers can practicably turn for alternative sources of the product and in which the antitrust defendants face competition.” *Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994). The boundaries of this area are shaped by “the geographic structure of supplier-customer relations.” *Philadelphia Nat’l Bank*, 374 U.S. at 357-58 (quoting Carl Kaysen & Donald F. Turner, *Antitrust Policy* 102 (1959)). Those boundaries “must . . . both ‘correspond to the commercial realities’ of the industry and be economically significant,” because “Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one.” *Brown Shoe*, 370 U.S. at 336-37 (citations omitted).

In a relevant geographic market, as in a relevant product market, the producers could exercise market power if they were united through a cartel or merger. *See* IIB Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law*, ¶ 551 (3d ed. 2007). The major constraint on producers’ ability to exercise market power is the availability of substitutes for their products. *Rothery Storage*, 792 F.2d at 218. Producers who can provide substitutes, and constrain any such exercise of market power, are appropriately included in the relevant geographic market. *See United States v. Rockford Memorial Corp.*, 717 F. Supp. 1251, 1261 (N.D. Ill. 1989), *aff’d*, 898 F.2d 1278 (7th Cir. 1990).

“To define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price and volume.”

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Rothery Storage, 792 F.2d at 218 (quoting Lawrence A. Sullivan, *Antitrust* § 12, at 41 (1977)).

The principal factors that the courts and the Commission consider in defining a relevant geographic market are set forth below.

a. Cross-elasticities of demand and supply

“The criteria to be used in determining the appropriate geographic market are essentially similar to those used to determine the relevant product market.” *Brown Shoe*, 370 U.S. at 336. The relevant geographic market, like the relevant product market, “depends on interchangeability and cross-elasticity of demand.” *Arch Coal*, 329 F. Supp. 2d at 123; *see, e.g., Heerwagen v. Clear Channel Communs.*, 435 F.3d 219, 228 (2d Cir. 2006) (finding little geographic cross-elasticity of demand for live rock concert tickets, since a purchaser of such a ticket is “hardly likely to look outside of her own area” in response to a change in relative prices between areas).

Cross-elasticity of supply may also be important. Indeed, “reliable measures of supply and demand elasticities,” while rarely available, are the “kinds of evidence [the Commission] consider[s] most valuable in the definition of a relevant market.” *In re General Foods Corp.*, No. 9085, 103 F.T.C. 204, 1984 FTC LEXIS 69, at *312 (Apr. 6, 1984).

A properly defined geographic market would include potential suppliers who could readily offer customers suitable alternatives to the products or services of the defendants should defendants’ prices become anticompetitive. *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995). A market so defined would address “the critical question of where consumers . . . could practicably turn for alternative sources of the product.” *Id.; Tampa Electric*, 365 U.S. at 327.

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Numerous courts have adopted a similar approach. *See, e.g., Rothery Storage*, 792 F.2d at 219 n.6 (observing that any attempt by a van line in one location to raise its price above a competitive level “would be met by other van lines sending in trucks and trailers at a lower price”); *FTC v. Foster, Western Refining*, 2007 U.S. Dist. LEXIS 47606, at *144-45 (D.N.M. 2007) (finding that current suppliers, from other areas, of gasoline in bulk to northern New Mexico would increase their role there in response to an anticompetitive move by the merging parties).

b. The approach of the Merger Guidelines

The Merger Guidelines provide guidance in determining the relevant geographic market. *Foster*, 2007 U.S. Dist. LEXIS 47606, at *137; *Arch Coal*, 329 F. Supp. 2d at 123.

The Merger Guidelines state:

Absent price discrimination, the Agency will delineate the geographic market to be a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a “small but significant and nontransitory” increase in price [“SSNIP”], holding constant the terms of sale for all products produced elsewhere.

Merger Guidelines § 1.21; *see In re Evanston*, 2007 FTC LEXIS 210, at *154.

The geographic market is the smallest area within which a hypothetical monopolist could profitably impose a SSNIP of, in general, five percent. *Oracle*, 331 F. Supp. 2d at 1112; *Merger Guidelines* §§ 1.21, 1.11. If enough consumers respond to that price increase by shifting their purchases to suppliers outside of that smallest area, the SSNIP would be unprofitable and the boundaries of the geographic market should be broadened. *Arch*

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Coal, 329 F. Supp. 2d at 123; *Merger Guidelines* § 1.21. In gauging consumers' likely response to that price increase, "all relevant evidence" will be considered, including evidence that buyers have shifted, or have considered shifting, purchases to another location in reaction to a price increase, that sellers base business decisions on the expectation of such demand substitution, and of the speed and cost of switching suppliers. *In re Adventist Health System/West*, 1994 FTC LEXIS 345, at *11; *Merger Guidelines* § 1.21.

The Merger Guidelines present a somewhat different analysis of market definition when there is price discrimination:

[I]f a hypothetical monopolist can identify and price differently to buyers in certain areas ("targeted buyers") who would not defeat the targeted price increase by substituting to more distant sellers in response to a "small but significant and nontransitory" price increase for the relevant product, and if other buyers likely would not purchase the relevant product and resell to targeted buyers, then a hypothetical monopolist would profitably impose a discriminatory price increase. . . . The Agency will consider additional geographic markets consisting of particular locations of buyers for which a hypothetical monopolist would profitably and separately impose at least a "small but significant and nontransitory" increase in price.

Merger Guidelines § 1.22.

Arbitrage – in this context, purchase at a lower price from a seller in one geographic area, and resale at a higher price to another customer in a different geographic area – can defeat a discriminatory price increase and thereby "'stitch' together" two geographic areas into a single geographic market. *Oracle*, 331 F. Supp. 2d at 1162 (citation omitted); see *Merger Guidelines* § 1.22. Arbitrage is "particularly difficult where the product is sold on a

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delivered [price] basis and where transportation costs are a significant percentage of the final cost.” *Merger Guidelines* § 1.22 n.12. Arbitrage is also impeded where products are differentiated and a product made for one customer would not work, or would not work well, for another customer. *See Oracle*, 331 F. Supp. 2d at 1162 (describing the testimony of Professor Kenneth G. Elzinga).

Critical loss analysis may be used in defining the relevant geographic market as well as the relevant product market. In defining the relevant geographic market:

[t]he critical loss test involves two steps: (1) determining the critical loss number of [customers] who would have to leave the proposed market in order to defeat a S[S]NIP by a hypothetical monopolist, and (2) determining whether that critical loss number of [customers] would actually leave the market if faced with a S[S]NIP. If fewer [customers] than the critical loss number would leave the proposed market, this implies that all practical alternatives have been included in the proposed market.

Sutter Health, 130 F. Supp. 2d at 1128.

c. Other indicia of the geographic market

Determination of the relevant geographic market is highly fact sensitive, *see Freeman Hosp.*, 69 F.3d at 271 n.16, as the proper market definition requires a factual inquiry into the commercial realities that consumers face. *See Flegel v. Christian Hosp. Northeast-Northwest*, 4 F.3d 682, 690 (8th Cir. 1993). The evidence must address not only where consumers actually go to obtain products or services, but where they could practicably go if a merger were to have anticompetitive effects. *Freeman Hosp.*, 69 F.3d at 268; *see, e.g., United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669, 674 (D. Minn. 1990) (finding that defendants demonstrated that buyers within an area could

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practicably turn to dairies outside that area if a dairy cartel were to impose a SSNIP).

The Commission has made clear what kinds of evidence it considers most valuable in defining the relevant geographic market:

Most direct, but rarely available, are reliable measures of supply and demand elasticities. Of the indirect evidence, especially probative is the level of entry barriers surrounding a market. We also have recognized the inferential value of evidence revealing price disparities, transportation costs, and transshipments between locations, as well as the perceptions firms have about the competitive threat posed by outsiders.

In re General Foods Corp., 1984 FTC LEXIS 69, at *312-13.

A more recent Commission case noted additional factors that may be relevant in identifying the geographic market: price (including exchange rate) movements, “the existence of excess capacity outside the tentatively identified geographic market,” tariffs, preferences for local supply “because of the need for timely and frequent deliveries, consistent quality and technical support,” and the increased storage and handling costs that imports might entail. *In re Occidental Petroleum Corp.*, No. 9205, 115 F.T.C. 1010, 1992 FTC LEXIS 333, at *32-36, 39-40 (Dec. 22, 1992).

A number of courts, as well as the Commission, have used the Elzinga-Hogarty test in defining the relevant geographic market for merger analysis. *E.g.*, *Oracle*, 331 F. Supp. 2d at 1165; *Country Lake Foods*, 754 F. Supp. at 672 n.2. As the latter decision explains:

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[This test] measures the accuracy of a market delineation by determining the amount of either imports into or exports from a tentative market. The test is based on the assumption that if an area has significant exports or imports, then that area is not a relevant geographic market. Under the [Elzinga-Hogarty test], exports or imports greater than 10% suggest that the market examined is not a relevant market.

Country Lake Foods, 754 F. Supp. at 672 n.2; see Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation Revisited: The Case of Coal*, 23 Antitrust Bull. 2 (1978). But see *In re Adventist Health System/West*, 1994 FTC LEXIS 345, at *17-19 (cautioning that “[t]he Commission has not, and does not now, endorse either the ‘strong’ [using the 10% cutoff for imports or exports noted above] or the ‘weak’ [using a 25% cutoff for imports or exports] [Elzinga-Hogarty] test as the [sole] basis for establishing a relevant market,” while conceding that statistical analysis of that sort has a place, along with other evidence, in geographic market definition).

With these principles in mind, the parties’ positions and the evidence regarding the relevant geographic market, are analyzed below.

5. The relevant geographic market in this case

a. Positions of the parties

The Complaint alleges, and Complaint Counsel sought to prove at trial, that the relevant geographic market is North America. Complaint ¶ 14; see CCB at 28-34; CCRB at 20-22. Complaint Counsel advocates a narrower geographic market than Respondent and relies on the statement in *Philadelphia National Bank*: “The proper question to be asked *in this case* is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate.” 374 U.S. at

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357; *see* CCB at 29. Complaint Counsel stresses the Merger Guidelines' application to geographic markets of the "smallest market' principle." CCB at 29; *see Merger Guidelines* § 1.21. The Merger Guidelines state that the geographic market is "the smallest region within which a hypothetical monopolist could 'profitably impose at least a 'small but significant and nontransitory' increase in price.'" *Merger Guidelines* § 1.21; CCB at 29 (quoting *Merger Guidelines* § 1.21).

Respondent submits in its Answer and sought to show at trial that the geographic market is the world. Answer ¶ 14; *see* RB at 14-17, RRB at 23-26. Respondent challenges Complaint Counsel's contention, citing Section 1.22 of the Merger Guidelines, that a hypothetical monopolist could profitably impose a discriminatory price increase on North American purchasers. *Compare* RB at 14; RRB at 24 n.3 (denying that a hypothetical monopolist could impose such a price increase) *with* CCB at 32; CCRB at 20-21. According to Respondent:

The FTC's geographic market case requires it to show that a hypothetical monopolist could engage in price discrimination on a worldwide basis. Making that case depends, in turn, on a showing that such discrimination would not be defeated by arbitrage. But Complaint Counsel's economic expert, Dr. Simpson, acknowledged that he had not adequately considered whether arbitrage could be used by worldwide customers to defeat price discrimination by the hypothetical monopolist.

RB at 14 (citations omitted).

Based on applicable law, and as more fully discussed below, the evidence presented in this case on price discrimination, customers' desire for local suppliers, barriers to foreign entry, and expert analysis supports a determination that the relevant

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geographic market is North America, as alleged by Complaint Counsel, and not the world, as urged by Respondent.

b. North America: the relevant geographic market**(i) Price discrimination**

The record supports Complaint Counsel's claim, *see* CCB at 31-32; CCRB at 20, that Daramic charges different prices in different geographic regions. F. 275-80. These same facts sufficiently support Complaint Counsel's claim that Daramic "price discriminates between markets." F. 272-73 (noting Dr. Simpson's conclusions); CCRB at 20. However, it is not established that Daramic price discriminates in the sense in which that term is generally used by economists. *See generally Merger Guidelines* § 1.22 (citing as an example of price discrimination a firm that "charg[es] *different prices net of transportation costs for the same product* to buyers in different areas") (emphasis added); IIB Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law* ¶ 517a (clarifying that price discrimination occurs when a firm earns different rates of return, through different ratios of price to marginal cost, on sales to different customers). Dr. Simpson refers, less precisely, to price discrimination "[w]hen a [firm] can charge different prices to different buyers." Simpson Report at 005-06 n.5, *in camera*.

To the extent that there is international price discrimination in separator sales, it would not likely be defeated by arbitrage. Arbitrage is discouraged by separators' product differentiation, manufacturers' direct shipments to customers' plants, freight and other costs of importation, and the preference of customers for local supply. F. 274. Dr. Kahwaty's opinion to the contrary, Kahwaty, Tr. 5165-68, *in camera*, is not persuasive. F. 360.

(ii) Local supply

It is advantageous for a separator manufacturer to offer its customers a local or regional, as opposed to a more distant, source

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of supply. F. 286. Local separator supply reduces the risk of supply chain disruption, F. 287; lowers shipping costs, as well as warehousing, inventory, and other costs, F. 288-89; speeds delivery, F. 288-89; gives the battery manufacturer greater flexibility in ordering separators for its production lines, F. 290; permits quicker responses to any technical and quality issues that the battery manufacturer may have, F. 291; provides other benefits to the separator supplier, along with its customer, from readier access to, and more frequent meetings with, the supplier's sales representatives and engineers, F. 293, 306; and fosters local or regional competitiveness in supplying expanding regional markets. F. 292, 295.

The advantages of local or regional separator supply are recognized by producers, *see* F. 287-93, 301, and by customers, *see* F. 294-300, 303-09. Certain of these advantages are explicitly acknowledged, for instance, in the Memorandum of Understanding that Microporous and EnerSys signed in 2006. F. 300. The advantages of local supply influenced Microporous' decision to expand into Europe, F. 301; JCI's effort to develop new suppliers in Asia, {redacted} F. 295; the expansion of Daramic's production lines in Thailand, F. 310; and Daramic's proposal to JCI in 2003 to build a new plant in Brazil. F. 292. Local or regional separator supply, from multiple plant locations around the world, is a factor that Daramic uses as a marketing point. F. 292. *See generally In re Occidental Petroleum Corp.*, 1992 FTC LEXIS 333, at *39-40; *Merger Guidelines* § 1.21 (noting the relevance of evidence that buyers have shifted, or have considered shifting, purchases to a different location in response to changes in price or other competitive variables, and that sellers have based business decisions on the expectation of such shifts in demand).

(iii) Barriers to foreign manufacturers

Freight charges and, in a number of countries, import duties, add to the price of separator imports. F. 314. Imports from China

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are further impeded by the Chinese value-added tax, F. 316-17, which could be reduced, but that would remain at an effective rate of 8%, by bonded manufacturing. F. 318.

The chief barrier to separator imports into North America is, however, the lack of competitiveness of BFR, F. 332- 41, 343-44, and other foreign separator suppliers in this region. *See* F. 342, 345-55. This is due, in large part, to higher production costs abroad. *See* F. 322-30; *see also* F. 337 (comparing the average sales prices of BFR and Entek). This lack of competitiveness is also the result of lesser competition in, and greater profitability of, separator sales abroad (from the vantage point of separator suppliers abroad), along with overseas separator suppliers' limited manufacturing capacity and lack of English-speaking staff to service the North American market. *See* F. 336 (referring to BFR); F.1091 (describing language barrier in dealing with Anpei).

Competitive disadvantages to foreign separator suppliers flow, in addition, from a reluctance of North American battery manufacturers to use some types of separators from abroad for other reasons. *E.g.*, F. 351 **{redacted}** There is in some cases, though, a simpler and starker explanation for the lack of separator imports into North America. This is the fact that suppliers in other regions do not yet produce – let alone produce tested and qualified versions of – certain categories of separators, including motive and UPS separators, leaving Daramic as their single source. *See* F. 340, 352, 446-47, 1051-52, 1064, 1069, 1073-74.

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(iv) Expert opinion

Dr. Simpson correctly concluded that North America is the relevant geographic market in this case. F. 271. Manufacturers of deep-cycle, motive, UPS, and SLI battery separators are able to set different prices for different geographic regions around the world and, in this sense, to price discriminate based on geography. F. 272. Through this price discrimination based on geography, a hypothetical monopolist could profitably and separately impose a small but significant and nontransitory increase in price on buyers of deep-cycle, motive, UPS, and SLI separators in North America. F. 273. Moreover, arbitrage, which theoretically might defeat any price discrimination, is discouraged by a number of factors, including manufacturers' direct shipments to customers' plants; freight and other costs of importation; and the preference of some customers for local supply. F. 274. Arbitrage is also less likely because separators are, for the most part, differentiated products, made with customer-specific designs. F. 274.

Dr. Kahwaty's analysis of the geographic market, referred to in F. 356-70, is not persuasive in several respects. According to Dr. Kahwaty's critical loss analysis, a decline of more than **{redacted}** in Daramic's PE separator sales, in response to a 5% price increase by Daramic for its North American plants (holding constant its prices for plants located elsewhere), would render that price increase unprofitable. Kahwaty Report at 51, *in camera*; F. 358. The comparable critical loss figure for Entek is, according to Dr. Kahwaty, **{redacted}** Kahwaty Report at 51, *in camera*.

Exports out of North America by both Daramic and Entek are, Dr. Kahwaty states, "significantly above the critical loss values." Kahwaty Report at 51, *in camera*; F. 358. Based on the cost data he used, reviewed at F. 361-66, Dr. Kahwaty reached the following conclusion: "If prices charged by North American PE plants increased, but prices charged by Asian PE plants did not, I would expect a large fraction of the North American plants' non-NAFTA volumes to switch to suppliers located outside of North

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America. . . . I conclude that the FTC's alleged North American market is too narrow." Kahwaty Report at 52, *in camera*.

Dr. Simpson's critique of Dr. Kahwaty's analysis is valid. In Dr. Simpson's words:

It [Dr. Kahwaty's analysis] didn't make sense . . . because the marginal cost of [Daramic's Thailand] plant does not reflect what they were selling the product for. . . .

And the second thing is, if Daramic was exploiting market power in North America, I didn't see why they would use their Thailand plant to undercut that.

And then the third thing was, [Dr. Kahwaty] reported the cost for the Daramic plant, which was not the cost for what independent rivals would have in Asia, so I didn't -- I didn't see really where his analysis was relevant

Simpson, Tr. 3238, *in camera*. Thus, Dr. Kahwaty's opinion is not supported by the record and therefore not accepted.

c. Conclusion

Based upon applicable legal principles and evaluating all the material evidence, Complaint Counsel has proved by a preponderance of the evidence that the relevant geographic market is North America. Evidence in this case of barriers to foreign competition, such as taxes and tariffs, preference for local supply to avoid higher costs and potential supply disruption, as well as expert opinion, adequately support the conclusion that Respondent could profitably impose a SSNIP in North America. *Oracle*, 331 F. Supp. 2d at 1112; *Merger Guidelines* §§ 1.21, 1.11. In addition, the record does not demonstrate that arbitrage by worldwide customers could defeat price discrimination.

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Accordingly, North America is the relevant geographic market in this case.

D. Reasonably Likely Anticompetitive Effects

After determining the relevant product and geographic markets, an analysis of the likely competitive effects of an acquisition requires a determination of the transaction's probable effects on competition in those markets. *CCC Holdings*, 605 F. Supp. 2d at 37 (citing *Marine Bancorp.*, 418 U.S. at 618-23; *Gen'l Dynamics*, 415 U.S. at 510-11). "[T]o satisfy section 7, the government must show a reasonable probability that the proposed transaction would substantially lessen competition in the future." *University Health*, 938 F.2d at 1218; *FTC v. Warner Communs. Inc.*, 742 F.2d 1156, 1160 (9th Cir. 1984).

The government can establish a presumption that the transaction will substantially lessen competition by showing that the acquisition will lead to undue concentration in the relevant markets. *Baker Hughes*, 908 F.2d at 982. Therefore, the analysis first evaluates the evidence presented on market shares and concentration, as found in F. 371-451.

"[M]arket share and concentration data provide only the starting point for analyzing the competitive impact of a merger. . . . [The government] also will assess the other market factors that pertain to competitive effects" *Merger Guidelines* § 2.1; *In re Weyerhaeuser Co.*, 1985 FTC LEXIS 26, at *215; *Hospital Corp.*, 807 F.2d at 1386 (deciding that market share figures are not always decisive in a Section 7 case and that the Commission was prudent in inquiring into the probability of harm to consumers). Therefore, to analyze the competitive impact of the acquisition, the Initial Decision next assesses and analyzes the probable and actual effects. Because evidence indicating the purpose of the merging parties is an aid in predicting the probable future conduct of the parties and the probable effects of the merger, *Whole Foods*, 548 F.3d at 1047, included in this analysis

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is a review of the evidence evincing Daramic's intentions in pursuing the acquisition of Microporous.

1. The role of market concentration statistics

“The legality of [an acquisition] . . . almost always depends upon the market power of the parties involved.” *Oracle*, 331 F. Supp. 2d at 1123 (quoting *Cardinal Health*, 12 F. Supp. 2d at 45). “By showing that a transaction will lead to undue concentration in the market for a particular product in a particular geographic area, the government establishes a presumption that the transaction will substantially lessen competition.” *Baker Hughes*, 908 F.2d at 982; see *Philadelphia Nat'l Bank*, 374 U.S. at 363 (holding that “a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects”).

As recognized by the D.C. Circuit in *FTC v. Heinz*, the theory of merger law is that in a market with few rivals, firms are able to coordinate behavior, “either by overt collusion or implicit understanding,” to restrict output and achieve anticompetitive profits. *Arch Coal*, 329 F. Supp. 2d at 124 (citing *Heinz*, 246 F.3d at 715; *PPG Indus.*, 798 F.2d at 1503). Thus, increases in concentration exceeding certain levels raise a likelihood of “interdependent anticompetitive conduct.” *Id.* (citing *Heinz*, 246 F.3d at 715-16). According to the Merger Guidelines, market concentration is a function of the number of firms in a market and their respective market shares. *Merger Guidelines* § 1.5. Dollar sales, shipments, and unit sales can be used to calculate market shares, depending on the nature of the firms and their products. *Id.* § 1.41.

To interpret market data, the Herfindahl-Hirschman Index (“HHI”) of market concentration is often used. *Baker Hughes*, 908 F.2d at 983 n.3 (stating that the HHI is a “yardstick” of

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market concentration). The HHI is calculated by summing the squares of the individual market shares of all the participants in the market. *Arch Coal*, 329 F. Supp. 2d at 124 (citing *Heinz*, 246 F.3d at 716 n.9). The spectrum of market concentration as measured by the HHI is divided into three regions: (1) a market with an HHI of less than 1000 is “unconcentrated;” (2) a market with an HHI between 1000 and 1800 is “moderately concentrated;” and (3) a market with an HHI above 1800 is “highly concentrated.” *Merger Guidelines* § 1.5.

An increase in HHI of greater than 100 points in a post-merger moderately concentrated market potentially raises significant competitive concerns. *Arch Coal*, 329 F. Supp. 2d at 124. Likewise, an increase in the HHI of 50 points or more in a post-merger highly concentrated market may raise significant competitive concerns. *Id.* It is presumed that mergers producing an increase in HHI of greater than 100 points in a highly concentrated market are likely to create or enhance market power or facilitate its exercise. *Id.* (citing *Merger Guidelines* § 1.51; *Heinz*, 246 F.3d at 716 & n.9). If HHI figures are sufficiently large, they will establish a prima facie case of an anticompetitive merger. *Id.* (citing *Heinz*, 246 F.3d at 716; *Baker Hughes*, 908 F.2d at 982-83 & n.3).

The evidence in this case demonstrates that in two of the four relevant markets – deep-cycle and motive – Daramic’s acquisition of Microporous resulted in Daramic attaining a 100% share of each market. Thus, the acquisition is “presumptively illegal because it [results] in a merger of the only two competitors in [these] relevant market[s] selling the relevant product[s].” *United States v. Franklin Elec. Co.*, 2000 U.S. Dist. LEXIS 20676, *24 (W.D. Wis. 2000).

In the other two relevant markets – UPS and SLI – Daramic did hold and continues to hold market shares of approximately 100% and 50%, respectively. Although Microporous did not have market shares in these markets, as found in F. 422-24, 439 and

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analyzed below, Microporous was a competitive threat in the UPS market and a competitor in the SLI market. F. 633, 636. Daramic's acquisition of Microporous eliminated this competitive constraint.

2. The acquisition eliminated Daramic's only competitor and established a monopoly in the deep-cycle and motive separator markets

a. Deep-cycle separator market

(i) Market shares and concentration

Before the acquisition, Daramic and Microporous were the only participants in the deep-cycle separator market in North America. Prior to the acquisition, Daramic's market share was approximately 10%, with total sales in 2007 of **{redacted}** F. 385. Daramic had been gaining market share steadily over the two years preceding 2007. F. 384. Microporous enjoyed the dominant share of the deep-cycle market in North America, with a share of approximately 90% and **{redacted}** in sales in 2007. F. 385. The acquisition was a merger-to-monopoly, increasing Daramic's market share to 100% and increasing the HHI by 1,891 to 10,000. F. 385.

Respondent contends that the HHI calculations fail to take into account that East Penn Battery used straight PE separators for its deep-cycle applications, and considered Entek an alternative supplier. RRB at 12 n.2; RRCCFOF 271. East Penn Battery does use straight PE for some of its deep-cycle batteries, even though such separators are not able to suppress antimony poisoning and result in a significantly shortened battery life. F. 142. However, the evidence indicates that East Penn Battery's use of straight PE for deep-cycle batteries is a stark exception in a market dominated by the use of separators made of rubber, or PE with rubber additive, and, thus, comprised of Microporous' Flex-Sil and CellForce and Daramic's HD products. *See* F. 143-56.

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(ii) Competition between Daramic and Microporous

Daramic had made repeated attempts to develop a product to compete with Microporous' Flex-Sil separators in the deep-cycle market and began testing Daramic HD ("HD") in 2003. F. 457, 461. Daramic saw itself in 2005 as "continuing to gain incremental volume and taking it away from Microporous." F. 467. A Daramic strategic planning document shows that HD was specifically targeted as an alternative to Microporous' rubber separator, Flex-Sil, being used in golf cart and floor scrubber batteries. F. 482.

Daramic increased its sales of HD in every year between the introduction of HD and Daramic's acquisition of Microporous and was gaining market share, in part through customers who were switching the separators that they were using in their deep-cycle batteries from Flex-Sil to HD. F. 477, 513-14. For example, a November 9, 2005 Daramic Trip Report to U.S. Battery concludes that U.S. Battery "appreciates that we developed a competing product for rubber . . . [and] sees their benefit as having two suppliers in order to manage costs while maintaining product performance. Meanwhile, we benefit by continuing to gain incremental volume (and taking it away from Microporous Products) in a market where we are relatively new entrants." F. 467.

Customers benefitted from the competition between Daramic and Microporous. For example, an internal Daramic email exchange states: "We know we can price the product where we want to either get business or cause [Microporous] to reduce theirs." The email response notes: "knowing that we're 'competitive' should we take prices down 5% to 10% to get even more aggressive?" F. 486. Other Daramic documents reflect this competition by Microporous in the deep-cycle market, stating, that in this market, "Microporous is attacking with price." F. 471. In the months prior to the acquisition of Microporous, Daramic

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continued to try to take market share from Microporous by touting Daramic HD as lower priced than Flex-Sil. F. 517.

Microporous' CEO knew "[w]ithout a doubt" that HD was "competing" and was a "threat" to Microporous in the deep-cycle market. F. 511. Recognizing HD as a threat, Microporous lowered its prices of Flex-Sil and CellForce to protect its market share and offered the lower priced CellForce in place of Flex-Sil. F. 470, 520. Trojan Battery, U.S. Battery and Exide each used HD as a competitive threat to get better pricing and terms from Microporous on deep-cycle battery separators. F. 521-42. From 2005 to the time of the acquisition, Trojan Battery continually used the threat of buying Daramic HD to get lower prices from Microporous. F. 529-42. In 2005, the possibility that U.S. Battery could switch to HD prevented Microporous from removing a material rebate program U.S. Battery enjoyed. F. 522. On three occasions between 2006 and 2007, Exide used HD to successfully constrain the price of Flex-Sil. F. 523-28. Exide believed that its knowing that both Daramic and Microporous wanted Exide's deep-cycle business provided Exide with leverage in negotiations. F. 526.

b. Motive separator market**(i) Market shares and concentration**

At the time of the acquisition, Daramic and Microporous were the only market participants in the motive battery separator market in North America. F. 386. Microporous' 2007 market share was approximately 9%, with sales of approximately **{redacted}** F. 410. Daramic's market share in 2007 was approximately 91%, with sales of **{redacted}** F. 410. Daramic's acquisition of Microporous increased the HHI by 1,663 points to 10,000 in the motive separator market. F. 410. Sales data from 2007 show that the change in HHI and the post-merger HHI for the motive separator market far exceed the thresholds listed in the Merger Guidelines and creates a strong presumption of a significant lessening of competition. *See Heinz*, 246 F.3d at 716.

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Further, the evidence shows that Microporous was making inroads in the motive market and would likely have gained a greater share of the market, absent the acquisition. A contract with EnerSys dated January 2, 2007, and amended in August 2007, obligated Microporous to supply all of EnerSys' motive power battery separator requirements. F. 390. Microporous anticipated that its share of the United States motive market would increase to almost 50% by the end of 2009. F. 404-05.

Respondent challenges the HHI statistics for failure to include Entek as a competitor in the motive market. RRFOF 280. Respondent relies on evidence that Entek is theoretically willing to enter the motive market today, if Exide were to pay for all the necessary retooling and commit to a long-term supply agreement. However, no such agreement has been reached, and the time and sunk costs required for Entek to enter the market are significant. F. 399. Further, the evidence shows clearly that Entek has been targeting its business to the SLI market and does not believe it could be price-competitive in the motive market. F. 398. Entek's conduct in not bidding in response to Exide's RFP for motive separators, declining to provide a quote to Douglas Battery for motive power separators, and informing Crown Battery and Bulldog Battery that Entek would not supply them with motive separators, confirms that Entek was not a competitor in the motive market. F. 394-97.

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(ii) Competition between Daramic and Microporous

For at least six years prior to the acquisition of Microporous by Daramic, Daramic and Microporous were the only competitors for North American battery manufacturers' motive power business. F. 577. The only price competition that Daramic faced in the sale of motive power separators came from Microporous and the only competitor that Daramic lost North American motive power business to was Microporous. F. 580.

Daramic recognized Microporous as a competitor in 2003, noting that "we have a new polyethylene competitor entering the North American market. Micro-Porous Products . . . they have attacked all the large manufacturers and to keep from losing business, we have adjusted prices as needed which has eroded our margins" F. 582. Daramic lowered prices on motive separators to C&D, EnerSys, and East Penn, to "fight the aggressive offers" of Microporous. F. 583-95. In its 2006 discussion document entitled "3-Year Strategy," Daramic saw Microporous as a threat because Microporous' planned capacity expansions could threaten additional Daramic industrial sales and noted that the key to Daramic's securing its motive sales was either execution of a long-term contract with EnerSys or the acquisition of Microporous. F. 596.

Daramic's customers benefited from the competition between Daramic and Microporous. In 2005, EnerSys and Daramic were exchanging emails related to an energy surcharge sought by Daramic. F. 594. Referring to Microporous' CellForce, EnerSys wrote to Daramic, "I tell you right now, if you expect any more than the **{redacted}** that I have approved, EnerSys will have to change our supply chain strategy due to newer technology that is available in the marketplace." F. 594. In its negotiations with Daramic over price in 2006, EnerSys believed that because of the availability of Microporous, Daramic could not negotiate as hard. F. 595. With respect to Exide, Daramic, in 2005, noted that because Exide could not go to Microporous, Daramic could

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“negotiate a little tougher” with Exide. F. 600. With C&D, where Daramic believed that Microporous was not capable of supplying all of C&D’s motive separator needs, in order to keep 100% of C&D’s business, Mr. Roe suggested that Daramic “play our card that we supply all or nothing.” F. 590.

Microporous’ customers, too, were able to use the threat of switching to Daramic to get better pricing and terms. Bulldog Battery was able to receive a price decrease on its separator purchases by telling Microporous that Daramic had offered it a lower price. F. 608. When Microporous sought a rubber cost pass-through agreement with its customers, EnerSys refused to accept it with respect to {redacted} using the threat of switching its volume to Daramic. F. 597.

c. Acquisition of the only competitor

In the deep-cycle and motive markets, the dramatic increase in Daramic’s market shares caused by the merger and the changes in HHI in these markets, are more than sufficient to create a “presumption that the merger will lessen competition.” *See Heinz*, 246 F.3d at 716 (holding that increase in HHI of 500 created presumption, “by a wide margin”). More importantly, in these two markets, Daramic acquired its only competitor. Numerous cases have concluded that the elimination of the closest competitor would likely lead to unilateral anticompetitive effects. *E.g., Swedish Match*, 131 F. Supp. 2d at 169 (“A unilateral price increase by Swedish Match is likely after the acquisition because it will eliminate one of Swedish Match’s primary direct competitors.”); *Cardinal Health*, 12 F. Supp. 2d at 53, 64 (holding that, by combining with their closest competitors to capture an 80% market share, defendants could “curb downward pricing pressure and adversely affect competition”); *Staples*, 970 F. Supp. at 1082 (stating that “merger would allow Staples to increase prices or otherwise maintain prices at an anti-competitive level” by eliminating its closest competitor).

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A monopoly market share raises the strongest level of concern that could be associated with a merger. A combination of the only two manufacturers “should be viewed” as nothing “other than a merger to monopoly that by definition will have an anticompetitive effect[.]” *United States v. Franklin Elec. Co.*, 130 F. Supp. 2d 1025, 1035 (W.D. Wis. 2000). *See also Heinz*, 246 F.3d at 717 (stating “no court has ever approved a merger to duopoly”); *PPG Indus.*, 798 F.2d at 1505-06 (stating that where there “appear[ed] to be only three fully capable firms in [the] market,” and “[t]he proposed acquisition would leave two,” the Commission’s showing of market concentration was “overwhelming”). Following Daramic’s acquisition of Microporous, purchasers of deep-cycle and motive battery separators no longer have an alternative to Daramic. F. 384, 410, 551, 610. Thus, Daramic’s elimination of its only competitor and merger to monopoly in the deep-cycle and motive markets is presumptively illegal.

3. The acquisition eliminated a competitive constraint and cemented Daramic’s monopoly in UPS and its duopoly in SLI

a. UPS separator market

(i) Market shares and concentration

At the time of the acquisition, Daramic held a nearly 100% market share in the UPS separator market in North America and Daramic continues, post-acquisition, to maintain that position. F. 422-23, 616. Also at the time of the acquisition, Microporous had been working to enter the market with its development of white PE, a PE separator for UPS flooded lead-acid batteries, designed to resolve the black scum problem in flooded batteries in UPS applications. F. 417-20. Prior to the acquisition, Entek had made small quantities of PE separators for use in industrial applications, but has no intention of producing UPS separators currently. F. 421.

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Complaint Counsel's expert, Dr. Simpson, did not calculate market shares or HHI for the UPS market. F. 424. The reasons he provided for not doing so were: Microporous had no sales of UPS battery separators in 2006 or 2007; although Entek may have had some limited sales of UPS separators during this period, the data was insufficient to calculate these sales; and, a calculation of market shares and HHI would, thus, not provide any additional information. F. 424.

(ii) Competition between Daramic and Microporous

In the UPS separator market, the acquisition did not increase Daramic's already 100% market share. However, although it had not yet made sales in the UPS market prior to the acquisition, Microporous, at the request of EnerSys, had been working on the development of a separator to compete with Daramic's Darak product and which could be used in UPS batteries. F. 617-21. As part of its project LENO, Microporous developed samples of a potential Darak replacement and provided samples to EnerSys. F. 623. EnerSys wanted to switch to Microporous' white PE product for its flooded UPS batteries as soon as the product was validated. F. 624. Salespeople from Microporous were optimistic that there was customer demand for its new battery separator in the United States and Europe, including at customers such as EnerSys, Exide and East Penn Battery. F. 627. Prior to the acquisition, Microporous had made capital expenditures in its European facility, and was planning on additional expenditures at its United States facility, in anticipation of separator sales from project LENO as early as late 2008 or early 2009. F. 626. The manager of project LENO expected that the new products from the project would generate revenues from commercial sales by the end of 2008 or early 2009. F. 628.

b. SLI separator market

(i) Market shares and concentration

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Prior to the acquisition, the North American SLI battery separator market was a duopoly, shared by Daramic and Entek. F. 426. In 2007, Entek's share was 51.6% and Daramic's share was 48.4%. F. 439. In 2006, Entek's share was 53% and Daramic's share was 47%. F. 439. The HHI calculation for Daramic of 5005, F. 439, indicates a highly concentrated duopoly. *See Heinz*, 246 F.3d at 716 (district court found HHI score of 4775 indicative of a highly concentrated industry).

(ii) Competition between Daramic and Microporous

Prior to the acquisition, Microporous had the capability of manufacturing separators for SLI applications; had undertaken an expansion plan which included production lines for either CellForce separators or plain PE separators that could be used for SLI or industrial battery separators; was marketing PE separators for SLI applications; and had endeavored to sell such separators to JCI, Exide, and East Penn Battery. F. 430-32. Moreover, prior to the acquisition, both Daramic and Entek perceived Microporous to be a competitive threat in the SLI market. F. 435-36.

(a) Microporous was expanding

Prior to the acquisition, Microporous was expanding, with firm plans to add a production line for polyethylene separators at its Piney Flats, Tennessee facility in May or June of 2008. F. 642. Microporous' strategic plan in May 2007 included: "Protect golf car market"; "Protect position in European traction"; "Regain U.S. traction position"; and "Create position in SLI market." F. 771. At the time of the acquisition, Microporous had built two state-of-the-art production lines at its plant in Feistritz, Austria, both of which could produce either CellForce separators or plain polyethylene separators, and, therefore, could be used for SLI batteries or industrial batteries. F. 778.

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(b) Microporous was taking steps to enter the SLI market***Microporous' work with JCI***

Beginning in 2003, Microporous was involved in discussions with JCI to enter the SLI market. F. 649-51. In the United States, JCI is one of only three major automotive battery manufacturers. F. 645. JCI had decided in the summer of 2003 to pursue a “Global Separator Strategy” in an effort to create more competition among suppliers and thereby reduce its purchasing costs. F. 649. JCI considered Microporous to be a “New Supplier” that it was developing, particularly for JCI’s United States facilities. F. 649. JCI reengaged in discussions with Microporous in 2005 about possible supply of PE SLI separators from Microporous to JCI in the United States and in Europe. F. 684. Microporous advised JCI that it was planning to add capacity in Europe, and that this would also free up capacity in the United States. F. 687. JCI contemplated that it would supply its European plants from Microporous’ planned European plant, and would supply its Winston-Salem or Tampa plant from Microporous’ Piney Flats plant. F. 687. Microporous’ PE SLI separators were qualified for use at JCI in 2007. F. 690. Ultimately, however, the JCI and Microporous negotiations did not lead to a contract between the two parties. F. 691.

Microporous' work with Exide

Microporous worked also with Exide to become a supplier of SLI separators. In the summer of 2007, Exide issued an RFP requesting bids on Exide’s global separator needs for automotive, motive, stationary and golf cart batteries. F. 694. Thereafter, Microporous and Exide entered into a memorandum of understanding (MOU). F. 697. The MOU recites that Microporous operates a plant in Tennessee that is “technologically capable of producing” SLI separators and industrial separators, including CellForce, that will meet Exide’s

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needs for automotive and motive power applications. F. 699. The MOU further states that the parties intend to discuss an agreement under which Exide would “provide [Microporous] the opportunity to participate in” supplying Exide, and Microporous would install and operate two PE lines, capable of producing either SLI or industrial separators. F. 699. The MOU noted that “[e]ach manufacturing line would be capable of producing approximately 11,000,000 square meters annually of SLI separator material, or the industrial equivalent of 4,000,000 square meters. F. 700. The MOU further recites that Microporous “would commit to have the above volumes available to Exide by no later than January 1, 2010, and to supply at least that volume each year over the life of” the intended supply contract, which the MOU states would be a five-year contract, and that Exide would make a reasonable effort to purchase “the Agreed Volume of 22,000,000 square meters volume of SLI separator material (or its equivalent in industrial separator square meters, or any combination of the two) from [Microporous] on an annual basis” F. 700.

After negotiating the MOU, Exide went forward with testing of Microporous’ separator samples and developing specific pricing for the separators. F. 707. Exide’s initial bench testing of Microporous’ PE SLI separators looked good and Exide then produced batteries in the United States and Europe for testing using Microporous’ separators. F. 708. Exide personnel also met with Microporous personnel on numerous occasions in furtherance of their work together on future supply of PE SLI separators. F. 709. In the months prior to the acquisition, Microporous and Exide were working on a draft supply contract and Microporous was expecting a counter-offer or revised draft contract from Exide. F. 711. Exide did not return its redline of the draft supply contract to Microporous, and no agreement was finalized prior to the acquisition. F. 715.

***Microporous’ work with East Penn
Battery***

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Microporous also held discussions with East Penn Battery regarding SLI separator supply. In October 2007, East Penn Battery discussed the possibility of Microporous supplying PE separators to East Penn Battery for use in SLI batteries. F. 717. East Penn Battery advised Microporous that East Penn Battery wanted an alternative to Entek and believed that Microporous had manufacturing capability to handle some of its volume. F. 718. During its visit to Piney Flats, East Penn Battery communicated to Microporous that it might be willing to enter into a long-term contract with Microporous for the supply of PE SLI separators. F. 719. East Penn Battery provided Microporous part numbers and volumes that East Penn Battery might be interested in purchasing from Microporous, but Microporous did not have the machinery or the tooling to supply the volumes that East Penn Battery requested. F. 720. Microporous did not commit to East Penn Battery that it could supply East Penn Battery with the sizes and volumes of PE separators discussed in 2007. F. 721.

(c) Daramic viewed Microporous as a competitive threat

Daramic grew concerned about the potential threat to Daramic from Microporous in the SLI market. In 2004, Daramic's Mr. Roe informed his worldwide sales team that Microporous might soon be pursuing automotive opportunities and that it had "become critical that we assess the true sales situation of [Microporous'] Cell-Force product." F. 681.

In late 2003, Daramic believed that Microporous was offering to supply JCI under a five-year contract with continuous price reductions passed along to JCI. F. 666. Soon after learning of Microporous' bid for JCI's SLI business, Daramic threatened to cut off supply to JCI in Europe if JCI did not sign a long-term contract. F. 667. On January 12, 2004, JCI conceded that Daramic's "aggressive tactics" had left [JCI] with no option but to sign **{redacted}** F. 677. A Daramic document notes: "Under

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pressure, JCI signed the proposed contract, and the deal was done January 19th, 2004.” F. 678.

Daramic believed that by forcing JCI into a long-term contract, it had stopped Microporous’ work with JCI on SLI supply. F. 679. One of Daramic’s goals in entering into this contract with JCI was to prevent Microporous from becoming a supplier to JCI and expanding its capacity. F. 683. Daramic knew that Microporous was trying to enter the SLI market and that Daramic’s long-term contract with JCI “effectively blocked them out of the space in a significant way.” F. 683. At the same time, Daramic recognized that the JCI contract did not entirely eliminate the future threat of Microporous in the SLI business. F. 679. Daramic worried that JCI and Microporous might continue to work together during the course of the Daramic contract, with Microporous bringing on new capacity in the United States and/or Europe to fulfill volume commitments that JCI could make for the end of the contractual period. F. 679.

In 2007, Daramic developed the “MP Plan” through which it targeted certain customers whose business Daramic believed was at risk of loss to Microporous in 2008. F. 820. With respect to one of these customers, East Penn Battery, Daramic viewed Microporous as a threat to its market share in the SLI market, projecting that it would lose one million square meters of automotive product. F. 821. The goals of the MP Plan were to: secure select long-term agreements to fight the Microporous threat; achieve price improvements; achieve margin improvements; achieve price stability; and increase volume resulting in net margin increase. F. 823. With one of the stated goals being “fight the Microporous threat,” Daramic’s documents regarding its MP Plan clearly evince Daramic’s view of Microporous as a competitive threat in the SLI market.

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c. Acquisition of the only competitive constraint

That Microporous had not yet made sales in the UPS and SLI markets does not diminish its competitive role. In *United States v. Continental Can Co.*, the Supreme Court stated: “It is not at all self-evident that the lack of current competition between Continental and Hazel-Atlas for some important end uses of metal and glass containers significantly diminished the adverse effect of the merger on competition.” 378 U.S. 441, 464 (1964). As in *Continental Can*, Daramic “might have concluded that it could effectively insulate itself from competition by acquiring a major firm not presently directing its market acquisition efforts toward the same end uses as [the acquiring firm], but possessing the potential to do so.” *Id.*

Also instructive in considering the impact of Microporous in the UPS and SLI markets is *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). There, the Supreme Court held that factual findings that the acquired company, Pacific Northwest, could not have taken business away from the acquiring company, El Paso, were irrelevant and did not prevent a conclusion that the merger had a tendency to lessen competition. Despite evidence that “as an independent entity, [Pacific Northwest] could not have obtained a contract . . . , could not have received the gas supplies or financing . . . , or could not have put together a project to the regulatory agencies,” Pacific Northwest was nevertheless “a substantial factor” in the market. *Id.* at 657-58. The Court noted that El Paso first declined an opportunity to supply California Edison, but then reapproached Edison after learning that Pacific Northwest had negotiated a tentative contract with the Edison. El Paso ultimately won the contract using substantial price concessions. According to the Court, such evidence “illustrates what effect Pacific Northwest had merely as a potential competitor. . . . [T]he mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso’s business attitudes within the State.” *Id.* at 659. As explained by the Supreme Court in *United States v.*

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Marine Bancorp., “[t]he merger declared unlawful in *El Paso* ‘removed not merely a potential, but rather an actual, competitor.’” 418 U.S. 602, 625 n.24 (1974) (citation omitted).

In the UPS market, as in *El Paso*, Microporous had been taking concrete steps to enter, and was shown by the evidence to have been “a substantial factor” in the relevant market at the time it was acquired. Following the acquisition, there is no potential entrant to constrain Daramic in the UPS market. “No merger threatens to injure competition more than one that immediately changes a market from competitive to monopolized.” Phillip E. Areeda, Herbert Hovenkamp & John L. Solow, *Antitrust Law*, ¶911a.

In the SLI market also, as in *El Paso*, Microporous’ efforts to gain share had a definite influence on Daramic. For example, the evidence shows Daramic projected losing market share to Microporous, and was so concerned about Microporous taking market share that Daramic was willing to reduce prices in order to obtain long-term contracts and maintain its volume. *E.g.*, F. 820-21, 851. In such circumstances, as in *El Paso*, Microporous’ position as a competitive constraint in this case “was not disproved by the fact that it had never sold” battery separators in the relevant market. “Nor is it conclusive that” Microporous did not achieve a firm contract by the time of the acquisition. *Id.* at 660. There is no question that Microporous was bidding for SLI business. *See, e.g.*, F. 684-89, 697-714, 718-20. “Unsuccessful bidders are no less competitors than the successful one.” *Id.* at 661. Moreover, as in *El Paso*, the evidence shows that, had Microporous remained independent, it would have continued its efforts to sell in the SLI market, and that opportunities existed for Microporous in that market. *See, e.g.*, F. 684-89, 697-714, 718-20. Where, as here, the competitive landscape was changing, it is appropriate to assess the probable future of the market. *Grumman Corp. v. The LTV Corp.*, 665 F.2d 10, 15 (2d Cir. 1981) (holding that District Court was properly concerned with maintaining small competitor in the market place, where even though competitor had not yet received sales, it was aggressively competing and

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evidence indicated that competitor would gain market share in the future).

“The acquisition by an already dominant firm of a new or nascent rival can be just as anticompetitive as a merger to monopoly.” IV Phillip E. Areeda and Herbert Hovenkamp Antitrust Law ¶912a (3d ed. 2006). “[A] firm that has submitted bids against the dominant firm but lost is clearly an ‘actual’ competitor, perhaps even forcing the dominant firm to lower its bid in the face of a rival bidder. But even the firm that is preparing to make its first bid or its first sale must be counted as an ‘actual’ rival once the entry decision has been made.” *Id.* The evidence summarized above clearly demonstrates that, in the SLI market, Microporous had made the decision to enter the SLI market and was working to enter into contracts to take SLI sales away from Daramic, and that Daramic viewed Microporous as a threat and responded to Microporous’ presence by lowering prices. Accordingly, Microporous was an actual competitor in the SLI market.

In the UPS market, Daramic acquired the only company poised to enter the market and cemented Daramic’s monopoly. In the SLI market, Daramic’s acquisition of an actual competitor left Daramic and Entek with their previous duopoly in North America, which, as shown below, was largely not competitive before the acquisition.

4. Reasonably probable anticompetitive effects

Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency. *Brown Shoe*, 370 U.S. at 317. Thus, the test of a violation of § 7 is whether, at the time of suit, there is a “reasonable probability” that the acquisition is likely to result in the condemned restraints. *United States v. E. I. Du Pont de Nemours & Co.*, 353 U.S. 586, 607 (1957). There “is no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be

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called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the Congressional policy of thwarting such practices in their incipiency would be frustrated.” *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967). Indeed, the Supreme Court in *Procter & Gamble* stated that the appellate court “misapprehended . . . the standards applicable in a § 7 proceeding” in holding that the post-acquisition evidence did “not prove anti-competitive effects of the merger.” *Procter & Gamble*, 386 U.S. at 576. *See also Hospital Corp.*, 807 F.2d at 1389 (“Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the acquisition create an appreciable danger of such consequences in the future.”).

Cases and the Merger Guidelines recognize two types of anticompetitive effects: unilateral and coordinated. *Oracle*, 331 F. Supp. 2d at 1112-13; *Merger Guidelines* § 2.1. Unilateral effects result when a merger leads to higher prices due to the loss of competition between the two merging firms, independent of the action of other firms in the market. *In re Evanston*, 2007 FTC LEXIS 210, at *157 (citing *Oracle*, 331 F. Supp. 2d at 1113; *Merger Guidelines* § 2.2). The Areeda treatise classifies unilateral effects into four different types: “(a) creating a monopoly or dominant firm; (b) perpetuating a monopoly or dominant firm by eliminating a nascent rival; (c) giving one firm more secure control of its ‘niche’ in a product-differentiated market; or (d) strengthening a firm’s power to make noncompetitive bids that buyers will be unable to refuse.” IV Phillip E. Areeda, Herbert Hovenkamp, & John L. Solow, *Antitrust Law* ¶ 910, at 55-56 (2d ed. 2006). Coordinated effects are reductions in competition caused by express or tacit interaction by the merged firm and the remaining firms in the market, with respect to competitive variables such as prices, price differentials, market shares, customers, or territories. *Oracle*, 331 F. Supp. 2d at 1113; *In re Evanston*, 2007 FTC LEXIS 210, at *157-58 (citing *Merger Guidelines* § 2.1).

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It is well settled that contemporaneous and post-acquisition evidence may properly be considered in determining whether the probable effect of a merger will be a substantial lessening of competition. *E.g.*, *Purex Corp. v. Procter & Gamble Co.*, 664 F.2d 1105, 1108 (9th Cir. 1981); *United States v. Falstaff Brewing Corp.*, 383 F. Supp. 1020, 1025 (D.R.I. 1974); *see also FTC v. Consolidated Foods Corp.*, 380 U.S. 592, 598 (1965). Post-acquisition evidence is appropriately considered where it “tends to confirm, rather than cast doubt upon, the probable anticompetitive effect” of a merger. *Consolidated Foods*, 380 U.S. at 598. However, post-acquisition evidence that can be manipulated by the party seeking to use it is entitled to little weight, in part because the actions may have been taken to “improve [the defendant’s] litigating position.” *Hospital Corp.*, 807 F.2d at 1384; *see also General Dynamics*, 415 U.S. at 504-05.

After consideration of the evidence presented at the hearing, as well as at the supplemental hearing, it is clear that the acquisition has probable anticompetitive effects. Evidence presented by Complaint Counsel did not always differentiate the specific relevant market to which it related. This collective evidence is considered below. Next, the impact on each of the relevant markets, individually, is assessed.

Post acquisition, Daramic announced several price increases. During the period of August 31, 2008, through approximately November 30, 2008, Daramic notified customers of price increases scheduled to take effect anywhere between September 1, 2008 and January 1, 2009. F. 912. In addition, on July 1, 2008, Daramic instituted **{redacted}** for most customers. F. 906. Daramic’s stated reason for **{redacted}** F. 907. Effective January 1, 2009, Daramic announced price increases that ranged from **{redacted}** F. 913-15. By contrast, customers who were under long-term exclusive contracts, as part of Daramic’s MP Plan, **{redacted}** F. 897.

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As explained by Complaint Counsel's expert, Dr. Simpson, four factors could lead to higher prices in a market: increasing demand for the product, changes in productivity, increasing input costs, and increasing market power. F. 920. Dr. Simpson noted that Daramic's fall 2008 price increase could not be explained by increasing demand for battery separators since demand for battery separators has fallen since mid-2008. F. 920. Dr. Simpson also noted that productivity changes could not explain Daramic's 2009 price increase since learning by doing generally makes firms more productive over time. F. 920. In Dr. Simpson's opinion, input price increases could not explain Daramic's 2009 price increase. F. 921. Moreover, {redacted} F. 921. With regard to these issues, Dr. Simpson was persuasive and was correct.

a. Unilateral anticompetitive effects in the deep-cycle, motive and UPS separator markets

Post-acquisition, in the markets where Daramic has a monopoly, Daramic has exerted unilateral market power.

(i) Deep-cycle

Since the acquisition, Daramic has instituted price increases in the deep-cycle market. With respect to Trojan Battery, Daramic insisted upon material changes to the contract extension that Trojan Battery had been negotiating with Microporous. F. 554. Those changes included the pricing structure, {redacted} changes to the contract length {redacted} and a clause stating that {redacted} F. 554. Citing increased energy and material costs, Daramic proposed a price increase to Trojan Battery of {redacted} on CellForce and {redacted} on Flex-Sil. F. 557-58. The highest price increase Trojan Battery had previously received from Microporous was {redacted} F. 557. The latest proposal from Daramic would result in Trojan Battery paying approximately {redacted} more than it had agreed to pay Microporous in September 2007. F. 561.

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With respect to Exide, **{redacted}** F. 562. The net effect of its agreement with Daramic has Exide paying **{redacted}** higher prices for Flex-Sil after the acquisition than it had been paying to Microporous before the acquisition. F. 563. Despite imposing price increases on deep-cycle separators since the acquisition, Daramic has not lost deep-cycle business to any competitor because there are no other competitors. F. 551.

In addition, post-acquisition, Daramic has undertaken a strategy of selling its higher priced, higher margin Flex-Sil, over its HD separator, as an alternative to the CellForce separator. F. 566-72. When **{redacted}** tried to increase its purchases of the lower priced HD from the more expensive Flex-Sil in March of 2008, Daramic's General Manager instructed his sales team to **{redacted}** increase in HD purchases. F. 568. When Daramic was unable to supply sufficient HD to Exide due to the strike at Owensboro, Exide was forced to purchase the higher priced Flex-Sil, because it was the only available alternate product for its deep-cycle batteries. F. 575. When, post-acquisition, U.S. Battery approached Daramic about buying CellForce or HD separators, Daramic informed U.S. Battery that the separators it wanted for its batteries were not available in either CellForce or HD, and sold it Flex-Sil separators instead. F. 570-72.

(ii) Motive

Post-acquisition, **{redacted}** Daramic announced price increases that ranged from **{redacted}** for certain motive customers. F. 611. For example, Daramic raised the prices for CellForce separators sold to Bulldog Battery by 10%, effective January 1, 2009. F. 613. Daramic had previously charged Bulldog Battery a 7% energy surcharge in 2008. F. 613. As compared to past pricing increases from separator suppliers, Bulldog Battery feels the 10% price increase is "pretty exorbitant." F. 613. By comparison, in the five-year period during which Bulldog Battery purchased CellForce separators from Microporous, the cumulative price increases from

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Microporous totaled about 3% and the largest price increase was 1 to 1 ½%. F. 613. Bulldog Battery did not try to negotiate a lower price with Daramic because “[t]here was no way to negotiate a lower price. There was no place to go.” F. 614.

Since the acquisition of Microporous in February 2008, Daramic has not lost any motive power business in North America to any competitors. F. 615. Further, Daramic has not made any price concessions to North American customers for motive products due to competition from any other competitor. F. 615.

(iii)UPS

In the UPS market especially, innovation competition has been eliminated post-acquisition. Despite Microporous’ prospects for a new separator for UPS applications from the LENO project, after the acquisition, Daramic’s management was not interested in the further development of a product to replace Darak. F. 630. There was little support for the LENO project among Daramic management since the goal of the project was to replace the costly, “very high-margin” Darak product with a less expensive, lower margin PE based separator. F. 632. One internal Daramic email discussing the LENO project and its potential importance at EnerSys states: “LENO . . . project likely to be stopped. This is a cannibalizing product of Daramic PE and Darak.” F. 630.

b. Unilateral and coordinated anticompetitive effects in the SLI separator market

Complaint Counsel has shown that Daramic’s acquisition of Microporous has had unilateral anticompetitive effects in the SLI market as to Exide and to other battery manufacturers who had been working with, and looking to, Microporous as an independent supplier of SLI separators. Exide wanted to have Microporous as an independent supplier because it believed that it could obtain better pricing with an additional supplier competing for its business. F. 723. Exide had been close to finalizing an

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agreement with Microporous to be a supplier of SLI separators. F. 711, 713. With the elimination of Microporous, Exide can turn only to Daramic and Entek. F. 437. For smaller battery manufacturers, Microporous “could be their second best supplier, in which case [it] would be the constraint on the supplier who was the best.” F. 724. As Dr. Simpson correctly concluded, “[f]or smaller battery manufacturers, Microporous would be in a position to meet all of their demand. And Microporous could be their best supplier, in which case eliminating it would reduce competition.” F. 724.

With the elimination of Microporous, in the SLI market, where only Daramic and Entek compete, there is a strong presumption of coordinated anticompetitive effects. High concentration levels make it “easier for firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.” *University Health*, 938 F.2d at 1218 n.24. “The combination of a concentrated market and barriers to entry is a recipe for price coordination” or the coordination of markets or customers. *Heinz*, 246 F.3d at 725 (finding that by buying its closest competitor, Heinz would create a “durable duopoly” that “affords both the opportunity and incentive for both firms to coordinate to increase prices) (citing *University Health*, 938 F.2d at 1218 n.24); *CCC Holdings*, 605 F. Supp. at 64-65.

Further, there do not there appear to be any “‘structural barriers,’ unique to this industry, that are sufficient to defeat the ‘ordinary presumption’” of coordination in such a “highly concentrated market.” *CCC Holdings*, 605 F. Supp. 2d at 60 (quoting *Heinz*, 246 F.3d at 725); *see also Merger Guidelines* ¶ 2.1 (coordinated interaction). Respondent did not demonstrate that there are any “structural barriers” to coordination. Rather, Respondent notes that Daramic lost its largest customer in the SLI market to Entek and is losing volume from its second largest SLI customer to Entek as well. RB at 21-22. At the supplemental hearing, Respondent produced evidence that Exide has been

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taking steps to **{redacted}** F. 747-48. Respondent argues that such evidence belies a conclusion that Entek and Daramic would coordinate their behavior. RB at 21-22.

This loss of **{redacted}** however, does not prove that Daramic and Entek are not able to coordinate their behavior in order to restrict output and achieve profits above competitive levels. Daramic's internal documents confirm as much. For example, Daramic's Strategy Audit notes that "[b]attery manufacturers lack purchasing power despite their scale due to limited number of suppliers." F. 435. In comments on an earlier draft of this Strategy Audit, Tucker Roe of Daramic stated: "I would say that over the past years there has not been an aggressive rivalry among competitors but this has changed when Microporous Products entered the market and more recently seen by Entek." F. 435.

Before Microporous began making in-roads into the SLI market, Entek and Daramic "were not aggressively competing against each other for business." F. 655. Daramic and Entek were viewed by customers as "lazy and unresponsive; they do not appear to compete and do not have to, given the absence of market forces." F. 660. As explained in *CCC Holdings*, "[i]n a highly concentrated market, with stable market shares, low growth rates and significant barriers to entry, there are few incentives to engage in healthy competition." *CCC Holdings*, 605 F. Supp. 2d at 66. "With only two dominant firms left in the market, the incentives to preserve market shares would be even greater, and the costs of price cutting riskier, as an attempt by either firm to undercut the other may result in a debilitating race to the bottom." *Id.* at 67. In the SLI separator market, the competitive market was "unhealthy," as Entek and Daramic, as stated by one customer, simply were not operating as competitors. F. 660. Without Microporous as a competitor, there are fewer incentives to engage in healthy competition.

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c. Summary

To summarize, post-acquisition price increases add to the strong presumption that a merger to monopoly in three markets, and from three to two competitors in the SLI market, will lead to anticompetitive effects. Daramic has failed to rebut these presumptions and the additional evidence that supports them.

5. Daramic’s intent in acquiring Microporous evinces probable anticompetitive effects

“[T]he Supreme Court has clearly said that ‘evidence indicating the purpose of the merging parties, where available, is an aid in predicting the probable future conduct of the parties and thus the probable effects of the merger.’” *Whole Foods*, 548 F.3d at 1047 (citing *Brown Shoe*, 370 U.S. at 329 n.48; Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 964 (2d ed. 2009) (“[E]vidence of anticompetitive intent cannot be disregarded.”)); *see also University Health*, 938 F.2d at 1220 n.27 (stating that evidence from defendants’ premerger documents evincing an intent to eliminate competition through the proposed acquisition can help establish the government’s *prima facie* case). Microporous recognized that Daramic’s offer to acquire it eliminated competition. F. 886-94. As discussed below, Daramic’s internal documents plainly evince Daramic’s intent to eliminate Microporous as a competitive threat, protect Daramic’s market share, prevent price decreases, and implement price increases.

a. Daramic acquired Microporous with the intent to eliminate a competitor and to protect Daramic’s market share

As early as July 2003, Daramic’s head of sales, Tucker Roe, sent a memo to the President of Daramic summarizing the rationale for acquiring Microporous: “The only reason for acquisition would be purely defensive to secure our market share

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of the traction market and terminate the continued price erosion.” F. 750 (“The main disadvantage I see if we do not acquire [Microporous] is that [Microporous] may continue their plans for a second line resulting in either our loss of current customers or further reduction in our market pricing, hence loss of margins.”). In 2003, the President of Daramic put an acquisition of Microporous at the top of his list of possible acquisitions, describing the benefit to Daramic as: “Eliminate price competition.” F. 751. In September 2005, Mr. Hauswald advised Mr. Toth that Daramic should buy Microporous because it has taken EnerSys’ business from Daramic and threatens to take even more. F. 755. Mr. Hauswald told Mr. Toth that “[Microporous] is a real threat for our business, not only in the industrial market, but, later, in the automotive market, because there is no doubt that JCI and EXIDE will contact them for a deal, when our contracts will expire. I’m still recommending to buy [Microporous], as a defensive action.” F. 755.

On October 24, 2007, at Polypore’s regular third quarter Board of Directors meeting, Mr. Hauswald made a presentation to the Polypore Board which presented his rationales for acquiring Microporous. F. 854. Included in these rationales was Hauswald’s projection that Daramic would lose {redacted} million square meters of volume in 2008, {redacted} million square meters in 2009, and {redacted} million square meters in 2011, if it did not make the acquisition. F. 855. In reviewing his report, Mr. Hauswald discussed the downside scenario that Daramic would have to “lower prices by {redacted} on {redacted} million square meters of industrial volume to avoid Microporous Phase III [Expansion].” F. 856. The October 4, 2007 interim due diligence report also stated that without the acquisition, Daramic would have a “5-year EBITDA loss of {redacted} [million] by fighting against MP Phase III”; that there would be “[e]xcess supply and market price erosion”; and that Daramic [would have a] market share loss of {redacted} F. 858.

In its 2008 budget, Daramic’s management assumed that it would lose PE separator sales to Microporous of {redacted}

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million square meters in 2008, 2009, and 2010, respectively. F. 865. Daramic's documents also show an assumption that it would have to lower prices by **{redacted}** on **{redacted}** million square meters of product in 2009. F. 866. When Daramic presented the 2008 budget to the Board for approval in December 2007, Daramic also provided a comparison of how the long-range plan would look with and without the Microporous acquisition. F. 867. With an acquisition of Microporous, Daramic's underlying sales assumptions changed dramatically. F. 867. Daramic assumed that with an acquisition of Microporous, it would retain the millions of square meters of separator sales that it previously projected as losing to Microporous. F. 867. Additionally, Daramic assumed that it would no longer have to lower prices by **{redacted}** on **{redacted}** million square meters of separators in 2009. F. 867.

In October 2007, Mr. Hauswald gave a presentation entitled "Project Titan," regarding the acquisition of Microporous to the Polypore Board. F. 869. This presentation projected a business risk without the acquisition was that Daramic would lose market share of **{redacted}** and would lose **{redacted}** in EBITDA over five years by fighting against Microporous' Phase III expansion. F. 871. The Project Titan Board presentation revealed that the impact on Daramic's long-range planning ("LRP") EBITDA without the acquisition would be a loss of **{redacted}** F. 872. Mr. Hauswald's speaker notes for the October 2007 Project Titan Board presentation showed, by customer, the volume of business Daramic was projected to lose to Microporous over the next four years, if it did not acquire Microporous. F. 873. Hauswald projected Daramic would lose industrial at EnerSys, industrial and automotive at East Penn Battery, and automotive at both JCI Europe and JCI Americas. F. 873. The total volume of business that Daramic was predicted to lose to Microporous at these customers was **{redacted}** which would result in a cumulative four-year loss of volume of **{redacted}** million square meters. F. 873.

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b. Daramic acquired Microporous to avoid having to lower prices and to gain the ability to raise prices

Daramic's documents show that it believed that, absent the acquisition, it would have to lower prices and build low cost facilities to compete on price with Microporous. F. 876. The October 2007 Board presentation speaker notes stated under the heading, "No Acquisition - Sales volume loss and aggressive approach to block MP phase 3 expansion," that without an acquisition Daramic would "[t]arget specific MP customers with minimum {redacted} price reduction" and that Daramic would "[b]uild low cost production line to compete on price." F. 876.

Conversely, Daramic's documents show that it believed that, if it did acquire Microporous, it would be able to increase prices. Daramic's 2008 budget documents assumed that if Daramic acquired Microporous, it would be able to institute a {redacted} price increase to noncontract customers on industrial separators in 2010, resulting in a total increase of {redacted} million in EBITDA for Daramic in 2010. F. 880. The Polypore Board documents also indicated that Daramic planned to gain {redacted} million in additional EBITDA by phasing out its low margin Daramic HD production in Owensboro with CellForce in 2009, and increasing the market price on HD in 2010. F. 881. Approximately four days before the acquisition, the due diligence team provided the Board with a presentation that again included as an acquisition benefit the {redacted} price increase on industrial products in 2010. F. 861.

The evidence, found in F. 853-81, and summarized above "indicating the purpose of the merging parties," *Whole Foods*, 548 F.3d at 1047, is further persuasive evidence that the probable effects of Daramic's acquisition are harmful to competition.

6. Summary

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Complaint Counsel presented convincing evidence that the market share and HHI statistics give rise to a presumption of illegality; that Daramic purchased its only competitor in two of four markets, the only competitive restraint in one market, and a competitor in a market where only two participants remain; that Daramic announced price increases after the acquisition; and that Daramic purchased Microporous with the intention of eliminating a competitor, protecting Daramic's market share, and acquiring the ability to raise prices. Accordingly, Complaint Counsel has demonstrated a reasonable probability that the acquisition will substantially lessen competition in the future. The analysis next turns to the defenses asserted by Respondent.

E. Respondent's Defenses

Complaint Counsel has shown that the loss of competition is a sufficiently probable and imminent result of Daramic's acquisition of Microporous. Respondent has presented evidence to try to show that the acquisition is not likely to create or enhance existing market power. Specifically, Respondent argues that actual entry into the relevant markets would be timely, likely, and sufficient. RB at 30-35. In addition, Respondent argues that the existence of power buyers in the battery separator industry have promoted entry and have the ability to prevent anticompetitive effects. RB at 35-44. Respondent also argues that efficiencies that have been implemented since the acquisition are beneficial to the marketplace and to the consumers in it, such that the merger is not likely to be anticompetitive. RB at 44-46. Lastly, Respondent argues that, had the acquisition not occurred, Microporous would no longer be an existing competitive entity or, at best, would not be a viable competitive entity.

Evidence and arguments presented in support of these defenses has been fully considered. For the reasons more fully described below, none of these defenses prevail.

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1. Entry will not counteract the anticompetitive effects of the acquisition**a. Overview**

Even in highly concentrated markets, such as the relevant markets in the instant case, “if there is sufficient ease of entry, enough firms can enter to compete with the merging firms, undercutting any of the likely anti-competitive effects of the proposed mergers. In other words, entry is one way in which post-merger pricing practices can be forced back down to competitive levels.” *Cardinal Health*, 12 F. Supp. 2d at 55. “[I]f alternative sources of supply could enter the market with relative ease, then no hypothetical monopolist or cartel could achieve or maintain supra-competitive pricing without attracting new entrants. See Statements of the Federal Trade Commission Concerning Horizontal Mergers, 4 Trade Reg. Rep. (CCH) ¶ 13,200 at 20,902, § III (A)(1) (if entry is easy ‘it is unlikely that market power, whether individually or collectively exercised, will persist for long’).” *United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1072 (D. Del. 1991). See also *In re Echlin Mfg. Co., Inc.*, No. 9157, 105 F.T.C. 410, 1985 FTC LEXIS 46, at *25 (June 28, 1985) (stating that “[a]n attempt to exercise market power in an industry without entry barriers would cause new competitors to enter the market. This additional supply would drive prices back to the competitive level”). Entry can be demonstrated either by new firms entering the relevant market or via expansion into the relevant markets by existing firms. See *Baker Hughes*, 908 F.2d at 988-89 (affirming finding of entry where evidence showed, among other things, that at least two companies had entered the United States market immediately prior to the challenged acquisition and that a number of firms competing in Canada and other countries were likely to do so).

Determining whether there is ease of entry hinges upon an analysis of the barriers to new firms entering the market or to existing firms expanding into the relevant market. *Cardinal Health*, 12 F. Supp. 2d at 55 (citing *Baker Hughes*, 908 F.2d at

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987). Post-acquisition evidence is properly considered in determining whether entry is likely to avert any anticompetitive effects. *See Chicago Bridge*, 2005 FTC LEXIS 215, at **18. *See also Lektro-Vend Corp. v. The Vendo Co.*, 660 F.2d 255, 276 (7th Cir. 1981) (holding that post-acquisition evidence can be an important indicator of probability of anticompetitive effects where the evidence is such that it could not reflect deliberate manipulation by the merged companies).

A fundamental step in determining ease of entry is timeliness. *See Cardinal Health*, 12 F. Supp. 2d at 55 (“The first step in determining ease of entry is timeliness.”). Entry must also be proven to be “*likely*, and *sufficient* in its magnitude, character and scope to deter or counteract the competitive effects of concern.” *Cardinal Health*, 12 F. Supp. 2d at 55 (quoting *Merger Guidelines* § 3.0).

As more fully demonstrated below, the evidence shows that the relevant markets are affected by significant entry barriers, that entry has not occurred since the merger, and that it is unlikely that entry will be timely or sufficient to counteract the anticompetitive effects of the merger.

b. Entry barriers

Entry barriers, as stated in *In re Chicago Bridge*, have been explained as follows:

Expertise in the industry, a fair amount of capital, a positive reputation, and possession of specialized equipment are all barriers to entry. *Fruehauf Corp. v. FTC*, 603 F.2d 345, 357 (2d Cir. 1979); *Cardinal Health*, F. Supp. 2d at 58; *United States v. Blue Bell, Inc.*, 395 F. Supp. 538, 549 (M.D. Tenn. 1975). . . . In some markets, “the need for reliability is so great and the consequences of new product failure so dire that, even if the competitive nature of the market

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deteriorated, consumers would still be reluctant to switch to new entrants.” *Tote*, 768 F. Supp. at 1076 (finding proven ability to provide reliable systems and service an important factor in a racetrack’s selection of a totalisator supplier to preserve the track’s revenue and goodwill). The unwillingness of customers to use a company with an unproven track record is a barrier to entry. *See Tote*, 768 F. Supp. at 1078.

In re Chicago Bridge & Iron Co., No. 9300, 138 F.T.C. 1024, 2003 FTC LEXIS 96, at **242-43 (June 18, 2003), *aff’d*, 2005 FTC LEXIS 215 (Jan. 6, 2005), *aff’d*, 534 F.3d 410 (5th Cir. 2008).

Moreover, entry barriers need not reach some predetermined level before an anticompetitive effect becomes possible. *Fruehauf Corp. v. FTC*, 603 F.2d 345, 357 (2d Cir. 1979); *accord FTC v. Bass Bros. Enters.*, 1984 U.S. Dist. LEXIS 16122, at *67 (N.D. Ohio 1984). Impediments to entry that do not rise to the level of absolute barriers to entry may nevertheless permit the exercise of market power for substantial periods of time. *In re B.F. Goodrich Co.*, No. 9159, 110 F.T.C. 207, 1988 FTC LEXIS 16, at *33 (March 15, 1988). Courts and the Commission include as barriers to entry any condition that necessarily delays entry into a market for a significant period of time and, thus, allows market power to be exercised in the interim. *Id.*; *In re Echlin Mfg. Co.*, 1985 FTC LEXIS 46, at *26 n.4 (stating that barriers to entry encompass significant delays encountered by entrants). Consistent with these principles, the Merger Guidelines state that entry must be timely, which is defined as entry that is “achieved within two years from initial planning to significant market impact.” *Cardinal Health*, 12 F. Supp. 2d at 55 (quoting *Merger Guidelines* § 3.2); *United Tote*, 768 F. Supp. at 1079 (citing *Merger Guidelines* and stating that entry will be considered “easy” if can be successfully accomplished within a two-year time period). The time assessment properly includes the time for study, development, and debugging to achieve a “truly competitive” product. *See United Tote*, 768 F. Supp. at 1074-75.

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Complaint Counsel contends that the relevant markets are characterized by high barriers to entry, including high capital costs to achieve necessary scale-based benefits, experience and learning effects, specialized expertise and the value of reputation or brand. CCB at 35. Complaint Counsel further asserts that these entry barriers, combined with such requirements as facility construction, product development and product testing, means that entry would not be timely under the Guidelines. *Id.* at 35, 37-38. Respondent counters that entry barriers are low, that industry technology is widely known and not proprietary, and that new production lines can be installed and products tested in less than two years. RB at 31-32.

As more fully set forth below, the evidence establishes that there are significant barriers to entry into the relevant markets, including the needs for millions of dollars in capital investment, specialized equipment, technical expertise and “know-how” that is not widely available, and a favorable reputation with customers. Moreover, the time required to surmount these barriers, including to develop and test products and achieve the customer validation necessary to make product sales, exceeds two years. Under the applicable legal principles, such evidence belies a conclusion that there is ease of entry.

(i) Capital investment

The relevant costs of entry are “‘economic costs measured at the time of entry;’ that is, the costs that each firm -- whether an incumbent or a prospective entrant -- confronts at the time of its entry effort.” *In re B.F. Goodrich Co.*, 988 FTC LEXIS 16, at *31-32 (quoting in part *In re Echlin Mfg. Co.*, 1985 FTC LEXIS 46, at *30). The approximate cost of constructing a battery separator production line is \$1 per square meter of production capacity. Thus, building a 6 to 8 square meter production line will generally cost approximately \$6 to \$8 million, or more when including land and/or production facilities. F. 925. A single

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calender roll can cost over \$60,000, and multiple rolls are typically required. F. 926. Acquiring land and constructing a facility for manufacturing are additional investment costs. F. 967, 1098.

In order to be competitive and profitable, however, the evidence also shows that entrants must invest additional sums in order to obtain sufficient production scale. *See* F. 928 (scale is a barrier to entry). For example, an individual PE line with annual production capacity of 3 million square meters is “too small” to operate profitably because the profit margin of the battery separator industry is very small. F. 966. Similarly, when Asian manufacturer BFR was operating just two PE separator lines, its capacity of **{redacted}** because of the larger cost of investment to buy the land and to build the building and the lines. F. 967. In addition, significant scale is required to meet the demands of large battery manufacturers. F. 929. Accordingly, an entrant can expect to invest well in excess of \$8 million in order to be profitable in the relevant markets. As Daramic’s own documents recognize, scale is a competitive advantage, F. 964, 968, and the “capital investment needed to achieve the scale required to supply the large battery manufacturers” is a barrier to entry. F. 929. *See In re B.F. Goodrich Co.*, 1988 FTC LEXIS 16, at *44 (finding that substantial minimum efficient scale requirements in the industry would be likely to impede entry, and that new entrant would have to achieve a high sales level to avoid suffering significant cost disadvantage relative to other firms); *see also Cardinal Health*, 12 F. Supp. 2d at 57 (holding that the sheer economies of scale defendants possessed served as a barrier to new entrants attempting to grow and compete).

(ii) Technical expertise and “know-how”

The technology of making microporous membranes for battery separators is a very complicated technology. F. 959. One person cannot create a turnkey PE line, because the process is too complicated. It requires a team of several members with prior experience in PE production. F. 940-41. Engineers are required

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because the line has many different sections and many different manufacturing steps with each step needing a special technology. F. 941. For example, chemical engineering is needed for the production process, mechanical engineering for automation issues, mechanical engineering for equipment design, and environmental engineering to address environmental issues. F. 941. Good engineering also helps reduce manufacturing costs. F. 943. In addition, a good technical team is required in order to redesign and improve battery separator products, which is necessary for a potential entrant to compete with large firms such as Daramic and Entek. F. 960, 963. *See United States v. Ivaco, Inc.*, 704 F. Supp. 1409, 1420 (W.D. Mich. 1989) (including as entry barrier the fact that entrant would have to develop a machine that surpasses those currently on the market in order to compete against existing suppliers).

Learning how to build a battery separator line is an ongoing process where one learns day-by-day. F. 935. The installation process is modified as defects and problems are discovered, so that each new line should be better than the prior lines. F. 935. For example, Mr. Kung of BFR has refined his designs for a PE separator production line over the years. F. 937. Similarly, the lessons that Microporous learned from the early manufacturing of CellForce in Piney Flats, Tennessee, were used when setting up its lines in Austria, so as to avoid making the same mistakes. F. 945.

A skilled workforce is required to run a battery separator plant effectively and to meet customers' needs. Workers on the line coordinate several different pieces of equipment with different functions, and to ensure the product is formulated to the customer's exact specifications, a worker must know how to set the proper conditions for pressures, temperatures, and speeds. F. 946-48. When Microporous bought a production line from Jungfer, it sent workers over to Austria for training. F. 949. Microporous also decided to hire the Jungfer engineer who designed the line, Peter Gaugl, as an "insurance policy" to get the

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line operating quickly and correctly. F. 949. Indeed, one of the reasons for choosing Austria for Microporous' expansion plan was so that Microporous could hire former Jungfer employees who were familiar with PE battery separator production. F. 950.

Similarly, when Daramic decided to relocate the Jungfer lines it had purchased from Austria to Thailand, it sent former Jungfer personnel from Austria who were familiar with the equipment and had experience setting up PE lines of that type. F. 944. Having personnel skilled in producing rubber separators was important to Daramic in its acquisition of Microporous, because the rubber market was a new market and a new technology for Daramic. F. 957. The importance of skilled personnel is also demonstrated by the fact that, even though during the Owensboro strike Daramic brought its own management and employees over from Europe to help run the manufacturing lines, the separators produced on those lines during the strike had quality issues and the number of defects rose significantly. F. 952-56.

Battery separator manufacturing technology is not only highly technical, but it is also not widely available. According to former Microporous, and now Daramic employee, Peter Gaugl, who built the PE/CellForce line for Microporous at Piney Flats in 2000, Mr. Kung of BFR, two former Jungfer employees – Dr. Winkler and Mr. Duya – and “certain people at Daramic as well as at Entek” could design and install a production line. F. 12, 939, 980. *Compare United States v. Gillette Co.*, 828 F. Supp. 78 (D.D.C. 1993), cited by Respondent, RB at 32, in which the court specifically found “ample evidence that the mechanics of fountain pen design are readily available, thus leaving no technological barriers to entry into the market.” 828 F. Supp. at 84. Moreover, there are proprietary barriers to acquisition of certain technology and processes. For example, CellForce technology is patent protected until 2019. F. 932. Daramic viewed the Jungfer manufacturing process it acquired as sufficiently proprietary to protect against its use by competitors, and sued Microporous hoping to prevent its use in Europe. F. 933. *See also* F. 934

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(Microporous and Daramic each protect production line specifications and consider them proprietary).

Technical expertise is very important to battery manufacturer customers when choosing a supplier, including for the purposes of innovation, customer support, and collaborative engineering. F. 961-62, 971, 1089, 1104. For example, one of the reasons EnerSys declined to get involved in helping {redacted} F. 961. EnerSys saw providing capital to an entity without expertise in the PE market as too high a risk. F. 961. Defects or delays in supply costs customers money, in terms of efficiency losses at plants as well as warranty claims on batteries. F. 953-56, 1059. Because PE battery separator plants make continuous improvements in efficiency and quality over time, an experienced producer is in a better competitive position than a start-up firm. F. 958. *See United Tote*, 768 F. Supp. at 1072-73 (holding that technical performance requirements, combined with customer demand for 100% system reliability, constituted barrier to timely entry).

(iii)Reputation

It is well-recognized that a company's reputation for expertise, quality, and success in the relevant markets can constitute an impediment to entry by others. *Chicago Bridge*, 534 F.3d at 437 (stating that reputation served as a proxy for firms' experience and success in building LNG projects in the United States); *Cardinal Health*, 12 F. Supp. 2d at 57 (noting that strength of reputation that the defendants possessed, in relation to competitors, constituted barrier to entrants' ability to compete). In the instant case, Daramic's own documents acknowledged that reputation is a barrier to entry. F. 928-29. Furthermore, battery manufacturer EnerSys testified that a good reputation is one of the things it looks for in a potential supplier, and that it was willing to try Microporous' CellForce product when it was offered because Microporous already had a great reputation with EnerSys' European and former Hawker personnel for customer focus, competitive pricing, and technical superiority. F. 970-71. Exide

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also perceived that Microporous had a very good reputation in the marketplace. F. 972. See *United Tote*, 768 F. Supp. at 1076 (holding that reputation was a barrier to entry where “proven ability to provide reliable systems and service” was an important factor in customer’s choosing supplier).

(iv) Time required for entry*In general*

Complaint Counsel’s expert, Dr. Simpson, correctly concluded that the overall time required to obtain tangible assets, such as those possessed by Microporous, including production facilities, an effective product that is qualified by customers, a technical workforce that could troubleshoot and innovate, and an effective sales force, as well as intangible assets such as “know-how” and a favorable reputation with customers, would require at least several years. F. 923, 973. Some of these assets need to be acquired sequentially. F. 923. As Dr. Simpson explained, “you can’t test a product until you develop a product and you can’t get learning by doing until you’re actually producing the product and figuring out through producing it how to make it more efficiently.” F. 923. Some assets can be acquired simultaneously, such as product development and product testing. F. 973. Regardless of how the time period for acquisition is measured, according to Dr. Simpson, entry would require several years. F. 973. Moreover, Daramic’s use of exclusive contracts (*see, e.g.*, F. 820-48) can further impede entry by depriving the entering firm of potential sales. F. 973

Constructing the means of production

On average, it takes an experienced PE line builder approximately 18 to 20 months to design, equip, install and “debug” a PE battery separator line. F. 974-75. This timeline assumes an existing facility, and, therefore, does not include the time required for an entrant to engage in planning, acquire land, if necessary, and to design and construct a facility to house the line.

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F. 974-75; *see also* F. 984 (“turnkey” line took 18 months to construct), F. 988-90 (including business plan, facility acquisition, and construction, Microporous’ Austrian plant took over two years to begin producing product). In addition, fully training a line workforce takes approximately six months. F. 985. While 18 to 20 months is an average to build a line, in practice, the total time period required to begin producing product for commercial sales is longer. For example, Microporous first began its plans to build a new plant in Europe in early 1999. F. 986. However, it was not until 2004 to 2005 that serious efforts were underway. F. 986. In January 2006, Microporous prepared its business plan for the expansion and ordered the long lead-time items for its new lines in December of 2006. F. 988-89. The construction of the plant building began in February 2007. F. 990. Commercial product was first produced from the Feistritz plant in March 2008, and the Feistritz plant started operations on a regular schedule in June 2008, although as of January 2009, the Austrian facility was still going through a learning curve. F. 990, 992.

Developing and testing product

The experiences of Daramic and Microporous show that developing a profitable, competitive separator product takes several years, even for established and experienced manufacturers.

Microporous’ development of the CellForce product took many years. F. 995. CellForce was initially developed by Microporous in 1995 to 1996. F. 995. Microporous installed its “turnkey” production line that it obtained from Jungfer in 1999 and began producing CellForce on a production line at its Piney Flats facility in early 2001. F. 995. It took more than a year for Hawker/EnerSys, the first CellForce customer, to complete its testing and approval process and to begin buying commercial quantities. F. 1002. Trojan Battery, the second CellForce customer, did not begin buying commercial quantities until 2002, after completing nearly two years of testing and several additional

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months of trouble-shooting. F. 1002-03. Significantly, Microporous did not begin making profits on its investment in CellForce until 2004, approximately two to three years after it began selling commercial quantities of CellForce to Hawker/EnerSys. F. 996.

Similarly, Microporous worked on entering the SLI market for years. F. 649-51, 684-90, 694-722. For example, Microporous provided a PE SLI sample to JCI in 2003, but the sample did not perform sufficiently and was not qualified by JCI. F. 651. JCI reengaged in discussions with Microporous in 2005 about possible supply of PE SLI separators from Microporous to JCI in the United States and in Europe. F. 684-85, 687. Subsequent to JCI's 2005 discussions with Microporous, JCI tested Microporous' PE SLI separators a second time after Microporous had improved the manufacturing process. F. 688. This second time, the problems that had been encountered by JCI in its earlier testing of Microporous separators were fixed. F. 688. Thereafter, JCI was comfortable that Microporous could produce an SLI separator that JCI could use, and JCI qualified Microporous' product for use in 2007. F. 689-90. Thus, it took several years, from 2003 until 2007, for Microporous to reach the point of entry with JCI.

Daramic spent many years trying to develop a battery separator that would work well in deep-cycle applications. F. 993. Daramic began testing different additives for a new deep-cycle separator as early as 1999. F. 993. This project evolved over time, beginning with the development of Daramic DC, which went to market in 2002, and culminated in the development of Daramic HD. F. 993. Daramic began testing Daramic HD, as a replacement for Daramic DC, in 2003. F. 993. Daramic expected customer qualification of Daramic HD for use in deep-cycle batteries to take more than 18 months. F. 1024. It was not until 2005 that Daramic made its first commercial sales of Daramic HD. F. 993. In 2005, however, Daramic was making very little gross margin on Daramic HD because of the manufacturing costs and the market price it had to set in order to get customers to

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switch from Microporous' deep-cycle battery separators to Daramic HD. F. 994.

Testing and qualification of product by customers

As indicated above, battery manufacturers test and validate separator products before purchasing commercial quantities. Battery manufacturers generally provide customers with a warranty against material, workmanship and manufacturing defects for a period of time. F. 1001. If a battery has a bad component, such as a separator, the warranty may require the manufacturer to replace the defective battery with a new battery. F. 1001. Failing to test a battery separator in the battery prior to sale is risky, since doing so increases the risk of warranty claims for quality issues. F. 1001.

In general, testing of new separator product typically involves testing both the separator material itself and the battery's performance using the material, including life-cycle measurement. F. 1001, 1007. Validation will typically rely on results of laboratory testing and, if the results of lab testing warrant, field testing. F. 1004-05, 1018-20. A battery manufacturer will also test and qualify a separator when it switches backweb thickness. F. 1008.

Use of a new separator also requires the battery manufacturer to understand and tweak the battery manufacturing machines to be able to run a different product. F. 1006. After a separator is qualified by testing, a battery manufacturer must also make sure the separator can run on the battery manufacturing lines. F. 1006.

To better illustrate the required procedure, at EnerSys, the process for testing and validating a new separator product involves preliminary material tests of separator samples, which are typically made in a laboratory, and subsequent tests of production samples in actual batteries. F. 1004. The preliminary

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tests involve testing the separator material in puncture, shrinkage and electrical resistance tests, as well as analyzing its brittleness and composition, *i.e.*, particularly oil. If the separator samples pass these preliminary tests, EnerSys will request the potential supplier to provide production samples, *i.e.*, separators made on the supplier's production line. F. 1004. After receiving production samples from a potential separator supplier, EnerSys builds test batteries with the new separators. These test batteries undergo performance and battery life tests. F. 1005. The performance tests essentially analyze whether the battery with the new separator will generate the electrical current specified for the battery. F. 1005. The battery life tests are time-consuming because they are designed to determine whether the battery will perform well for the duration of the battery's warranty period. F. 1005. These tests involve placing the test batteries in a box that has an elevated temperature, which helps age the battery. F. 1005. Life-cycle testing and testing of production samples can be conducted concurrently. F. 1007.

The evidence shows that completion of customer testing and validation of products for the relevant markets varies. Full testing of battery separators for motive and UPS batteries takes two to three years to complete. F. 1011-13. Product testing for deep-cycle batteries may be completed in 18 to 24 months, depending on how frequently the battery is cycled from charge to discharge. F. 1015-17, 1019-20. In general, completing testing for SLI separators takes less time than for other applications. Life-cycle testing for transportation battery separators can be expected to take up to nine months, and field testing to take one year. F. 1025.

(v) Summary of barriers to entry

The relevant markets in this case are characterized by substantial barriers to entry. The most significant of these are the many millions of dollars in capital investment required to achieve sufficient scale to compete, and the several years that are required to plan, construct, and debug production facilities, develop and

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test products, obtain customer validation and achieve a favorable reputation. “As the time and expenditures needed to overcome barriers and impediments to entry increase, the likelihood that a given acquisition will have anticompetitive effects, . . . increases as well.” *In re B.F. Goodrich Co.*, 1988 FTC LEXIS 16, at *34. Accordingly, the barriers to entry in the relevant markets prevent a conclusion that there is ease of entry in the relevant markets at issue. *See Fruehauf Corp.*, 603 F.2d at 358 (holding that Commission’s finding of initial capital costs in excess of 10 million dollars was substantial evidence supporting conclusion that capital costs were substantial and significant barrier); *United Tote*, 768 F. Supp. at 1079 (concluding that because entry into relevant market with a competitive product would be costly and time consuming, threat of entry would not pose a significant constraint on price increases in the market); *Ivaco*, 704 F. Supp. at 1420 (entry difficult where it would take approximately three years and cost between 2.5 and 3 million dollars). *Compare United States v. Calmar, Inc.*, 612 F. Supp. 1298, 1306 (D.N.J. 1985) (holding that entry was easy where it would take a year and a half and cost approximately half a million dollars); *In re Echlin Mfg. Co.*, 1985 FTC LEXIS 46, at *21, *40, *45 (noting that entry would take as little as 500 dollars and less than a year to successfully enter the market, and concluding entry was easy).

c. Actual and potential entrants

Respondent contends that entry has occurred in the relevant markets, or is likely. RB at 31-33. The history of entry into the relevant market is a central factor in assessing the likelihood of entry in the future. *See* Guidelines § 3.1; *Baker Hughes*, 908 F.2d at 988; *United States v. Waste Management, Inc.*, 743 F.2d 976, 982 (2d Cir. 1984); *United Tote*, 768 F. Supp. at 1080-82; *Cardinal Health*, 12 F. Supp. 2d at 56. *See also Chicago Bridge*, 2005 FTC LEXIS 215, at **18 n.45 (quoting 2A Areeda, Hovenkamp & Solow, *Antitrust Law* ¶ 420b at 60 (2d ed. 2002) (“The only truly reliable evidence of low barriers is repeated past entry in circumstances similar to current conditions.”)); *In re B.F.*

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Goodrich Co., 1988 FTC LEXIS 16, at *40 (noting that history of lack of de novo entry supported conclusion that entry barriers were high). “The Guidelines state that entry is to be considered ‘likely if it would be profitable at premerger prices, and if such prices could be secured by the entrant.’ Guidelines § 3.3.” *Cardinal Health*, 12 F. Supp. 2d at 56.

In the instant case, there is not a history of easy entry. Indeed, while Entek supplied separators for industrial applications more than a decade ago, it has essentially exited that business. F. 1027, 1040. Moreover, the experiences of Microporous in entering the SLI market and trying to enter the UPS market, and Daramic in entering the deep-cycle market, described in F. 457-501, 617-28, 638-722, only confirm that entry into the relevant markets is not easy; their efforts, over many years, required the devotion of considerable resources to planning, obtaining specialized equipment, product development, and product testing, among other necessities. Compare *United States v. Syufy, Enters.*, 903 F.2d 659, 666 n.11 (9th Cir. 1990) (holding that entry was easy where new competitor in movie distribution business not only successfully entered market in less than two years, but also was operating more first-run screens).

Respondent asserts that Entek, as well as various Asian manufacturers, are likely entrants. Entek is not a participant in any of the relevant product markets except SLI. F. 382-83, 393-397, 425, 1031-32, 1034, and the evidence demonstrates that Entek is unlikely to enter the deep-cycle, motive or UPS battery separator markets within the next two years. F. 398, 400-03, 1028-30, 1033, 1037-38, 1041, 1043-44, 1048. First, Entek has repeatedly declined opportunities to expand into these markets, due to the cost of entry, and because Entek is committed to a strategy that focuses on selling for the SLI market. F. 395-98, 400, 1029-31, 1033-39, 1041. Moreover, in order to enter the deep-cycle market at a level sufficient to restore the pre-acquisition competitive environment, Entek would need to develop a reliable product, modify its production line, get qualified by customers, and then gain the learning by doing

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necessary to be efficient. F. 1047. This is unlikely to happen within two years. F. 973, 1028. **{redacted}** F. 1049-50.

Respondent next claims that various Asian manufacturers have entered, or are likely entrants. RB at 32. According to Respondent, Asian separator makers are “aggressive” global competitors, which are considered to be “equal” to their North American counterparts in terms of quality, technology and capability, and that many have been qualified by North American battery makers. RB at 32-33. The evidence demonstrates, however, that Asian separator manufacturers are not currently supplying any of the relevant product markets in North America. F. 334, 442, 446-450, 1062, 1064, 1069, 1078. Respondent maintains that an Asian manufacturer could build a production line in 16 to 18 months, and obtain product qualification “well within” the two-year time frame, and operate profitably in the North American market. RB at 32-33. Again, the evidence is to the contrary.

In fact, as set forth above, it takes more than two years to build a production line, complete testing, and obtain customer validation of products. In addition, battery manufacturers do not consider the quality of Asian-produced separators to be in line with American standards. F. 1061, 1082, 1088-89, 1101. *See also* F. 1065 (Daramic rated Anpei **{redacted}**); F. 1075-77 (**{redacted}**). For example, Exide believes that the infrastructure, technology and “know-how” is not present in the manufacturing operations of Asian suppliers and that Asian manufactured separators do not meet the standards of American consumers for American cars. F. 1089. *See also* F. 963 **{redacted}**; F. 1066 **{redacted}** EnerSys believes that, other than **{redacted}** does not have the technical expertise in making separators, setting up lines, and handling technical issues. F. 1103. If **{redacted}** EnerSys would consider **{redacted}** to be on “shaky ground.” F. 1103. Finally, while some battery manufacturers have performed some testing on material produced by some Asian manufacturers, full testing has not been completed and, as to some Asian

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manufacturers, testing that was performed has yielded inadequate results. F. 1061, 1081-83, 1095, 1102. Contrary to Respondent's assertions, the evidence does not show that any Asian battery separator manufacturer has been qualified for use in any of the relevant product markets. *See, e.g.*, F. 1102 (qualification process for {redacted} "just getting started" at EnerSys); F. 1108 (East Penn Battery approved Anpei separator for use in lawn mower battery). Even {redacted} F. 445, 1111.

Asian battery separator makers face additional barriers to being able to compete in the relevant markets. Purchasing Asian products for the North American markets is more costly, due among other things, to import charges, higher shipping costs, and additional warehousing costs. F. 314, 316-19, 337, 341-42, 1060, 1084, 1094, 1096, 1100, 1102, 1104, 1110. Language barriers are also an issue. F. 1091. In addition, {redacted} battery customers may be reluctant to contract with {redacted} F. 1050, 1085. In light of these and other significant entry barriers, such as small scale production, F. 1057, 1069, 1072, 1082, and lack of positive reputation, F. 1061, 1082, 1088, 1101, timely entry by any Asian battery separator with a "truly competitive" product is unlikely. *United Tote*, 768 F. Supp. at 1075. F. 1063; *see also* F. 967 ({redacted} of its PE manufacturing operations).

Battery manufacturers testified that they have considered, or would consider, Asian-made battery separators for the North American market, and some have engaged in discussions with various Asian suppliers, including consideration of quotes. F. 1081-82, 1090, 1092, 1094, 1096, 1108-09. However, "the mere fact that a customer may try to develop an additional supplier in an attempt to enhance competition does not mean that the competition lost from an acquisition has been replaced." *In re Chicago Bridge*, 2005 FTC LEXIS 215, at **174; *see also id.* at **117 (noting that unless customers were willing to consider bidders from the alleged potential entrants, LNG tank customers in the United States would have no choice other than CB&I. Thus, such consideration showed little more than a refusal to throw themselves on CB&I's mercy). Despite consideration of

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Asian suppliers, it remains unlikely that battery manufacturers will purchase Asian made battery separators for the North American market in the next two years. F. 1063, 1087, 1093, 1097, 1099, 1102, 1105, 1110-12. For example, JCI, {redacted} F. 1111. Exide does not foresee buying {redacted} in the next two years. F. 1087.

Even if entry were deemed to be timely and likely, however, entry must also be at a level sufficient to counter the anticompetitive effects of the merger. *Cardinal Health*, 12 F. Supp. 2d at 58 (quoting *Merger Guidelines* § 3.0) (“[T]imely and likely entry must also ‘be sufficient to return market prices to their premerger levels.’”). Respondent contends, that for entry to sufficiently replace the loss of competition due to the merger, an entrant need only “replace one small PE line in the North American market” because this was the extent of “Microporous’ scale.” RB at 32. This assertion lacks legal or factual support. For entry to be sufficient, it has to be of a “sufficient scale” adequate to constrain prices and break entry barriers. *Chicago Bridge*, 534 F.3d at 429. The potential entrant must be of a sufficient scale to compete on the same playing field as the incumbent in order to be able to constrain the likely anticompetitive effects. *Id.* Respondent’s citation to *In re B.F. Goodrich*, 110 F.T.C. at 345, refers to the divestiture order in that case and is immaterial to the determination of sufficiency of entry in this case. Moreover, as Dr. Simpson indicated, replacing Microporous as a competitive constraint would require an entrant to possess numerous tangible assets, including production facilities, an effective product that was qualified by customers, a technical workforce that could troubleshoot and innovate, and an effective sales force, as well as intangible assets such as “know-how” and a favorable reputation with customers. F. 923, 973. As set forth above, the evidence shows that Asian manufacturers do not presently possess such assets for the relevant markets, and that they are unlikely to acquire such assets within two years.

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Finally, contrary to Respondent's argument, RB at 34-35, the evidence does not warrant a conclusion that battery makers will vertically integrate with, or sponsor entry into the relevant markets by, Asian separator manufacturers, within the applicable time frame or on a sufficient scale to counter the anticompetitive effects of the merger. F. 1113-26. For example, Exide has never considered entering a joint venture with any separator manufacturer, nor is Exide interested in investing money in a battery separator manufacturer. F. 1126. In addition, East Penn Battery has never considered investing capital in an Asian supplier of PE, and East Penn Battery does not have any current plans to enter a joint venture with any battery separator manufacturer or to sponsor the entry of any battery separator manufacturer. F. 1125. Further, East Penn Battery does not have any plans to vertically integrate and manufacture separators in-house. F. 1125. Exide has not agreed to sponsor Entek in expanding into separators for industrial applications. F. 1033, 1035. EnerSys considered {redacted} F. 1124. {redacted} F. 1123, the preponderance of the evidence, as described above, is that neither sponsored entry nor vertical integration is likely to restore competition in the relevant markets. *See Chicago Bridge*, 534 F.3d at 430 n.10 (“[T]here is a high threshold applied to assertions as to whether a company can be considered a potential entrant for anti-trust purposes. . . . The more concentrated the market and the greater the threat posted by the challenged practice, the more convincing must be the evidence of likely, timely, and effective entry.”) (citation omitted).

2. Power buyers will not counteract the anticompetitive effects of the acquisition

Respondent argues that “power buyers” have the ability to prevent anticompetitive effects. RB at 35-36. Complaint Counsel responds that North American customers are captive to Daramic's pricing and supply decisions and that there is no evidence that characteristics in the separator industry are “so much greater . . . than in other industries that they rebut the normal presumption.”

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CCRB at 22, 26 (citing *Heinz*, 246 F.3d at 724). For the reasons which follow, Respondent's argument fails.

The "power buyer" defense is grounded in the theory that large, sophisticated buyers may have the bargaining power to resist anticompetitive price increases and, thereby, counter anticompetitive effects of a merger. In *Baker Hughes*, upon which Respondent relies, the Court of Appeals for the D.C. Circuit relied upon the findings of the district court regarding the buyers' sophistication and large order sizes, coupled with their ability to "closely examine available options" while "typically insist[ing] on multiple, confidential bids for each order," as convincing evidence of bargaining power, which would allow customers to resist anticompetitive price increases that might result from the merger. *Baker Hughes*, 908 F.2d at 986-87. In *Baker Hughes*, the court also found that defendants had additionally provided compelling evidence of ease of entry into the market. *Id.* at 987. "Although the courts have not yet found that power buyers alone enable a defendant to overcome the government's presumption of anti-competitiveness, courts have found that the existence of power buyers can be considered in their evaluation of an antitrust case, along with such other factors as the ease of entry and likely efficiencies." *Chicago Bridge*, 534 F.3d at 440 (citing *Cardinal Health*, 12 F. Supp. 2d at 58; 4 *Areeda & Hovenkamp*, at ¶ 943c).

Respondent contends that three battery manufacturers – JCI, EnerSys and Exide – are power buyers. RB at 36-44. However, Respondent does not delineate the product markets in which these manufacturers are ascribed as being power buyers. *Id.* Complaint Counsel, in its reply, similarly argues generally that "North American customers are captive to Daramic's pricing and supply decisions," CCRB at 26, without regard to the product markets in which the customers operate. *See also* CCRB at 37 ("Daramic's repeated mantra that the relevant product markets have 'power buyers' is unsupported.").

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“At a basic level, customers must have alternative suppliers in order to have any real bargaining power.” *Chicago Bridge*, 2005 FTC LEXIS 215, at **195. For example, in *Country Lake Foods*, relied upon by Respondent, the district court found defendants’ power buyer argument persuasive where “substantial buyers” of the relevant product could and would turn to alternative suppliers just outside the relevant geographic market. *Country Lake Foods*, 754 F. Supp. at 672-73, 679. See also *In re American General Ins. Co.*, No. 8847, 89 F.T.C. 557, 1977 FTC LEXIS 167, at *184-85 (June 28, 1977), *rev’d on other grounds*, *American General Ins. Co. v. FTC*, 589 F.2d 462 (9th Cir. 1979) (where respondent challenged the ALJ’s failure to take into account the sophistication of agents, the Commission held: “we fail to see how the agents’ perspicacity in locating alternatives can immunize them from market power. Wise choices among alternatives depend in the first instance on the existence of those alternatives.”).

In the deep-cycle, motive, and UPS markets, as a result of the acquisition of Microporous, customers have no alternative suppliers to Daramic. Section III D 4 a, *supra*. Therefore, as in *Chicago Bridge*, “the buyers in this case have no real alternatives to the monopolist” and, thus, do not have “any real ability to thwart price increases post-merger.” 2005 FTC LEXIS 215, at **196-97. It is only in the SLI market where customers have an alternative to Daramic. Section III D 4 b, *supra*. Accordingly, Respondent’s argument that customers exercise buyer power is evaluated only with respect to the SLI market.

In support of its claim that JCI is a power buyer, Respondent points to evidence that JCI, the largest battery manufacturer in the world, no longer buys its separators from Daramic, having instead entered into a long-term supply contract with Entek. Respondent notes also that **{redacted}** RB at 36. Respondent asserts that JCI is powerful enough to have **{redacted}** in the SLI market, thereby counteracting any possible anticompetitive effects of Daramic’s acquisition of Microporous. RB at 36.

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The evidence does not demonstrate that JCI is a power buyer within the meaning of applicable case law. First, JCI {redacted} F. 339, 1111. Moreover, the evidence does not indicate that JCI plans to {redacted} See RFF 491-500, 1114-19. In addition, {redacted} the evidence indicates that {redacted} may actually strengthen Daramic's position with other manufacturers, such as Exide and EnerSys. {redacted} F. 1115. {redacted} F. 1050, 1085.

With regard to EnerSys, which on January 14, 2010, filed a Form 8-K with the Securities and Exchange Commission ("SEC") announcing the purchase of certain assets and assumption of certain liabilities of the Douglas Battery Manufacturing Company, F. 59, Respondent states that Daramic has agreed to myriad terms beneficial to EnerSys and that Daramic's pricing for PE separators for EnerSys was the result of extensive contract negotiation. RB at 39. Respondent argues that {redacted} (discussed in subsection 1, above) demonstrate the power that buyers in the battery separator industry have to control the competitive atmosphere of their supply. RB at 40. As discussed below, this evidence does not support Daramic's assertion that EnerSys is a power buyer.

In support of its argument that Exide is a power buyer, Respondent asserts that although Exide, either the largest or second largest battery manufacturer in the world, entered into a negotiated ten-year supply agreement with Daramic in 1999 as part of the purchase of Exide's Corydon separator facility, Exide has still been able to repeatedly negotiate for itself better terms, has managed to avoid price increases, and has breached the terms of those agreements. RB at 42-44. Respondent further claims, based upon evidence adduced in the reopened hearing of November 12, 2009, that most recently Exide has been {redacted} RBROH at 13.

Respondent overstates the significance of the evidence adduced at the reopened hearing of November 12, 2009 to its

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asserted power buyer defense. Evidence adduced at that hearing demonstrates that, beginning in June 2009, and pursuant to the supply contract between Exide and Daramic, Exide began **{redacted}** F. 746. The evidence further shows, however, that Exide's purpose **{redacted}** and was not to enable Exide to replace Daramic with another supplier. F. 747. Exide's purpose in this regard was communicated to Daramic. F. 747 (Daramic acknowledging its "understanding" that Exide **{redacted}**). In addition, on January 19, 2010, Respondent filed a Form 8-K with the SEC announcing that Daramic entered into a new evergreen supply agreement with Exide. F. 749. As discussed below, this evidence does not support Daramic's assertion that Exide is a power buyer.

In the SLI market, there is only one alternative to Daramic. In the deep-cycle, motive and UPS markets, there are no alternatives to Daramic. Accordingly, the evidence cannot support Respondent's power buyer defense. As in *Chicago Bridge*, "this case is unlike *Baker Hughes*, . . . where there were ample available alternatives for customers in a market with low entry barriers." *Chicago Bridge*, 534 F.3d at 440. Further, also as in *Chicago Bridge*, "there is no history nor other indication that customers who formerly relied on [the acquiring and the acquired company] will undertake to [manufacture the product] on their own." 534 F.3d at 439; F. 1113-20 (no vertical integration). "The absence of such evidence, together with the lack of evidence of adequate entry of competitors, undermine the basic premise for this defense." *Id.*

Contrary to Respondent's argument, the fact that EnerSys and Exide have each considered obtaining supply from some Asian separator manufacturers does not demonstrate that such manufacturers are available alternatives. *In re Chicago Bridge*, 2005 FTC LEXIS 215, at **174; see also *id.* at **117. Furthermore, the evidence, as discussed in Section III E 1 c, *supra*, indicates that Exide does not foresee **{redacted}** Asia in the next two years, and that Asian separator manufacturers are not

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now, or likely in a timely fashion to become, meaningful alternatives to Daramic in the North American SLI market.

Further undermining Respondent's power buyer defense is evidence that shows the power that Daramic has exerted over its customers. For example, Daramic admitted in its own strategic planning document that "[b]attery manufacturers lack purchasing power despite their scale due to limited number of suppliers." F. 435. Daramic acknowledged "strong-arming" JCI into the January 2004 {redacted} F. 677, 680; *see also* F. 678 (Daramic document noting, "[u]nder pressure, JCI signed the proposed contract). Daramic's post-acquisition supply proposals to Exide are {redacted} than what Exide was paying pre-acquisition. F. 905. Exide's analysis shows that it will {redacted} F. 905.

Without ample alternatives to turn to and with high barriers to entry or expansion (*see* Sections III D 4, III E 1, *supra*), Respondent's power buyer defense does not overcome Complaint Counsel's strong showing of reasonably likely anticompetitive effects in the four relevant product markets.

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3. Efficiencies will not counteract the anticompetitive effects of the acquisition

Courts and the Commission recognize that efficiencies resulting from a merger can constitute a means of rebutting the government's *prima facie* case that a merger will substantially lessen competition. *University Health*, 938 F.2d at 1223; *Heinz*, 246 F.3d at 720; *In re Evanston*, 2007 FTC LEXIS 210, at *191-92 (“The defendant has the burden of production to show that efficiencies offset any likely anticompetitive effects of the increase in market power produced by the merger.”). “A defendant who seeks to overcome a presumption that a proposed acquisition would substantially lessen competition must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers.” *University Health*, 938 F.2d at 1223.

Efficiencies almost never justify a merger to monopoly or near-monopoly. *Heinz*, 246 F.3d at 720 (quoting *Merger Guidelines* § 4). Where, in the instant case, the HHI is well above 1800 in all four product markets and the HHI increase is well above 100 in two of the four markets, “extraordinary” efficiencies must be shown. *Heinz*, 246 F.3d at 720 (quoting 4A Areeda and Hovenkamp, *Antitrust Law* ¶ 971f at 44 (2d ed. 1998)). A showing of extraordinary efficiencies is appropriate in such strong statistical cases because “the likelihood of a significant price increase is particularly large, and there is less competition present to ensure that the benefit of efficiencies will flow to consumers even in the relatively long run.” Areeda, *supra*, at 44-45. Moreover, claimed efficiencies must stand up to “rigorous analysis” in order to ensure that they are more than mere speculation. *Heinz*, 246 F.3d at 721. As the Commission stated in *In re Evanston Northwestern Healthcare*, the claimed efficiencies must be:

- (1) verifiable; (2) merger-specific, *i.e.*, ones that could not practicably be achieved without the proposed

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merger; and (3) greater than the transaction's substantial anticompetitive effects. *See Merger Guidelines* § 4; *see also Heinz*, 246 F.3d at 721-22 (finding that, among other things, asserted efficiencies must be “merger-specific”); *University Health*, 938 F.2d at 1223 (“speculative, self-serving assertions” will not suffice); *Staples*, 970 F. Supp. at 1089-90 (rejecting claimed efficiencies that were “unverified” and not supported by “credible evidence”).

2007 FTC LEXIS 210, at *226-27. Applying the above principles to the instant case, Respondent's efficiency defense is without merit.

In support of its efficiencies defense, Respondent relies on evidence that, since the acquisition: Daramic has saved an annualized amount of approximately **{redacted}** in raw materials costs due to including Microporous' volume in Daramic's purchasing agreements, F. 1139; after procedures implemented by Daramic, CellForce line yields have increased from 76% to over 90%, F. 1142; Daramic has implemented procedures at Microporous facilities to reduce waste and energy consumption and to recycle, F. 1144; Daramic has also reduced the number of employees since the acquisition, F. 1141; Daramic has **{redacted}** F. 1143. Together, this evidence does not amount to “extraordinary” efficiencies that are of sufficient magnitude to offset the anticompetitive effects of the Microporous acquisition. F. 1147.

Respondent has failed to quantify its efforts to recycle, reduce waste, reduce energy usage, **{redacted}** F. 1143-44. Respondent also has not demonstrated that such claimed efficiencies could not have been achieved without the merger and its concomitant anticompetitive effects. *See Heinz*, 246 F.3d at 722 (rejecting efficiencies defense based on claimed product improvements). For the same reason, evidence of improvements in CellForce yields does not suffice, even though such improvements appear to

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have been quantified by Respondent. F. 1142. Similarly, Respondent's reduction in duplication of employees and achievement of volume savings in raw material costs do not rise to the level of significant economies that offset the anticompetitive effects of the merger. *See University Health*, 938 F.2d at 1223; *In re Evanston*, 2007 FTC LEXIS 210, at * 226-27. To be sure, the evidence presented does not meet the standard of "extraordinary" efficiencies necessary to justify the merger in this case, where, in all four markets, the HHI is well above 1800 and, in two markets, the HHI increase is well above 100. *See Heinz*, 246 F.3d at 720. Respondent's reliance upon *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045 (8th Cir. 1999) is unavailing. In that case, unlike the instant case, the district court erroneously refused to consider evidence that the claimed efficiencies had procompetitive effects, and moreover, unlike the instant case, "the evidence show[ed] that the merged entity may well enhance competition. . . ." *Id.* at 1055.

Most importantly, and in contrast to *Tenet Health*, Respondent has failed to demonstrate that any of the asserted cost savings upon which it relies have been passed on to consumers, and that, therefore, the merger is procompetitive. Indeed, Respondent's expert did not even analyze whether any efficiencies gained since the acquisition have been passed on to consumers. F. 1145. In this respect, the instant case is readily distinguishable from *United States v. Country Lake Foods*, 754 F. Supp. at 680, a case relied upon by Respondent, in which there was ample evidence that the claimed efficiencies would result in greater price competition in the marketplace. *See also In re American Medical Int'l.*, No. 9158, 104 F.T.C. 1, 1984 FTC LEXIS 11, at *516 (Jul. 2, 1984) (holding that efficiencies defense failed because even assuming "that these cost savings can be realized, [respondent did] not establish that they will necessarily inure to the benefit of consumers").

For all the foregoing reasons, Respondent's efficiencies defense must fail.

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4. Microporous' financial condition does not weigh against finding anticompetitive effects of the acquisition

Respondent contends that Microporous was in a “precarious financial position” at the time of the acquisition, and that this condition has been exacerbated by current economic conditions. RB at 47-51. According to Respondent, such financial weakness is evidence weighing against a finding that the acquisition is reasonably likely to have an adverse effect on competition, irrespective of whether the evidence is sufficient to establish a “failing firm” defense. As support for this theory, Respondent cites *General Dynamics*, 415 U.S. at 503-04, among other cases, and relies principally on *FTC v. Arch Coal*, 329 F. Supp. 2d at 158.

In *Evanston Northwestern Healthcare*, the Commission explained its approach to the “financially weakened company” defense as follows:

In *General Dynamics*, the Supreme Court held that the market share statistics used by the government to challenge the merger of two coal companies were insufficient to sustain its case because, by failing to take into account the fact that the acquired firm’s coal reserves were depleted or committed under long-term contracts, those statistics overestimated the acquired firm’s ability to compete in the future. 415 U.S. at 500-04. Several courts have applied the *General Dynamics* rationale in ruling that evidence of the acquired firm’s weakened financial condition, among other factors, may rebut the government’s statistical showing of anticompetitive market concentration. See *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1337-41 (7th Cir. 1981); *FTC v. National Tea Co.*, 603 F.2d 694, 698-700 (8th Cir. 1979); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 153-54 (D.D.C. 2004).

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These courts have generally cautioned, however, that “[f]inancial weakness, while perhaps relevant in some cases, is probably the weakest ground of all for justifying a merger,” and “certainly cannot be the primary justification” for permitting one. *Kaiser Aluminum*, 652 F.2d at 1339, 1341; *accord Arch Coal*, 329 F. Supp. 2d at 154.

In re Evanston, 2007 FTC LEXIS 210, at *216-17 (footnote omitted).

As the Eleventh Circuit held in *FTC v. University Health*: “[W]e will credit such a defense only in rare cases, when the defendant makes a substantial showing that the acquired firm’s weakness, which cannot be resolved by any competitive means, would cause that firm’s market share to reduce to a level that would undermine the government’s prima facie case.” 938 F.2d at 1221. *See also In re Pillsbury Co.*, No. 9091, 93 F.T.C. 966, 1979 FTC LEXIS 323, at *153 (June 15, 1979) (rejecting interpretation of *General Dynamics* that financial weakness is a defense to otherwise illegal merger; but even if some sort of defense outside failing company context, it “should rarely, if ever, be followed”). As discussed below, Respondent’s “financially weakened company” defense is not supported by the facts, or by the cases on which Respondent relies.

Respondent’s assertion that Microporous was “capital constrained,” RFOF 427, is not supported by the evidence. The evidence relied upon by Respondent shows only that, as of December 31, 2007, Microporous had outstanding debt of approximately \$46 million, which included debt for the purchase of the Jungfer line for the Piney Flats expansion in 2001 and for the 2007 Feistritz expansion. F. 1129. However, the evidence also shows that in the years leading up to the acquisition, Microporous’ sales had been steadily growing. F. 1127. Its EBITDA for 2007 was {redacted} F. 1127. Daramic’s own downwardly adjusted financial projections for Microporous still showed a healthy company, with {redacted} F. 1127. In

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addition, at the time of the acquisition, Microporous had completed an expansion into Europe, F. 770-72, 778, and had obtained a valuable contract with EnerSys to help fill the Feistritz capacity, as well as offers for backfilling its CellForce production line at Piney Flats. F. 787-90, 1136-37. Furthermore, Microporous was negotiating with Exide for substantial business in SLI, negotiations which would have continued, but for the acquisition. F. 694-716. While Microporous carried debt, F. 1129, and was concerned about cost control and improving margins, F. 1131-32, Microporous had plans in place to address these issues. F. 1132. IGP intended to continue efforts to grow Microporous' business, and would have continued to own Microporous if the merger had not gone through. F. 1134. Furthermore, Microporous had not been for sale to the general public. Rather, Daramic had approached Microporous regarding acquiring it. F. 1133.

The foregoing evidence does not support a "financial weakness" defense. In *Evanston Northwestern Healthcare*, the Commission rejected the respondent's contention that the acquiree hospital was in a weakened financial position, even though the acquiree hospital had long term debt. Indeed, the Commission concluded that the hospital was essentially sound even though it had experienced operating losses, a fact not present in this case. *In re Evanston*, 2007 FTC LEXIS 210, at *221. Also, as in this case, the acquiree had historically been profitable, management believed it could continue to operate independently, and there was no urgency to merge. *Id.*

The financial conditions of the acquired companies in the cases upon which Respondent relies are readily distinguishable from the financial condition of Microporous at the time of the acquisition. In *Arch Coal*, for example, the evidence showed that the acquiree was actively seeking necessary capital to cover significant shortfalls and that, due to the acquiree's poor financial profile, conventional financing was unlikely. 329 F. Supp. 2d at 156. Moreover, the acquiree had been actively seeking a buyer

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and Arch was the only satisfactory choice. None of these facts are present in the instant case.⁷ Also distinguishable is *United States v. Int'l Harvester Co.*, 564 F.2d 769 (7th Cir. 1977), in which the Seventh Circuit upheld a partial acquisition under a stock purchase agreement. The evidence in that case showed that the liabilities of the acquired company exceeded its assets; it was struggling with operating losses; and was burdened by above-market, high interest debt. *Id.* at 774-75. Because of its financial condition, the acquired company was unable to secure any additional lines of credit to meet its capital needs and sought out an injection of capital. *Id.* at 776.⁸ In the present case, the evidence, as described above, shows that Microporous was profitable in the years preceding the acquisition, was not suffering losses, was not overburdened by debt, and did not need a buyer. Compare also *Lektro-Vend Corp.*, 660 F.2d at 275-76 (affirming rejection of Section 7 claim, in part because acquired entity was financially weak at time of acquisition, where evidence showed years of declining market share and acquisition was for purpose of stemming the decline).

Respondent further asserts that, had Microporous stayed independent, its "precarious financial position" would have only gotten worse. Respondent points to testimony that both the Piney Flats and Feistritz plants are currently under capacity. See e.g., RFOF 425. However, as noted in *General Dynamics*, 415 U.S. at 504, the probative value of post-acquisition evidence is "extremely limited," and cannot be given "too much weight" when it is subject to manipulation by the acquiring company. The evidence regarding the current operating capacity of Piney Flats

⁷ Also significant is that the statistical case in *Arch Coal* was found to be weak, while in this case, the statistical evidence is strong.

⁸ In addition, after the stock purchase agreement and injection of capital, the two companies continued to compete, which forced greater price competition in the relevant market. 564 F.2d at 778. In the instant case, in contrast, the evidence shows that the acquisition has constrained price competition. See Section III D 4, *supra*.

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falls into this category. For example, **{redacted}** were set to be switched to Piney Flats in March 2008, but Daramic requested that **{redacted}** F. 1138. Thus, absent the acquisition, it is likely that **{redacted}** F. 1138. Indeed, with the 2007 amendment to the EnerSys/Microporous agreement, Microporous had **{redacted}** F. 1136.

Moreover, Respondent's forecasts for the net income of the Piney Flats and Feistritz plants, absent the acquisition, *see* RFOF 426, are too speculative and fail to take into account steps an independent Microporous might have taken to fill its capacity in competition with Daramic. For example, the contract with EnerSys filled one line at Feistritz and Microporous was working to sell PE separators from the second Feistritz line to several SLI battery manufacturers. F. 1137. In addition to Exide and JCI, there were 35 to 40 smaller SLI battery manufacturers in Europe, many of whom were good customer prospects because they liked Microporous' PE technology, which was based on Jungfer's technology. F. 1137. Some of these manufacturers had formerly purchased separators from Jungfer when it was still in business. F. 1137.

Respondent has not demonstrated that Microporous was a failing firm under the requirements of a failing firm defense. For all the foregoing reasons, Respondent's "financially weakened company" defense is rejected.

5. Summary

The evidence presented by Respondent on entry, power buyers, efficiencies, and Microporous' financial condition fails to offset the preponderance of the evidence of reasonably likely anticompetitive effects, as proved by Complaint Counsel. Accordingly, Complaint Counsel has met its burden of proving that the effect of Daramic's acquisition of Microporous may be substantially to lessen competition in the deep-cycle, motive, UPS, and SLI separator markets in North America. Therefore,

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Complaint Counsel has proved Count I of the Complaint, that, through its acquisition of Microporous, Respondent violated Section 7 of the Clayton Act and Section 5 of the FTC Act. Before turning to the remedy for the violation of Section 7, the Complaint's additional charges are addressed.

F. Counts II and III

In addition to the case against Respondent charging that the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, the Complaint charges Respondent with unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Complaint ¶¶ 50-53.

Count III, Monopolization, charges that Daramic has, through the acquisition, and the other conduct alleged in the Complaint, engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Complaint ¶¶ 52, 53. The Complaint alleges that Daramic engaged in certain conduct to preclude or deter Microporous from expanding or otherwise achieving sufficient scale, and thereby destroy competition and increase its market dominance. Complaint ¶ 46.

Count II, Unfair Method of Competition, charges that Daramic has, through the acquisition, and the other conduct alleged in the Complaint, engaged in unfair methods of competition in or affecting commerce in violation of Section 5 of the FTC Act, 15 U.S.C. § 45. Complaint ¶¶ 50, 51. The Complaint alleges that "Daramic entered into a joint marketing agreement in 2001 with Hollingsworth & Vose, a firm that manufactures absorbed-glass-mat battery separators, in order to prevent them from entering the PE separator market." Complaint ¶ 47.

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Unfair methods of competition under Section 5 of the FTC Act include any conduct that would violate Sections 1 or 2 of the Sherman Act. *See, e.g., California Dental Assn. v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948); *Fashion Originators' Guild v. FTC*, 312 U.S. 457, 463-64 (1941). Although the Commission does not directly enforce the Sherman Act, conduct that violates the Sherman Act is generally deemed to be a violation of Section 5 of the FTC Act as well, and principles of antitrust law developed under the Sherman Act apply to Commission cases alleging unfair competition. *E.g., Fashion Originators' Guild, Inc.*, 312 U.S. at 463-64; *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 451-52 (1986); *Rambus Inc. v. FTC*, 522 F.3d 456, 462 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (2009); *California Dental Ass'n*, 121 F.T.C. 190, 292 n.5 (1996).

Both Counts II and III charge that Daramic, through the acquisition, violated Section 5 of the FTC Act. These allegations are derived from the alleged violation of Section 7 of the Clayton Act. *See FTC v. Cement Inst.*, 333 U.S. at 694. The Commission held in *Chicago Bridge*, that the allegation that the acquisition is also a Section 5 violation “does not require an independent analysis.” *In re Chicago Bridge*, 2005 FTC LEXIS 215, at **8 n.23; *Chicago Bridge*, 534 F.3d at 423 n.5 (“The appeal at issue primarily concerns section 7 of the Clayton Act as section 5 of the FTC Act is, as the Commission determined and the parties do not contest, a derivative violation that does not require independent analysis.”). Accordingly, no further analysis on whether the acquisition violates Section 5 of the FTC Act is necessary.

However, the Complaint also charges that Daramic has engaged in unfair methods of competition, in violation of Section 5 of the FTC Act, through other conduct alleged in the Complaint. Complaint ¶¶ 50-53. The challenged “other” conduct is analyzed below.

1. Count III: Monopolization

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In its post-trial brief, Complaint Counsel asserts that “Daramic’s pattern of coercive and exclusionary behavior to obtain or maintain monopoly status in *several relevant markets* through its exclusionary bargaining and contracting arrangements violates Section 5 [of the FTC Act].” CCB at 50 (emphasis added). Complaint Counsel argues that “[d]uring 2006 and 2007, Daramic coerced, pressured, and induced customers – large and small – to enter into exclusive dealing agreements with Daramic, and as a consequence, to accept contract terms that weakened Microporous, harmed the competitive process, and injured consumers of battery separators.” *Id.* Although the Complaint charges Respondent only with monopolization, in its post-trial briefs, Complaint Counsel argues additionally that Daramic engaged in attempted monopolization. CCB at 50-51.

Complaint Counsel did not advance the proposition that the acquisition itself of Microporous constitutes a violation of Section 5 of the FTC Act applying Sherman Act 2 principles. To the extent that the acquisition of Microporous created a monopoly, that conduct is addressed, and remedied, by the finding of liability under Section 7 of the Clayton Act (making unlawful acquisitions, the effect of which “may be substantially to lessen competition, or tend to create a monopoly”) and the Order entered herewith. As noted above, a finding of liability under Section 7 of the Clayton Act requires no independent analysis under Section 5 of the FTC Act.

Respondent asserts that Complaint Counsel has not shown that Daramic had or has monopoly power in any alleged market. RB at 51-52. Respondent further asserts that Complaint Counsel failed to show that Daramic engaged in exclusionary conduct. RB at 52-55.

The analysis which follows addresses the monopolization claims advanced by Complaint Counsel in its post-trial brief and reply brief. The analysis does not specifically address certain claims made in proposed findings of fact submitted by Complaint Counsel under the heading, “Monopolization,” but which

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Complaint Counsel did not further advance in support of its monopolization charge in its post-trial briefing.

Those claims, relating to Daramic's January 2007 contract proposal to Exide; an asserted solicitation by Daramic of an agreement with Microporous not to enter the SLI market in exchange for Daramic's deep-cycle technology; and the purported use of hard ball strategies by Daramic in contract negotiations, have, however, been fully considered and are rejected as without sufficient evidentiary or legal support.⁹

a. Legal standard

Monopolization requires proof of “(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Attempted monopolization requires proof: “(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving or obtaining monopoly power.” *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

b. Possession of monopoly power in the relevant markets**(i) Relevant markets**

⁹ An example of what Complaint Counsel charges in its proposed findings as “hardball” tactics is Daramic's contract negotiations with JCI. These JCI contract negotiations pertained to SLI. F. 652-83. As discussed herein, Daramic has neither monopoly power nor a dangerous probability of achieving monopoly power in the SLI market. Therefore, this conduct does not support a charge of monopolization.

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Establishing the relevant market is the first step in assessing whether a respondent possesses monopoly power. *Spectrum Sports*, 506 U.S. at 456 (“without a definition of th[e relevant] market there is no way to measure the defendant’s ability to lessen or destroy competition”). Complaint Counsel “carries the burden of describing a well-defined relevant market, both geographically and by product, which the defendants monopolized.” *H.J., Inc. v. Int’l Tel. & Tel.*, 867 F.2d 1531, 1537 (8th Cir. 1989). Complaint Counsel has clearly described and proved that the geographic market is North America and that there are four relevant product markets: deep-cycle, motive, UPS, and SLI battery separators for flooded, lead-acid batteries. Section III C, *supra*.

(ii) Monopoly power

Monopoly power is defined as “the power to control prices or exclude competition.” *Du Pont*, 351 U.S. at 391. “[M]onopoly power may be inferred from a firm’s possession of a dominant share of a relevant market that is protected by entry barriers.” *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc); *Re/Max Int’l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999) (stating that monopoly power may be established by showing a high market share within a defined market); *Grinnell Corp.*, 384 U.S. at 571 (“The existence of such power ordinarily may be inferred from the predominant share of the market.”).

As stated by the Court of Appeals in *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*:

Judge Learned Hand enunciated what has become the classic explanation of when market share becomes large enough to constitute a monopoly: “over ninety . . . percentage is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not.” In *Eastman Kodak*, the Court cited its earlier precedent

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that possession of “over two-thirds of the market is a monopoly.”

431 F.3d 917, 935-36 (6th Cir. 2005) (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2nd Cir. 1945); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992)). Market shares in excess of 90% are sufficient to support a finding of monopoly power. *E.g.*, *Grinnell*, 384 U.S. at 571; *American Tobacco Co. v. United States*, 328 U.S. 781, 797 (1946); *Aluminum Co. of America*, 148 F.2d at 429.

As found in Sections III D 2, 3, *supra*, at the time the challenged conduct occurred, Daramic had a near 90% share in the motive and a near 100% share in the flooded UPS battery separator markets in North America. The evidence also shows that Daramic had approximately a 10% share in the deep-cycle market in 2007, but that, with the acquisition of Microporous, Daramic holds a nearly 100% monopoly. *Id.* Thus, Complaint Counsel has proved a dangerous probability of achieving a monopoly in the deep-cycle market. Because barriers to entry are substantial (Section III E 1, *supra*), there exists at all relevant times a dangerous probability that Daramic’s monopoly power will persist in each of these three markets. Accordingly, Respondent has monopoly power in the North American motive, UPS, and deep-cycle battery separator markets.

As found in Section III D 3, *supra*, at the time the challenged conduct occurred, in the SLI market, Daramic had 48.4% and 47% share of the market in 2007 and 2006. The other 51.6% and 53.0% share of the market in 2007 and 2006 was held by Entek. If, as according to Judge Learned Hand, it is doubtful that 60 or 64 percent would be enough, it is even more doubtful that less than 50 percent would be enough to constitute monopoly power. Reviewing numerous cases and considering the relevant economics, the Areeda treatise concludes: “We believe 70 or 75 percent to be a reasonable minimum for a ‘well defined’ market.”

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IIIB Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 801(a)1 at 384 (3rd ed. 2008).

Further, the evidence presented on market shares in 2006 and 2007 is undermined by recent changes in the SLI market. JCI, the largest manufacturer of flooded lead-acid batteries in the world, and one of only three major automotive battery manufacturers in the United States, entered into a long-term contract with Entek in 2007 to be an exclusive supplier to JCI in the Americas and Europe. F. 734. On January 1, 2009, Daramic lost {redacted} of JCI's business to Entek when JCI's contract with Daramic expired. F. 736. Exide, with the largest battery plant in North America, has, in 2009, been taking steps to move some of its SLI business from Daramic to Entek. F. 745. Exide intends to purchase {redacted} of its SLI needs after 2009 from Entek. F. 745. On January 19, 2010, Respondent filed a Form 8-K with the SEC announcing that Daramic entered into a new evergreen supply agreement with Exide. F. 749.

There is no indication that Daramic lost JCI as a customer or lost sales from Exide to Entek purposefully in order to "improve [its] litigating position." *See Hospital Corp.*, 807 F.2d at 1384. These losses significantly weaken Daramic's position in the SLI market. One court has commented that, "in evaluating monopoly power, it is not market share that counts, but the ability to maintain market share." *United States v. Syufy Enters.*, 903 F.2d at 665-66.

The evidence shows that Daramic had less than approximately 50% of the SLI market in 2007, and that Daramic is not maintaining that share. Complaint Counsel, therefore, has not demonstrated that Daramic has a dangerous probability of achieving a monopoly in the SLI market. Because Daramic did not have monopoly power or a dangerous probability of achieving monopoly power in the SLI market, Complaint Counsel has not proved a basic element of its monopolization charge with respect to any conduct occurring in the SLI market. Accordingly, conduct occurring in only the SLI market cannot support

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Complaint Counsel’s monopolization or attempted monopolization charges. Thus, only conduct occurring in the three markets in which Respondent has monopoly power – deep-cycle, motive, and UPS – is analyzed in evaluating whether the challenged conduct constitutes unlawful monopolization. For purposes of analyzing the monopolization claim, these three markets are referred to in only this Section of the Initial Decision as the “non-SLI markets.”

c. Exclusionary Conduct

“It is settled law that the mere existence of a monopoly does not violate the Sherman Act.” *Rambus*, 522 F.3d at 463. The offense of monopolization additionally requires “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.” *Verizon Communs., Inc. v. Trinko*, 540 U.S. 398, 407 (2004).

A firm violates Section 2 when it maintains or attempts to maintain a monopoly by engaging in exclusionary conduct. *Microsoft*, 253 F.3d at 58. Exclusionary conduct is “behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way.” *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) (quoting 3 P. Areeda & D. Turner, *Antitrust Law* 78 (1978)). “Generally, a finding of exclusionary conduct requires some sign that the monopolist engaged in behavior that – examined without reference to its effects on competitors – is economically irrational.” *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 523 (5th Cir. 1999); *see also Aspen Skiing*, 472 U.S. at 608, 610-11 (finding conduct exclusionary where defendant failed “to offer any efficiency justification whatever for its pattern of conduct”).

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In evaluating alleged exclusionary conduct, “[t]he key factor courts have analyzed in order to determine whether challenged conduct is or is not competition on the merits is the proffered business justification for the act.” *Stearns Airport*, 170 F.3d at 522; *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1062 (8th Cir. 2000) (“A Section 2 defendant’s proffered business justification is the most important factor in determining whether its challenged conduct is not competition on the merits.”). Where “the conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported.” *Stearns Airport*, 170 F.3d at 522.

Complaint Counsel’s argument in support of its monopolization charge is that Daramic used exclusive contracts with customers to weaken Microporous. CCB at 55-56. Complaint Counsel states that one measure of the effectiveness of Daramic’s anticompetitive campaign is that in 2008, Daramic’s exclusive contracts covered 70% of the motive market.” CCB at 55. As analyzed below, however, these contracts do not constitute exclusionary conduct.

“Exclusive dealing arrangements are essentially requirements contracts, whereby the buyer agrees to purchase exclusively the product of the contracting supplier.” *Servicetrends, Inc. v. Siemens Medical Systems, Inc.* 870 F. Supp. 1042, 1064 (N.D. Ga. 1994) (dismissing Sherman Act Section 1 claim). “The antitrust problem that courts have found lurking in requirements contracts grows out of their tendency to ‘foreclose’ other sellers from the market by ‘tying up’ potential purchases of the buyer.” *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) (Breyer, J.); *Servicetrends*, 870 F. Supp. at 1064 (“[M]any ordinary supply contracts, motivated by legitimate business needs, inevitably foreclose some competing seller from a portion of the market.”). However, as explained in *Barry Wright*:

virtually *every* contract to buy “forecloses” or “excludes” alternative sellers from some portion of the market, namely the portion consisting of what was

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bought Thus, in determining “the probable effect of the contract on the relevant area of effective competition,” [courts] are to take into account both the extent of the foreclosure and the buyer’s and seller’s business justifications for the arrangement. [Courts] must look both to the severity of the foreclosure (a fact which, other things being equal, suggests anticompetitive harm) and the strength of the justifications.

724 F.2d at 236-37 (quoting *Tampa Electric*, 365 U.S. at 329, 334-35). *Accord Microsoft*, 253 F.3d at 69.

(i) Summary of the evidence on the challenged conduct

Complaint Counsel points to what it calls four key examples of Daramic’s “monopolistic conduct”:

- (1) Daramic’s conduct in September 2006 in declaring a force majeure under the then-existing contract between Daramic and EnerSys, allegedly as leverage to negotiate a contract renewal with EnerSys in the motive separators market;
- (2) The “MP Plan,” which Complaint Counsel describes as steps Daramic took to respond to Microporous’ threat to Daramic’s automotive and motive power business in the United States and Europe, culminating in exclusive or nearly exclusive supply contracts with Crown Battery, Douglas Battery, and East Penn Battery;
- (3) Daramic’s 2007 bid to Exide where, in response to Exide’s RFP for all of Exide’s battery separator requirements globally, which includes

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motive, automotive SLI, industrial, golf cart, and specialty, Daramic submitted a bid for 100%, 75% and 25% of Exide's separator requirements, but did not submit a bid to supply 50% of Exide's separator requirements; and

- (4) Daramic's 2007 contract extension negotiations with Fiamm, a European automotive battery manufacturer.

CCB at 55-59. As analyzed below, these actions do not constitute exclusionary conduct in the relevant markets in which Daramic has monopoly power or a dangerous probability of achieving monopoly power.

The 2006 contract with EnerSys

Complaint Counsel charges that Daramic was intent on securing exclusive dealing arrangements with its customers in order to weaken Microporous and that Daramic used its 90% market share in motive separators to force EnerSys to sign a contract with a higher price than EnerSys would have received from Microporous. Complaint Counsel further argues that Daramic declared force majeure as a tactic to coerce EnerSys into agreeing to an exclusive contract. CCB at 55-56. As summarized below and set forth at F. 1150-99, the evidence does not support these arguments.

EnerSys had entered into a three year supply contract with Daramic on May 21, 2004, through which EnerSys agreed to purchase **{redacted}** from Daramic. F. 1152. In late 2005 and early 2006, EnerSys and Microporous discussed the potential for Microporous to construct a new factory in Austria, and to displace Daramic as a supplier for most of the EnerSys plants in Europe. F. 1154. On February 10, 2006, Microporous and EnerSys executed a MOU which provided for Microporous to supply all of EnerSys battery plants in Europe and China, and most of its plants in North America, beginning in 2007. F. 1155-56. The MOU

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specified that EnerSys and Microporous would “begin negotiation and drafting of the **{redacted}** agreement with the good faith objective of completing the agreement no later than May 1, 2006.” F. 1157. By spring 2006, Microporous management had not completed the process of obtaining Board approval for its capital investment in the Austrian plant. F. 1161. In May 2006, the MOU between Microporous and EnerSys expired. F. 1162. At the end of 2006, EnerSys was still unsure if the Microporous product would work in EnerSys’ North American plants and qualification was uncertain. F. 1194. Therefore, the evidence demonstrates that, as of May 2006, when EnerSys entered into the challenged contract with Daramic, Microporous was not in a position to meet EnerSys’ needs.

The evidence also does not establish that Daramic declared a force majeure event as a tactic to force EnerSys into an exclusive contract. Ticona, a company that makes **{redacted}**, the primary raw material used by Daramic, suffered an extensive fire in its production facility. F. 1177, 1180. As a result, Ticona notified Daramic in September 2006 that it was experiencing a force majeure event and Ticona anticipated that it would not be able to supply more than 50% of Daramic’s demand for several months. F. 1181. Daramic anticipated, based on information received from Ticona, that its separator production would be impacted in the amount of approximately **{redacted}** square meters. F. 1183. Daramic, in turn, notified its customers, including EnerSys, that Daramic would need to allocate its separator production among its customers. F. 1178 (“[E]ffective immediately EnerSys will receive most likely 10 to 20%, if possible up to 50% of your normal material requirements for the next six to eight weeks. Based on the timing communicated to us by our vendor, our current best estimate is that this event will likely impact our ability to supply you with your full allocation of products through at least the middle of November.”). At the time of Ticona’s declaration of force majeure, Daramic could not supply all of its customers with PE separators with the reduced supply of **{redacted}** from Ticona. F. 1186. The evidence shows that the

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force majeure was a real event and that it was not “simply a tactic in Daramic’s monopoly playbook,” as characterized by Complaint Counsel. CCB at 57.

Subsequent to the force majeure event, EnerSys and Daramic agreed to a new supply contract orally and officially executed the contract extension on October 31, 2006. F. 1192. Under the new contract, EnerSys agreed to purchase 90% of its separator requirements for its North America facilities from Daramic and was able to contract with any company, including Microporous, to provide battery separators to EnerSys for its remaining requirements, and for each of its plants in any amount, as its contractual commitment to Daramic for those plants expired. F. 1193. At the end of 2006, EnerSys was still unsure if the Microporous product would work in the EnerSys North American plants and had concerns about whether Microporous had enough capital to enable it to supply other EnerSys plants. F. 1194.

EnerSys did, however, in January 2007, enter into a contract with Microporous for motive separators for EnerSys’ facilities in Europe, Tennessee, and Mexico and amended the agreement in August 2007 to provide for Microporous to supply separators to EnerSys’ remaining North American facility located in Richmond, Kentucky. F. 1196. In its Purchasing Outlook Economic Assumptions Fiscal Year 2009, EnerSys stated as one of its assumptions for fiscal year 2009: “All steps are in place to move all PE business to [Microporous’] CellForce as Daramic’s contract expires for each location.” F. 1198. Therefore, the evidence demonstrates that Microporous was not excluded.

The MP Plan

Complaint Counsel charges that Daramic executed a plan to approach Crown Battery, Douglas Battery, and East Penn Battery and offer each an all or nothing proposition: that is, contract with Daramic exclusively or near exclusively, and on a long-term basis, or no battery separators would be available from Daramic, and that by so doing, Daramic excluded Microporous from the

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motive and SLI markets. CCB at 58. Because Daramic did not have monopoly power in the SLI market or a dangerous probability of achieving monopoly power, evidence pertaining only to the SLI market is not analyzed.

With respect to East Penn Battery, the evidence shows that on January 7, 2008, East Penn Battery entered into a three-year contract with Daramic pursuant to which Daramic agreed to supply 90% of East Penn's Battery industrial PE needs at specified prices and East Penn Battery would receive **{redacted}** F. 833, 836. The percentages agreed to were based upon East Penn's Battery then-current purchasing habits. F. 834. At the time, East Penn Battery was purchasing motive separators from Microporous in an amount meeting less than 10% of its needs and wanted to continue to purchase 10% of its motive separators from Microporous. F. 834. Under its contract with Daramic for 90% of its industrial needs, East Penn Battery was not foreclosed from continuing to do so.

With respect to Crown Battery, the evidence shows that in December 2007, Crown Battery entered into a **{redacted}** supply agreement with Daramic for 100% of Crown Battery's requirements for polyethylene battery separators for lead-acid batteries for its motive and automotive power applications. F. 825. Crown Battery viewed the opportunity to lock in fixed prices as a good idea, had a twenty-year relationship with Daramic, and viewed Daramic as one of its best suppliers. F. 827. Conversely, Crown Battery did not have test results for Microporous' CellForce product and did not consider Microporous' product when negotiating the 2007 contract with Daramic. F. 829.

With respect to Douglas Battery, the evidence demonstrates that in January 2008, Douglas Battery entered into a **{redacted}** contract with Daramic for 100% of its total requirements for polyethylene battery separators. F. 844. The parties agreed that **{redacted}** and, thus, provided an enhancement to the contract.

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F. 845. Moreover, at the time of entering into the 2008 supply contract with Daramic, Douglas Battery was not engaged in any discussions with Microporous. F. 848. Douglas Battery had tested a golf cart battery separator manufactured by Microporous, but found it too brittle. F. 847. The battery that Douglas Battery makes for UPS stationary applications uses absorbed glass mat (AGM), and takes a different separator than was available from Microporous. F. 848. In addition, Douglas Battery had not discussed the supply of separators with Microporous since 2004. F. 846.

The 2007 Exide Bid

In 2007, Exide issued a Request for Proposal (“RFP”) which called for each separator manufacturer to bid on all of Exide’s PE needs globally at volumes of 25%, 50%, 75% and 100%. F. 1201. Exide did not define in the RFP how the supplier was to bid a lower percentage, whether by plant, product mix or otherwise. F. 1201. Exide gave the suppliers to whom it issued the RFP the “choice to quote on part or all or whatever they felt comfortable with” F. 1202. Daramic responded to Exide’s 2007 RFP by quoting prices for 100%, 75% and 25% supply, but did not provide a bid as to 50% supply. F. 1203.

Of the five companies to which the RFP was submitted, only Daramic provided a quote that covered all of Exide’s needs as set out in the RFP. F. 1208. Under Daramic’s proposal, Exide’s pricing, payment terms, credit limit and other terms degraded in each supply scenario less than 100% supply. F. 1207. While Exide claims it was not satisfied with the proposal it received from Daramic, Exide never made a counterproposal to Daramic’s offer, and never asked Daramic to submit a new proposal or to specify the parts of the proposal that it considered insufficient. F. 1216.

The evidence establishes that Daramic did not provide Exide with a quote for 50% because the drop in volume to supply Exide with only 50% would not be economical for Daramic. F. 1206.

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Exide was Daramic's highest volume customer in 2007, and loss of volume from Exide would necessitate Daramic realigning its sourcing strategy. F. 1204.

The evidence is unclear whether Microporous submitted a response to Exide's RFP to supply Exide's motive needs. Rather, the evidence shows that after Exide issued its RFP, Exide and Microporous entered into an MOU on September 28, 2007 which stated: "Also to be agreed to by both parties is whether the individual lines [to be built by Microporous] . . . will produce SLI separators or industrial separators." F. 1211. Moreover, the evidence does establish that, at the time Exide issued its RFP, Exide had not even considered testing Microporous' CellForce. F. 1213.

The Fiamm contract

In negotiations with Fiamm, Fiamm misrepresented to Daramic the bid it had received from Microporous and presented Daramic with a "take it or leave it" proposal of a three-year contract, with some reduced pricing and no price increase in 2009. F. 1223, 1225. The lower prices represented a loss of **{redacted}** in contribution margin for Daramic. F. 1223. However, Daramic believed it was worth it to capture a guarantee of **{redacted}** million square meters of automotive product (SLI) and a **{redacted}** on the third largest battery manufacturer in Europe. F. 1223. This agreement relates to a product that is not in North America and, thus, outside the geographic market. Also, this agreement relates to a product in a market in which Daramic neither has monopoly power, nor a dangerous probability of achieving monopoly power. Accordingly, evidence relating to the Fiamm contract need not be evaluated further.

(ii) The challenged conduct is not exclusionary

For challenged conduct to be exclusionary, a rival must have been excluded. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d

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181, 191 (3d Cir. 2005) (“The test is . . . whether the challenged practices bar a substantial number of rivals or severely restrict the market’s ambit.”). *See also Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O’Connor, J. concurring) (adjudicating a claim brought under Section 3 of the Clayton Act and stating “[e]xclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.”); *Roland Machinery Co. v. Dresser Indus. Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) (adjudicating a claim brought under Section 3 of the Clayton Act and stating that the plaintiff in an exclusive dealing case “must prove . . . that it is likely to keep at least one significant competitor of the defendant from doing business in a relevant market. If there is no exclusion of a significant competitor, the agreement cannot possibly harm competition.”).

Complaint Counsel has not shown that Daramic’s conduct was likely to keep Microporous from doing business in the non-SLI markets, because with respect to EnerSys and East Penn Battery, Microporous was not “frozen out.” Microporous did contract with EnerSys in 2007 and EnerSys had steps in place to move all its PE purchases from Daramic to Microporous. Microporous did continue to supply East Penn Battery the amount which East Penn Battery insisted it wanted to purchase from Microporous, 10% of its industrial separators.

In addition, Complaint Counsel has not shown that Daramic’s conduct was likely to keep Microporous from doing business in the non-SLI markets, because, with respect to EnerSys, in 2006, and Crown Battery and Douglas Battery, in 2007, the evidence shows that Microporous was not yet capable of supplying their motive battery separator needs. F. 1194 (At the end of 2006, EnerSys was still unsure if the Microporous product would work in the EnerSys North American plants and qualification was uncertain); F. 829 (Crown Battery did not consider switching to Microporous because it had no test results from them); F. 846-48

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(Douglas Battery had no interest in purchasing from Microporous). Thus, Complaint Counsel has not proved that Daramic's long-term exclusive contracts were likely to keep Microporous out of the non-SLI markets. *See Dentsply*, 399 F.3d at 191

With respect to Daramic's "refusal" to provide a bid on 50% of Exide's supply, such action does not appear to be "economically irrational," as required under *Stearns* to find exclusionary conduct. Although Daramic did not submit a bid for 50%, it did for 25%, 75%, and 100%. F. 1203. At the time Daramic submitted its response to Exide's 2007 RFP, Daramic was exploring other business opportunities which made offering a quote at 50% difficult for Daramic. F. 1205. As Exide's Gillespie recognizes, running a plant at 100% of its capacity is more economical than running a plant at 50% of its capacity. F. 1206. Moreover, the evidence does not establish that Microporous was excluded from supplying non-SLI separators to Exide, because Exide could have accepted Daramic's bid at lower levels and, more importantly, because Exide had not yet even considered testing Microporous' CellForce at the time of the RFP. F. 1213.

In addition to the lack of factual support, the cases relied upon by Complaint Counsel to support its monopolization charge also do not merit the conclusion that Daramic engaged in exclusionary conduct in this case. In *Microsoft*, the Court of Appeals held, "it is clear that in all cases [where an exclusive deal is challenged] the plaintiff must both define the relevant market and prove the degree of foreclosure." 253 F.3d at 69. There, Microsoft entered into exclusive deals with fourteen of the top fifteen Internet access providers ("IAPs") which ensured that the majority of all IAP subscribers were offered Microsoft's product, Internet Explorer, as the default or only browser, to the exclusion of Microsoft's rival, Netscape's Navigator. *Id.* at 70-71. In *Microsoft*, Netscape was already in the market as an Internet browser. *Id.* at 47. In *Dentsply*, the defendant manufacturer of prefabricated artificial

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teeth entered into exclusionary arrangements with dealers – the preferred distribution channel – to prevent the dealers from selling different manufacturers’ products. *Dentsply*, 399 F.3d at 193-94. Again, in *Dentsply*, there were other manufacturers capable of, and in fact selling, the relevant product, who were foreclosed by the agreements.

To be clear, this is not to say that Microporous must have already been selling non-SLI separators to Douglas Battery, Crown Battery, and Exide for Daramic’s exclusive contracts to have had an exclusionary effect. But, since the evidence in this case shows that these customers had not previously purchased motive separators from Microporous and that the reason they did not intend to do so was that Microporous’ CellForce had not yet been qualified by them for use, Daramic’s conduct should not be viewed as “excluding” Microporous. Because Daramic’s conduct was not shown to exclude Microporous, Daramic’s proffered business justifications are not further evaluated.

Complaint Counsel has not met its burden of proving that Respondent engaged in exclusionary conduct in the markets in which Respondent is found to have had monopoly power or a dangerous probability of obtaining monopoly power. Accordingly, Count III of the Complaint is DISMISSED.

2. Count II: Unreasonable Restraint of Trade

Count II of the Complaint charges Daramic with unreasonable restraint of trade in violation of Section 5 of the FTC Act. The Complaint alleges that Daramic entered into a 2001 Cross Agency Agreement (“Cross Agency Agreement”) with Hollingsworth & Vose (“H&V”), a producer of absorptive glass mat (“AGM”) battery separators for sealed lead-acid batteries. CCB at 63-64. Under the Cross Agency Agreement, the Complaint alleges, Daramic agreed not to make or sell AGM battery separators in the United States or anywhere in the world; in return, H&V agreed not to make or sell PE battery separators in the United States or anywhere in the world. CCB at 64.

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Respondent replies that the Cross Agency Agreement was a legitimate sales joint venture between the companies. RRB at 37. Pursuant to the Cross Agency Agreement, Daramic was to promote the sale of H&V's AGM separators, while H&V was to promote the sale of Daramic's PE separators, Respondent asserts. RB at 56. Respondent also argues that Daramic, which makes PE separators, does not compete with H&V, which makes AGM separators, and, thus, since Daramic and H&V were not actual or potential competitors in the AGM and PE markets, the non-compete provisions in the H&V Agreement could not have had any adverse effects on competition and imposed no restraint of trade. RB at 56.

a. Summary of the evidence

Daramic and H&V entered into a Cross Agency Agreement that took effect on March 23, 2001 and continued for five years. F. 1243. Pursuant to the Cross Agency Agreement, Daramic was authorized to act as a non-exclusive sales agent for H&V products; and H&V was authorized to act as a non-exclusive sales agent for Daramic products. F. 1246. Also pursuant to the Cross Agency Agreement, Daramic agreed not to make or sell AGM battery separators anywhere in the world; and H&V agreed not to make or sell PE battery separators anywhere in the world ("non-compete provision"). F. 1243.

The Cross Agency Agreement was extended in 2006 for an additional three years, expiring in March 2009. F. 1257. The non-compete provision, memorialized in Sections 4(a) and 4(b) of the Cross Agency Agreement, was extended an additional five years following expiration of the Cross Agency Agreement, until March 2014. F. 1257. Thus, at this point, the agency relationship between Daramic and H&V has ceased. Only the non-compete provision survives.

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The evidence at trial establishes that Daramic believed that H&V was interested in entering the PE separator industry. F. 1233, 1238, 1240. In order to block this competitive threat, Daramic approached H&V and proposed an “alliance” between the two companies. F. 1241. From the outset, the core of this arrangement was a set of mutual promises to stay out of one another’s markets. F. 1240-45.

While Daramic and H&V were authorized, under the Cross Agency Agreement, to act as non-exclusive sales agents for each other’s products anywhere in the world, the parties contemplated that there would be no cross-selling in any area or to any customer where a party already had sales representation. F. 1247. Because both H&V and Daramic already had full sales coverage of “the known customer base in the United States,” at the time they entered their agreement, they looked abroad to “remote parts of the world” for potential joint sales opportunities. F. 1248-50. By the time it formally terminated in March 2009, the Cross Agency Agreement had generated a small volume of AGM separator sales by Daramic outside North America. F. 1251. H&V never made any sales of PE separators during the course of the Cross Agency Agreement. F. 1252.

The anticompetitive objective of the non-compete provision of the Cross Agency Agreement is evident through an internal email authored by Daramic’s Vice President and General Manager:

A few years ago, H&V announced that they want to go into the PE business, and plan to make an acquisition (it was Exide) or build their own plant.

In order to stop them, we made a written agreement with them, through a partnership, saying that:

- we will work together where ever possible
- they will not go in the PE business
- we will not go in the glass business (AGM).

F. 1240.

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b. Legal framework

Section 1 of the Sherman Act prohibits “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States” 15 U.S.C. § 1. Three elements must be established in order to prove a Section 1 violation: (1) the existence of a contract, combination, or conspiracy among two or more separate entities, that (2) unreasonably restrains trade, and (3) affects interstate or foreign commerce. *See, e.g., Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

The non-compete provision of the Cross Agency Agreement is clearly a contract between Daramic and H&V. *See* F. 1243. Daramic admits that its conduct is in and affects interstate commerce. (Answer ¶ 3). Accordingly, with regard to Count II of the Complaint, the only issue to be decided is whether the non-compete provision of the Cross Agency Agreement unreasonably restrains trade.

The ban on contracts in restraint of trade extends only to unreasonable restraints of trade, *i.e.*, restraints that impair competition. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). The essential inquiry under Section 1 is “whether or not the challenged restraint enhances competition.” *California Dental Ass’n*, 526 U.S. at 780; *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005).

The first step in evaluating a challenged restraint is to “determine whether it is obvious from the nature of the challenged conduct that it will likely harm consumers.” *Polygram Holding*, 416 F.3d at 35. “If so, then the restraint is deemed ‘inherently suspect’ and, unless the [respondent] comes forward with some plausible (and legally cognizable) competitive justification for the restraint, summarily condemned.” *Id.* at 35-36.

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The second step is to evaluate such justifications, which “may consist of plausible reasons why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question, or they may consist of reasons why the practices are likely to have beneficial effects for consumers.” *Id.* at 36.

Applying this framework to the evidence in this case, Complaint Counsel has met its burden of showing that the non-compete provision of the Cross Agency Agreement is obviously likely to harm consumers. Respondent has asserted that it had a procompetitive justification for the restraint, arguing that it was necessary as part of a legitimate sales joint venture between the two companies. Complaint Counsel has also shown that the challenged restraint is not reasonably necessary to achieve the Respondent’s procompetitive justifications and that those objectives may be achieved in a manner less restrictive of competition.

c. The agreement not to compete in each others’ markets is an unreasonable restraint of trade

An agreement not to compete is inherently suspect. As consistently held by the Supreme Court, agreements between competitors to allocate territories to minimize competition are *per se* illegal. *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344, n.15 (1982); *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998). “[W]hen there is an agreement not to compete in terms of price or output, ‘no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.’” *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 (1984).

Respondent argues that the non-compete provision of the Cross Agency Agreement is not likely to harm consumers because Daramic had no plans to produce AGM separators and H&V had no plans to produce PE separators. RB at 56. The evidence

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establishes, however, that H&V management viewed PE separators as a natural complement to its AGM business, as the products have many of the same customers. F. 1235. In addition, H&V actively considered entering the PE separator market at various times, including submitting a proposal to acquire PE separator assets from Exide. F. 1234, 1236. The evidence further establishes that Daramic believed H&V had plans to produce PE separators. F. 1241 (internal Daramic letter stating: “Because H&V threatened us of going in the PE separator business, we made a strategic alliance with them. We will not produce AGM, and they will not produce PE separator.”). As a result of the Cross Agency Agreement, Daramic has not developed its own AGM separator, has been relegated to having to develop what it calls a “me too” product, and has been prevented from purchasing another AGM separator manufacturer. F. 1260.

Even without the evidence that Daramic believed H&V might compete in producing PE separators, the non-compete provision of the Cross Agency Agreement is inherently suspect. As explained in *Palmer*, the defendants in *Topco* had never competed in the same market, but had simply agreed to allocate markets. *Palmer*, 498 U.S. at 49. “Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other.” *Palmer*, 498 U.S. at 49-50. “Based upon economic learning and the experience of the market,” it is obvious that the non-compete provision of the Cross Agency Agreement, which reserves the PE market for Daramic and the AGM market for H&V, “likely impairs competition,” and, thus, “is presumed unlawful.” *See Polygram*, 416 F.3d at 36.

In order to avoid liability, Respondent must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm. *Polygram*, 416 F.3d at 36. In this regard, Respondent advances two reasons for the Cross Agency Agreement: (1) to allow Daramic and H&V to compete with a

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similar arrangement between Entek and Dumas; and, (2) to allow Daramic and H&V to engage in joint sales and activities. RB at 56-58. Neither of these proffered reasons for the restraint of trade provides a procompetitive justification for the challenged restraint.

First, there is no evidence that Entek and Dumas (an AGM producer) did anything more than appear at trade shows together. F. 1242. The mere existence of an agreement between Entek and Dumas does not provide a legitimate justification for the Cross Agency Agreement entered into by Daramic and H&V.

Second, the joint marketing agreement was never implemented in any serious or commercially significant way. H&V made no sales on behalf of Daramic, and Daramic's sales of H&V products were insignificant. F. 1251-52. From the outset, the parties contemplated that there would be no cross-selling in any area or to any customer where a party already had sales representation and both H&V and Daramic already had full sales coverage of "the known customer base in the United States." F. 1248. In addition, the evidence shows that, while Daramic and H&V jointly hosted "customer appreciation nights" and shared booth space at annual industry conventions, Daramic acknowledged that the non-compete provision of the Cross Agency Agreement was not needed to do so. F. 1253-54. To enable the parties to jointly host customer appreciation events is not a serious foundation for a market allocation agreement. Lastly, while H&V and Daramic looked at joint research and development opportunities for new products, exchanged raw materials, and collaborated on what materials would work well together, such activity never progressed past the initial "concept." F. 1255. Accordingly, the joint marketing provision does not provide a plausible justification for the non-compete provision. *Cf. Palmer*, 498 U.S. at 47 (market division agreement judged per se illegal notwithstanding trivial licensing arrangement between parties); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 8 (1st Cir. 1979) (market allocation agreement judged per se illegal where contemplated collaboration was not implemented).

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Furthermore, contrary to Respondent's argument, the Cross Agency Agreement did not require the non-compete provision to protect the passing of confidential information between Daramic and H&V. Respondent did not demonstrate that Daramic shared with H&V any of its trade secrets, know-how, or other intellectual property related to PE separator manufacturing or Daramic's internal pricing plans or marketing strategies related to future PE separator sales. *See* F. 1256. To the extent that legitimate confidentiality concerns might have arisen, each party's confidential information was protected in the Cross Agency Agreement by non-disclosure provisions. F. 1256. Thus, Daramic had less restrictive means than the non-compete provision to address its confidentiality concerns.

This horizontal market allocation agreement between Daramic and H&V is an obvious restraint of trade likely to harm consumers. There is no procompetitive justification for the non-compete provision. Therefore, Daramic's conduct violates Section 5 of the FTC Act. The appropriate remedy is addressed below.

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G. Remedy

Complaint Counsel proved Count I of the Complaint, that Respondent's illegal acquisition violates Section 7 of the Clayton Act and Section 5 of the FTC Act. Complaint Counsel also proved Count II of the Complaint, that the non-compete clause in Respondent's Cross Agency agreement with H&V constitutes an unfair method of competition in violation of Section 5 of the FTC Act. Complaint Counsel has not proved Count III of the Complaint, monopolization in violation of Section 5 of the FTC Act. The Initial Decision first discusses the remedy for Daramic's unlawful agreement with H&V (Section III G 1) and then the remedy for Daramic's unlawful acquisition of Microporous (Section III G 2).

The provisions of the order proposed by Complaint Counsel, as well as Complaint Counsel's arguments in support of, and Respondent's arguments in opposition to, the proposed order have been carefully considered. As more fully discussed below, the order proposed by Complaint Counsel will be issued herewith as the Order in this case (hereafter "Order"), except that Paragraph VII of Complaint Counsel's proposed order will not be included. Complaint Counsel did not prove Count III of the Complaint (Monopolization) and, therefore, Paragraph VII of Complaint Counsel's proposed order is omitted. As so modified, the order proposed by Complaint Counsel is supported by the record and applicable case law.

1. Remedy for Count II

As a remedy for the unlawful restraint on competition contained in the Cross Agency Agreement with H&V, Complaint Counsel seeks an order requiring Respondent to:

1. . . . (a) modify and amend the H&V Agreement in writing to terminate and declare null and void, and (b) cease and desist from, directly or indirectly, . . . implementing or enforcing, the covenant not to compete

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set forth in Section 4 of the H&V Agreement, and all related terms and definitions, as that covenant applies to North America and to actual and potential customers within North America.

2. . . . [F]ile with the Commission the written amendment to the H&V Agreement (“Amendment”) that complies with the requirements of the [above] Paragraph [1]

Section 4 of the Cross Agency Agreement between Daramic and H&V includes two paragraphs, which together comprise the unlawful market allocation agreement. F. 1244-45. Pursuant to Section 4(a), Daramic covenants not to make or sell AGM separators. F. 1244. Pursuant to Section 4(b), H&V covenants not to make or sell PE separators. F. 1245.

Intervenor H&V contends that the “essence of the government’s claim against Daramic on the Cross Agency Agreement is that Daramic did not have a legitimate procompetitive purpose that could justify the restraint on H&V’s competitive activities with respect to PE battery separators” and that “[i]t is the non-competition provision concerning the PE battery business [in Section 4(b)] – not the overarching Cross Agency Arrangement – that the government contends is an ‘unfair method of competition.’” H&V Brief on Remedies, at 2. Accordingly, H&V argues that any order should be limited to Section 4(b) and preserve H&V’s rights pursuant to Daramic’s covenant in Section 4(a). H&V Brief on Remedies, at 9.

H&V also contends that it did not receive notice that its contractual rights were at stake because the Complaint did not name H&V as a party and did not allege unlawful conduct by H&V with respect to the Cross Agency Agreement’s “ancillary restraints” on AGM competition in Section 4(a). *Id.* at 2. Moreover, according to H&V, Complaint Counsel informed H&V during discovery in this matter that H&V was not being targeted.

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Id. at 2, 8. In such circumstances, H&V argues, due process and limitations on the Commission's remedial authority prohibit an order that would nullify H&V's contract rights under Section 4(a) to keep Daramic out of the AGM business. Accordingly, H&V requests that any remedy be limited to nullifying Section 4(b), regarding Daramic's contractual right to keep H&V out of the PE market. *Id.* at 3.

Respondent maintains that Complaint Counsel has not proved that the non-compete provisions constitute an unlawful restraint, and, therefore, no remedy is warranted. Respondent's Response to H&V Brief on Remedies, at 1-4. Respondent argues in the alternative, however, that if Complaint Counsel prevails on the claim, Respondent opposes what it calls the "piecemeal" remedy urged by H&V, contending that H&V has failed to provide any legal authority for such a remedy. Respondent's Response to H&V Brief on Remedies, at 4.

Complaint Counsel also opposes H&V's arguments. Complaint Counsel asserts that the non-compete provision in Section 4 constitutes an unlawful, reciprocal agreement to stay out of each other's markets and that a remedy that nullifies that agreement is a reasonable and proper exercise of the Commission's broad remedial powers. Complaint Counsel's Reply Brief to H&V's Brief on Remedies, at 2, 4-5. Complaint Counsel further asserts that the Complaint, which included a notice of proposed relief, gave H&V adequate notice that its contractual rights under the Cross Agency Agreement were at issue, and that Complaint Counsel informed H&V repeatedly that it considered the non-compete provision to be unreasonably overbroad, but that H&V chose not to intervene and participate in the matter until after active litigation was concluded. *Id.* at 3. In addition, Complaint Counsel asserts that H&V's private rights, to the extent implicated by the proposed order, are not protected against the consequences resulting from the necessary restoration of competition. *Id.* at 4.

a. Permissible scope of remedy

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The proper scope of remedy for an unreasonable restraint of trade was addressed in *In re Ky. Household Goods Carriers Association*, in which the Initial Decision stated:

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. § 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. . . .

In re Ky. Household Goods Carriers Ass’n, No. 9309, 139 F.T.C. 404, 2004 FTC LEXIS 107, at **94 (June 21, 2004) (emphasis added), *aff’d*, 2005 FTC LEXIS 124 (June 21, 2005), *rev. denied*, 2006 U.S. App. LEXIS 21864 (6th Cir. 2006).

Thus, in *Kentucky Movers*, where Complaint Counsel proved that the respondent engaged in horizontal price fixing through the association’s collective ratemaking practices, the appropriate remedy was an order requiring Respondent to cease and desist from such collective ratemaking in the future. Because it was determined that the existing tariffs had been based upon unlawful collective ratemaking, respondent there was required to take action to cancel or withdraw existing tariffs. 2004 FTC LEXIS 107 at **95. In the instant case, it has been determined that the non-compete provisions of Section 4 of the Cross Agency

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agreement constitute an unlawful market allocation agreement. Contrary to H&V's assertion, the provisions of 4(a) are not mere "ancillary restraints" to the unlawful provisions of Section 4(b). Rather, it is the entire market allocation agreement between the parties, encompassed by both provisions, that is unlawful. Accordingly, the appropriate remedy is to prohibit any continued performance of the non-compete agreement.

H&V's characterization of the Complaint as charging only a restraint of trade in the PE market, in which H&V does not compete, is, at best, incomplete. While the Complaint alleges that "Daramic entered into a joint marketing agreement in 2001 with Hollingsworth & Vose, a firm that manufactures absorbed-glass-mat battery separators, in order to prevent them from entering the PE separator market," the Complaint also clearly alleges that "[t]his agreement is, at a minimum, an overbroad agreement in restraint of trade, and may be an illegal market allocation agreement that is not justified by any legitimate business purpose." Complaint, ¶ 47. Whether H&V was an actual or potential competitor in the PE market is not determinative because, as noted above, "[s]uch agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other." *Palmer*, 498 U.S. at 49-50.

b. Notice and opportunity to be heard

H&V's assertion, that Complaint Counsel was obligated to make H&V a party, if the proposed order is to affect its rights, is without merit. Joinder is not mandatory because, as the Supreme Court has stated, in administrative proceedings devoted "to the protection and enforcement of public rights, there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Pepsico, Inc. v. FTC*, 472 F.2d 179, 188 (2d Cir. 1972) (quoting *National Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940)). Rather, it is well established that "in an agency proceeding seeking to vindicate public rights against a respondent, the private rights of other parties can be

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concluded if they have had notice and an opportunity to intervene.” *Id.* at 188 n.10 (affirming Commission’s refusal to dismiss complaint for failure to join indispensable parties). Thus, in *Pepsico*, the Court held that whether to join in an action all parties to certain challenged soda distribution contracts is within the Commission’s discretion, and because Commission Rule 3.14 enabled parties to the challenged contracts to intervene in the action, a remedial order affecting such parties’ rights under the contracts would still be binding. *Id.* at 184, 189-90. As the Commission decision in the *Pepsico* matter explained:

Traditionally, of course, antitrust proceedings and decrees have taken little, if any, notice of third parties to any contract held to be in contravention of one of the antitrust laws perhaps because the vindication of public rights, even though they run counter to contractual rights between defendants and third parties, may be accomplished without joining these third parties. This reasoning is advanced by Professor Moore in 3A MOORE’S FEDERAL PRACTICE, Section 19.10 at 2344.

In re Crush International Ltd., Nos. 8853-57, 8859, 80 F.T.C. 1023, 1972 FTC LEXIS 255, at *8 (Mar. 23, 1972).

The general due process cases upon which H&V relies reinforce the importance of notice and opportunity to be heard, and are, therefore, consistent with the foregoing authorities. Regardless of whether H&V believed that it was a “target” of the unfair competition claim in the Complaint, H&V cannot reasonably contend that it had no notice that its contractual rights might be affected by the litigation. The Complaint plainly charges that “Daramic entered into a joint marketing agreement in 2001 with Hollingsworth & Vose . . . to prevent them from entering the PE separator market.” Complaint ¶ 47. As part of the Complaint, the Notice of Contemplated Relief seeks “an order that requires Daramic to cease and desist from the conduct,

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agreements, and attempt to enter agreements alleged in the Complaint.” Thus, H&V was on notice that its contractual rights might be affected by the litigation.

During the litigation, H&V sought to protect its interests in discovery, as follows: H&V filed a stipulation regarding the treatment under the Protective Order Governing Discovery of certain of H&V’s confidential information on February 4, 2009; H&V submitted three motions for *in camera* treatment of its materials on April 9, 2009, May 28, 2009, and June 16, 2009; and H&V filed a motion to quash the subpoenas *ad testificandum* served on H&V employees, Robert Cullen and Kevin Porter, on May 12, 2009.¹⁰ Despite its extensive involvement in discovery issues, H&V did not seek to intervene to protect its rights with regard to the proposed order, pursuant to Commission Rule 3.14, until September 2, 2009, nearly one year after the Complaint was issued, and nearly three months after the adjudicative trial was concluded. Having chosen to delay asserting its right to be heard, H&V has no valid claim that such right was deprived.

Moreover, when H&V ultimately did move to intervene, after the trial, it was granted intervention for the “purpose of providing a brief and any proposed findings of fact on the issue of how the proposed remedy might affect H&V’s rights under the Cross Agency Agreement.” Order on Motion of Non-Party Hollingsworth & Vose for Leave to Intervene, September 23, 2009, at 3. H&V’s proposed findings and arguments have been thoroughly considered, and for all the foregoing reasons, are rejected.

The relief for Daramic’s unlawful agreement in violation of Section 5 of the FTC Act, as proposed by Complaint Counsel, is set forth in Paragraph VII of the Order.¹¹

¹⁰ These H&V employees appeared through deposition testimony, as agreed to by the parties and approved by the Administrative Law Judge.

¹¹ The language of the Order requiring a unilateral “modification” and “amendment” to the contract was submitted by Complaint Counsel in the

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2. Remedy for Count 1

As a remedy for Respondent's illegal acquisition of Microporous, Complaint Counsel seeks an order requiring complete divestiture and other provisions to further the creation of a viable competitor. CCB at 68-78. As discussed below, complete divestiture is the appropriate remedy to most effectively "pry open to competition [the] market[s] that [have] been closed by [Respondent's] illegal restraints." *See United States v. E. I. Du Pont de Nemours & Co.*, 366 U.S. 316, 323 (1961). Accordingly, complete divestiture is required by the Order. In addition, a number of ancillary provisions included in the Order are crucial to establishing a viable entrant and, therefore, are necessary to replace competition lost from Daramic's acquisition of Microporous.

a. Applicable legal standards

As discussed in detail herein, Complaint Counsel has established that the acquisition of Microporous by Respondent may substantially lessen competition in the relevant markets and, thus, has established that Respondent violated Section 7 of the Clayton Act. Pursuant to Section 11(b) of the Clayton Act:

If upon such hearing the Commission . . . shall be of the opinion that any of the provisions of [Section 7] have been or are being violated, it shall . . . issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the . . . assets, held . . . in the manner and within the time fixed by said order.

15 U.S.C. § 21(b).

proposed order. Curiously, neither Respondent nor H&V addressed this specific issue.

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Through Section 11 of the Clayton Act, Congress expressly directed the Federal Trade Commission to issue orders requiring that a violator of § 7 divest itself of the assets held in violation of the Clayton Act. *California v. American Stores Co.*, 495 U.S. 271, 284-85 and n.11 (1990); *FTC v. Western Meat Co.*, 272 U.S. 554, 559 (1926).

Under both the text of the Clayton Act and Supreme Court precedent, divestiture is the usual and proper remedy where a violation of § 7 has been found. *United States v. Du Pont*, 366 U.S. at 329 (“The very words of § 7 suggest that an undoing of the acquisition is a natural remedy.”); *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) (“Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.”); *American Stores Co.*, 495 U.S. at 285 n.11 (noting that a person who is allowed to continue holding ownership over stock or assets that created a Section 7 violation would be engaging in a perpetual violation, and thus, divestiture is the only effective remedy). *See also El Paso Natural Gas*, 376 U.S. at 662 (directing the district court to order divestiture without delay). “Of the very few litigated § 7 cases which have been reported, most decreed divestiture as a matter of course.” *Du Pont*, 366 U.S. at 330.

In addition, “it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.” *Du Pont*, 366 U.S. at 334. In a merger case, absent “unusual circumstances,” it is presumed that total divestiture of the acquired assets is the best means of restoring competition. *In re RSR Corp.*, No. 8959, 88 F.T.C. 800, 1976 FTC LEXIS 40, at *208 (Dec. 2, 1976), *aff’d*, *RSR Corp. v. FTC*, 602 F.2d 1317 (9th Cir. 1979). Accordingly, “the burden rests with respondent to demonstrate that a remedy other than full divestiture would adequately redress any violation which is found.” *In re Fruehauf Corp.*, No. 8972, 1977 FTC LEXIS 9, at *3 n.1, 90 F.T.C. 891,

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892 n.1 (Dec. 21, 1977); *In re Chicago Bridge*, 2003 FTC LEXIS 96, at **277.

“[E]xceptions to the general rule [of full divestiture] can be reasonably invoked . . . only when the proof of their probable efficacy is clear and convincing.” *In re Diamond Alkali, Co.*, No. 8572, 72 F.T.C. 700, 742, 1967 FTC LEXIS 44, at *88 (Oct. 2, 1967).

In the absence of proof to the contrary the assumption of this Commission must be that “only divestiture can reasonably be expected to restore competition and make the affected markets whole again.” Moreover, if an order of divestiture appears to the Commission to be in all likelihood the most effective available remedy, the Commission need not justify its order beforehand by showing that it will unquestionably restore competition.

Id. (citation omitted).

In this case, as more fully discussed below, Respondent has not presented compelling arguments or sufficient proof to depart from the usual remedy of full divestiture of the illegally acquired assets.

b. Complete divestiture is the appropriate remedy in this case

Respondent contends that complete divestiture in this case is overbroad, inappropriate, and punitive because it will not serve the “principal purpose of relief [which] is to restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger.” RB at 58; RRB 39 (citing *In re B.F. Goodrich*, 1988 FTC LEXIS 16, at *138). Preliminarily, Respondent raises certain general objections to divestiture based on its assertions that Microporous was in a precarious financial position at the time of the acquisition and Microporous’ survival

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was far from clear; that appropriate relief must consider the current downturn in the economy; and that, given these circumstances, complete divestiture, at no minimum price, is unnecessary and punitive. RB at 59-62; RRB 37-39. Specifically, Respondent objects to divestiture of: (1) the entire Piney Flats plant, as opposed to divestiture of a single PE line at the plant; (2) the Feistritz plant in Austria; and (3) the equipment Microporous purchased for an additional production line (the “line in boxes”). According to Respondent, a sufficient remedy is to divest a single PE line at Piney Flats. RB 62-67; RRB 40-43. Each of these assertions is discussed below.

(i) Respondent’s general objections to complete divestiture

The record does not support Respondent’s contention that Microporous was failing financially. *See* F. 1127-28; Section III E 3, *supra*. Moreover, to the extent Respondent’s anticompetitive conduct contributed to any financial difficulties at Microporous, Respondent should not be allowed to rely on such difficulties as a basis for avoiding a complete remedy in this case. Respondent’s additional argument, that divestiture must consider the current economic climate, also does not compel an order of less than full divestiture of Microporous. Respondent contends that neither the Piney Flats plant nor the Feistritz plant {redacted} that the Feistritz plant {redacted} RFOF 425, and that the “line in boxes” will only saddle a potential acquirer with additional unneeded equipment. RRB at 38. However, contrary to Respondent’s arguments, such factors support ordering broad divestiture, in order to “ensure that the package of assets divested is sufficient to give its acquirer a real chance at competitive success.” *In re Olin*, No. 9196, 113 F.T.C. 400, 1990 FTC LEXIS 234, at *65 (June 13, 1990), *rev. denied*, 986 F.2d 1295 (9th Cir. 1993).

Finally, Respondent’s assertion that requiring divestiture in current economic conditions will result in a punitive “give away,” RRB at 38, does not require a lesser remedy. As the Commission stated in *In re RSR Corp.*: “Certainly it cannot be forecast with

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absolute assurance that the divested [entity] will find a willing buyer and become the vigorous competitor it once was. But neither is there anything more than speculation to justify the opposite conclusion, and in a merger case we think that absent clear proof, which is generally likely to come only at the compliance stage when a good faith effort to divest has been made, the presumption should be that an acquired competitive entity can be viably restored to its preacquisition status.” 1976 FTC LEXIS 40, at *210-11. In this case as well, it is speculation at this stage whether a buyer can be found, and whether the price will amount to a “punitive” give-away. The mere fact that divestiture may have an adverse economic impact on Respondent does not compel a lesser remedy. *See Du Pont*, 366 U.S. at 326 (“[C]ourts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests. Divestiture is itself an equitable remedy designed to protect the public interest.”).

(a) The Piney Flats plant

Respondent objects to divestiture of the Ace-Sil and Flex-Sil production lines at the Piney Flats plant because, according to Respondent, neither product is within the relevant product market. Moreover, Respondent argues, Flex-Sil does not compete with any Daramic product. Therefore, Respondent argues, divestiture of lines that produce these products is not necessary to restore competition. RB at 60-62. These arguments are without merit.

Contrary to Respondent’s assertions, the evidence shows that Flex-Sil does compete in the relevant deep-cycle product market. F. 371, 464-71, 502-510. Moreover, Ace-Sil is important to the production of CellForce, which is a product in the relevant markets and competes directly with Daramic HD, because Ace-Sil dust is used to make CellForce. F. 45, 148, 198, 233, 257, 387, 415. Furthermore, the Commission has ordered divestiture in consummated merger cases where violations of the Clayton Act have been found, even where products outside the relevant market

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are implicated. For example, in *In re Chicago Bridge*, 2005 FTC LEXIS 215, at **214-16, the Commission ordered complete divestiture of what CB&I acquired, including both the former PDM Engineered Construction Division, which made the relevant products, and its former water division, which made products outside the relevant market. Similarly, *In re Olin*, 1990 FTC LEXIS 234, at *63-65, the Commission ordered the respondent to divest a facility that manufactured both the relevant product and a product outside the relevant market. Thus, even if Ace-Sil and Flex-Sil were outside the relevant markets, a conclusion contrary to the evidence, this fact alone would not prevent divestiture of facilities used to make these products. To the contrary, as noted in *In re Olin*, such broad divestiture helps “ensure that the package of assets divested is sufficient to give its acquirer a real chance at competitive success.” 1990 FTC LEXIS 234, at *65.

(b) The Feistritz plant

Respondent contends that because the Feistritz plant is located in Europe, it is beyond the jurisdiction of the FTC to order its divestiture. RB at 62. Respondent also asserts that the Feistritz plant is not subject to divestiture because it is located outside the relevant geographic market of North America. *Id.* Respondent is incorrect on both counts.

As noted in Section III A above, the FTC jurisdiction in this matter arises from Respondent’s activities in or affecting interstate commerce, the FTC’s power to determine the legality of the acquisition, and its power to order divestiture if a violation is found. 45 U.S.C. § 5 (a); 15 U.S.C. § 21(b). It has already been determined that there is jurisdiction over Respondent and the subject matter of this proceeding. *See* Section III A, *supra*. An order of divestiture would arise from, and be directed to, the conduct of Respondent, a domestic corporation. Accordingly, Respondent’s reliance on the Foreign Trade Antitrust Improvements Act (“FTAIA”), which governs foreign conduct affecting United States commerce, is misplaced.

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Divestiture orders against domestic corporations have included a requirement to divest foreign assets, where appropriate to restore competition lost through an illegal acquisition. See *Yamaha Motor Co., Ltd. v. FTC*, 657 F.2d 971, 982 (8th Cir. 1981) (affirming Commission's order that respondent divest foreign stock acquired in violation of Clayton Act); *In re Chicago Bridge & Iron Co.*, No. 9300, 140 F.T.C. 1152, 1169-70, 2005 FTC LEXIS 216, at **14-15 (Aug. 30, 2005) (modifying final order to specify divestiture of foreign assets if necessary to restore competition in the relevant markets). See also *United States v. National Lead Co.*, 332 U.S. 319, 363 (1947) (affirming district court order to present plan to divest stockholdings and financial interests in foreign companies, based upon findings that such acquisitions were part and parcel of unlawful territorial allocation agreements).

Similarly, just as divestiture orders can reach products outside the relevant product market where appropriate to restore competition, the law does not protect an asset located outside the relevant geographic market against divestiture. Rather, as the above-cited cases clearly indicate, the relevant issue is not where the assets are located, but whether divestiture of the assets will contribute to restoring competition lost through the acquisition. For example, in *In re Chicago Bridge*, the respondent petitioned the Commission to reconsider and to modify the final order, *inter alia*, to expressly remove foreign assets from the scope of the required divestiture. The Commission acknowledged that the Commission's Opinion focused on competition in the United States market, but noted that "the possibility exists that some foreign assets may be necessary for an acquirer to compete effectively." 2005 FTC LEXIS 216, at **15. Accordingly, the final order was modified "to include language that ensures such assets are available if they are needed to ensure the viability of the Relevant Business but makes clear that CB&I need include foreign assets only to the extent they are necessary for an acquirer to compete in the Relevant Markets." *Id.*

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In the instant case as well, the Feistritz plant, while itself outside the relevant North American market, is nevertheless a necessary asset to enable an acquirer to compete in that market. F. 1261. The evidence shows that the ability to supply a battery manufacturer's needs on a global basis is important to customers. F. 282, 1276. The availability of local supply reduces freight costs and lead-times, and also reduces other costs of more distant supply, such as inventory and warehousing costs. F. 286-90, 298. In addition, local supply enables the supplier to meet with the customer and to respond if technical or quality issues arise, which is also important to customers. F. 291-93. Logistic considerations including shipping costs to the customer, reductions in lead-times, as well as pure customer preference, framed the basis of Microporous' decision to expand into Europe. F. 301. Moreover, the scale of production provided by multiple plants is important to customers. F. 282, 297, 1272-73. For example, the 2007 EnerSys contract with Microporous was conditioned on Microporous building an additional facility in Europe, both to serve EnerSys' European business locally and to ensure Microporous had the capacity to meet EnerSys' European and North American supply needs. F. 300, 1277-79.

Respondent also contends that the Feistritz plant should not be included in the divestiture order because it had not begun operating at the time of the acquisition, and therefore was not "part of" the acquisition. RB at 62. Contrary to Respondent's assertion, the Feistritz plant was, indeed, part of the acquisition. F. 1264. In *In re RSR Corp.*, the Commission required divestiture of a pre-merger plant owned by the acquired company, even though the plant was not completed at time of merger, as well as a plant that manufactured a product outside the relevant product market. *In re RSR Corp.*, 1976 FTC LEXIS 40, at *218-19. The Commission held that including the plant as part of a broad divestiture order was required to restore competition in the relevant market, and the Ninth Circuit affirmed. *Id.*; see 602 F.2d at 1326. The facts in the instant case are even stronger than in *RSR*. In this case, at the time of the acquisition, the two lines planned for the facility had been completed. F. 778. There were

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approximately 15 employees working at the plant, F. 1265, and the plant began producing products within the first week after the acquisition. F. 1266. In these circumstances, and given the fact that Microporous planned the Feistritz plant in order to be more competitive in the relevant markets, F. 768-72, there is no valid basis for concluding that the Feistritz plant should not be divested.

Respondent further argues that including the Feistritz plant would not add to the viability of a new company, but, in fact, make the divestiture package less attractive to potential buyers. RB 62, 64-66. Specifically, Respondent relies on evidence: (1) that, at the time of the acquisition, Microporous had no contracts in place committing the second line at the Feistritz plant, and that the Exide MOU had expired; (2) that the Feistritz plant is operating at less than capacity; and (3) that, if not for the transfer of orders from Daramic's Potenza plant to Feistritz, the capacity level would only be about {redacted} *Id.*; see F. 710, 1267, 1281, 1284-86. However, it is neither necessary, nor appropriate to speculate as to the viability of a divestiture package. Rather, "in a merger case [the Commission thinks] that absent clear proof, which is generally likely to come only at the compliance stage when a good faith effort to divest has been made, the presumption should be that an acquired competitive entity can be viably restored to its preacquisition status." *In re RSR Corp.*, 1976 FTC LEXIS 40, at *210-11. The evidence in this case does not demonstrate "that a smaller set of assets than those illegally acquired . . . will suffice to restore competition, and what we know with certainty is that this [preacquisition] combination of assets has made a saleable package in the past." *In re Chicago Bridge*, 2005 FTC LEXIS 215, at **215. See also *In re Crown Zellerbach Corp.*, No. 6180, 54 F.T.C. 769, 808, 1957 FTC LEXIS 22 (Dec. 26, 1957) (rejecting order allowing piecemeal sale of acquired company's assets), *aff'd*, 296 F.2d 800 (9th Cir. 1961).

For all the foregoing reasons, the Feistritz plant should be, and is, included in the divestiture Order.

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(c) The line in boxes

Respondent also objects to divestiture of the equipment Microporous had purchased for the purpose of constructing a third manufacturing line, but which Microporous did not in fact construct prior to the acquisition (the “line in boxes”). RB at 66; *see* F. 1268. Part of the equipment remains in boxes in Austria, and part of it is in Piney Flats. F. 1269. A pinhole detector that Microporous purchased is being used in Piney Flats in production. The extruder purchased by Microporous is in a semi-finished stage at the supplier. F. 1270.

Respondent states that the plan to build the third line was put on hold at the time of the acquisition. RB at 66. Moreover, Respondent argues that requiring divestiture of the line in boxes, when neither Piney Flats nor Feistritz are operating at full capacity, will further detract from the attractiveness and viability of the divestiture. RRB at 38. As noted above, the presumption is that full divestiture is the appropriate remedy to restore competition to the state that existed at the time of the acquisition. Speculation that the divestiture package will be unattractive to buyers or not allow a new buyer to be a viable competitor does not defeat that presumption. *See In re Chicago Bridge*, 2005 FTC LEXIS 215, at **215; *In re RSR Corp.*, 1976 FTC LEXIS 40, at *210-11.

Accordingly, the line in boxes is included in the divestiture Order.

(ii) Alternative remedy of partial divestiture of single PE line

Respondent asserts that partial divestiture, consisting of a single PE line at Piney Flats, is sufficient to restore competition in this case. RB at 66-67. As discussed above, however, production facilities manufacturing Ace-Sil and Flex-Sil at the Piney Flats plant, the Feistritz Plant, and the line in boxes should be divested,

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in order to restore competition to the state it was in prior to the acquisition, and to re-create an entity capable of competing in the marketplace. *See also* F. 1261.¹² For these reasons, partial divestiture of a single PE line – particularly when the line is housed on the same property, in a building adjacent to related manufacturing facilities – cannot suffice. *See In re Chicago Bridge*, 2003 FTC LEXIS 96, at **280-81 (noting that complete divestiture of closely interrelated business operations is appropriate).

3. Summary of Order

a. Divestiture provisions

Paragraph II of the Order requires complete divestiture of Microporous, including the Feistritz plant and the line in boxes. (Order ¶¶ I.AA, II.A, II.B).¹³ These provisions, as discussed above, are a necessary and appropriate remedy for the illegal acquisition. Also included in the divestiture provisions of Paragraph II is a provision for the assignment of contracts to the acquirer to ensure that the acquirer (“Newco”) will have a base of business consistent with its ongoing operations at the time of divestiture. (Order ¶ II). A similar provision was included in the final order in *Chicago Bridge*, 138 F.T.C. at 1165. Respondent is required to divest technology and other intellectual property, limited to what it acquired from Microporous in the acquisition, together with any additions and improvements since the

¹² Respondent’s assertion that it should retain CellForce, and divest Daramic HD, as a way of resolving the problem of access to Ace-Sil dust for the manufacture of CellForce, merits little discussion. Suffice it to say that Respondent has failed to prove that allowing Polypore to maintain all of Microporous’ products and all but one of its production lines would effectively restore competition. Moreover, Respondent cites no authority that would permit an antitrust violator to maintain the fruits of its acquisition and to divest one of its own products instead.

¹³ Paragraph I of the Order contains applicable definitions and is not separately analyzed herein.

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acquisition. (Order ¶ II.A). This requirement is necessary to restore competition to the state in which it would likely have continued to exist “but for” the illegal merger.

Respondent must also grant the acquirer a perpetual, worldwide, royalty-free license to use any Daramic technology that Respondent introduced into use at the former Microporous plants after the acquisition to ensure that those plants can continue to operate post-divestiture without disruption. (Order ¶ II.C.4). This requirement is necessary since there would be no effective way to purge certain information, such as best practices, from the minds of personnel involved in those operations who might become employees of the acquirer in connection with the divestiture. The requirement that Daramic must covenant not to sue the acquirer over any technology that it owns or licenses at the point of divestiture, including the Jungfer technology (Order ¶ II.F.1.), is necessary to ensure that Newco’s ability to compete in the relevant markets is not impeded.

The potential provision of transitional services if needed by the acquirer (Order ¶ II.F.3), and the removal of impediments to the acquirer’s ability to recruit and hire employees of “Microporous,” including non-compete agreements (Order ¶ II.D.2), are also necessary to ensure the viability of Newco immediately following divestiture. Prior to the acquisition, Microporous had an entire infrastructure to provide shared services to the plants, including administrative, payroll, information technology and human resources, which are now being provided by Respondent. Accordingly, it is reasonable to require Respondent to continue to provide these services for a transitional period if necessary. A similar provision was also included in the final order in *Chicago Bridge*, 138 F.T.C. at 1166-69.

The removal of non-compete agreements is necessary to allow the acquirer to hire and utilize the personnel working at the Microporous plants who are now employed by Respondent, and is needed to ensure the viability of those plants post-divestiture. The

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requirement does not apply to all of Respondent's employees, only to those who worked at Microporous before the acquisition and those who have worked in the former Microporous plants after the acquisition. (Order ¶¶ I.EE, II.D.2.). The final order in *Chicago Bridge* included a similar provision. 138 F.T.C. at 1165-66, 1173 & n.592.

b. Ancillary provisions

“In Section 7 cases, the principal purpose of relief is to restore competition to the state in which it existed prior to, and would have continued to exist but for, the illegal merger.” *In re B.F. Goodrich Co.*, 110 F.T.C. 207, 345 (1988) (quoting *In re RSR Corp.*, 88 F.T.C. 800, 893 (1976)). The Commission is “clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist.” *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957). It has “wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.” *Id.* (internal quotations omitted). Further, the Supreme Court has recognized that “[t]he relief which can be afforded” from an illegal acquisition “is not limited to the restoration of the status quo ante.” *Ford Motor Co.*, 405 U.S. at 573 n.8. “There is no power to turn back the clock. Rather, the relief must be directed to that which is ‘necessary and appropriate in the public interest to *eliminate the effects* of the acquisition offensive to the statute.’” *Id.* Thus, in addition to the provisions in the Order requiring divestiture, the Order contains a number of ancillary provisions designed to restore competition lost through Daramic's illegal conduct.

Paragraph III of the Order provides for the appointment of a Monitor Trustee to make sure that Respondent complies with the requirements of the Order. Paragraph IV provides for a Divestiture Trustee in the event Respondent does not divest within the required time frame. Paragraph V of the Order requires Respondent to maintain the viability and competitiveness of

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Microporous pending divestiture. These are standard provisions in Commission divestiture orders. *See Chicago Bridge*, 138 F.T.C. at 1024.

Paragraph VI of the Order allows customers to reopen and negotiate or terminate contracts entered into by Daramic in the exercise of market power. This provision is necessary to prevent Respondent from continuing to reap the benefits of its illegal acquisition. Paragraph VI does not require across-the-board termination of customer contracts, but rather provides customers with the option to reopen and renegotiate or terminate the contracts they were forced to enter into with Daramic during a period in which it unlawfully exercised its market power. This provision is necessary to prevent Daramic from continuing to reap the benefits of its unlawful conduct. The provision in the Order is narrower than what the Commission required in the final order in *In re North Texas Specialty Physicians*, No. 9312, 140 F.T.C. 715, 785, 2005 FTC LEXIS 206, at *8 (Nov. 29, 2005), because it does not require Respondent to terminate all contracts, but instead leaves it up to the customer to determine whether to opt for reopening.

Paragraph VII of the proposed order is advocated by Complaint Counsel as a provision, “[i]n addition to the merger-specific relief requested,” to require Respondent to cease and desist from any other practice that is found to be an unfair method of competition or an unreasonable restraint of trade. CCB at 76-77. The provisions sought in Paragraph VII of the proposed order relate to the conduct that Complaint Counsel charged as, but did not prove to be, exclusionary conduct. Because Count III of the Complaint relating to monopolization was dismissed, Paragraph VII of the proposed order is not adopted in the Order.

With the deletion of Paragraph VII from the proposed order, the remainder of the Order is renumbered. Paragraph VII of the Order (Paragraph VIII of the proposed order) requires Daramic to undo the H&V Agreement and to refrain from entering similar agreements in the future. Section III G 1, *supra*.

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Paragraph VIII of the Order (Paragraph IX of the proposed order) prohibits Respondent from introducing any battery separator using cross-linked rubber for a period of two years following the divestiture. Microporous' pre-acquisition use of cross-linked rubber technology in its battery separators distinguished Microporous' products from Daramic's. This technology, which was exclusively Microporous' before the acquisition, will be divested pursuant to the Order. To assure that the viability of the divestiture is not undermined from the outset by Daramic's introduction of a product improperly based on Microporous technology, a brief moratorium period of two years on any such product introduction is reasonable.

The remaining provisions of the Order are standard reporting, notice, compliance monitoring and sunset provisions that are typically required in Commission orders. (Order ¶¶ IX-XIII); *see Chicago Bridge*, 138 F.T.C. at 1197-99; *In re North Texas Specialty Physicians*, 140 F.T.C. at 787-88.

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4. Conclusion

Upon consideration of the entire record, relief designed to remedy the violations found to exist is hereby ordered. The Order is designed to restore competition as it existed prior to the Respondent's unlawful conduct and to remedy the anticompetitive effects arising therefrom.

IV. SUMMARY OF CONCLUSIONS OF LAW

1. The Commission has jurisdiction over Respondent Polypore International, Inc. ("Respondent" or "Polypore") and the subject matter of this proceeding, pursuant to Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, and Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18, 21(b).
2. Respondent is, and at all times relevant herein, has been, engaged in "commerce" as 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 defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.
3. On February 29, 2008, Daramic Acquisition Corporation, a subsidiary of Polypore, acquired Microporous from Industrial Growth Partners II L.P. and other stockholders (the "acquisition"). The acquisition is a transaction subject to Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45.
4. Section 7 of the Clayton Act prohibits acquisitions, the effect of which "may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18. "Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), expressly vests the Commission with jurisdiction to determine the legality of a corporate acquisition under Section 7 and, if warranted, to order divestiture."

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5. Section 7 of the Clayton Act prohibits acquisitions, “where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.” 15 U.S.C. § 18.
6. The appropriate lines of commerce within which to evaluate the probable competitive effects of the acquisition are: (1) deep-cycle; (2) motive; (3) uninterruptable power supply (“UPS”); and (4) starting, lighting, and ignition (“SLI” or “automotive”) battery separators for flooded lead-acid batteries.
7. The appropriate section of the country within which to evaluate the probable competitive effects of the acquisition is North America.
8. Complaint Counsel has established that there is a reasonable probability that Respondent’s acquisition of Microporous will substantially lessen competition in the deep-cycle, motive, UPS and SLI battery separator markets in North America.
9. The government can establish a presumption that a transaction will substantially lessen competition by showing that an acquisition will lead to undue concentration in the relevant market. However, market share and concentration data provide only the starting point for analyzing the competitive impact of a merger. Other market factors that pertain to competitive effects are also assessed.
10. Daramic’s acquisition of Microporous resulted in a merger to monopoly in the deep-cycle and motive markets, with Daramic attaining a 100% share of each market. Thus, the acquisition is presumptively illegal because it resulted in a

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merger of the only two competitors in these relevant markets.

11. Although Microporous did not have market shares in either the UPS or SLI markets at the time of the acquisition, Microporous was a competitive threat to Daramic in the UPS market and a competitor in the SLI market. Daramic's acquisition of Microporous has the anticompetitive effect of eliminating Microporous as a competitive constraint.
12. With the acquisition, the UPS market continues to be a monopoly, with Daramic having a 100% market share.
13. With the acquisition, the SLI market remains a duopoly, with Daramic having nearly a 50% market share.
14. Complaint Counsel has demonstrated unilateral anticompetitive effects in the deep-cycle, motive, and UPS markets, in which Daramic has a monopoly. Daramic has exerted unilateral market power in these markets since the acquisition.
15. Complaint Counsel has shown that Daramic's acquisition of Microporous has had unilateral anticompetitive effects in the SLI market as to battery manufacturers which had been working with, and looking to, Microporous as an independent supplier of SLI separators.
16. With the elimination of Microporous from the SLI market, the SLI market continues to be a duopoly, for which there is a strong presumption of coordinated anticompetitive effects.

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17. Post-acquisition price increases add to the strong presumption that a merger to monopoly in three markets, and from three to two competitors in the SLI market, will lead to anticompetitive effects. Daramic has failed to rebut these presumptions and the additional evidence that supports them.
18. Evidence indicating the purpose of the merging parties is an aid in predicting the probable future conduct of the parties and, thus, the probable effects of the merger, and Daramic's documents show that Daramic acquired Microporous with the intent to eliminate a competitor and to protect Daramic's market share; to avoid having to lower prices; and, to gain the ability to raise prices.
19. For entry to counteract the anticompetitive effects of an acquisition, entry must not only be timely, but must also be likely, and sufficient in its magnitude, character and scope to deter or counteract the competitive effects of concern.
20. In highly concentrated markets, if there is sufficient ease of entry, enough firms can enter to compete with the merging firms, undercutting any of the likely anticompetitive effects of the proposed merger.
21. A fundamental step in determining ease of entry is timeliness. Timely entry is entry that is achieved within two years from initial planning to significant market impact.
22. There are significant barriers to entry into the relevant markets, including the needs for millions of dollars in capital investment required to achieve sufficient scale to compete, specialized equipment, technical expertise and "know-how" that is not widely available, and a favorable reputation with customers. The time required to surmount

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these barriers, as well as to plan, construct, and debug production facilities, develop and test products, and obtain product validation by customers necessary to make product sales, exceeds two years.

23. Entry into the relevant markets will not counteract the anticompetitive effects of the acquisition.
24. Respondent presented a “power buyer” defense. The power buyer defense is grounded in the theory that large, sophisticated buyers may have the bargaining power to resist anticompetitive price increases and, thereby, counter anticompetitive effects of a merger. At a basic level, however, customers must have alternative suppliers in order to have any real bargaining power.
25. As a result of the acquisition, in the deep-cycle, motive, and UPS markets, customers can purchase only from Daramic, and in the SLI market, customers can purchase only from Daramic or one other supplier. In addition, barriers to entry are high and entry is unlikely. Therefore, the buyers in this case do not have any real ability to counter the anticompetitive effects of the acquisition.
26. Respondent failed to sustain its power buyer defense.
27. Respondent presented an efficiencies defense. A proponent of an efficiencies defense must demonstrate that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers.
28. Claimed efficiencies must be: (1) verifiable; (2) merger-specific, *i.e.*, ones that could not practicably be achieved without the proposed merger; and (3) greater than the transaction’s substantial anticompetitive effects.

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29. Efficiencies almost never justify a merger to monopoly or near-monopoly. A showing of extraordinary efficiencies is necessary in such strong statistical cases because the likelihood of a significant price increase is particularly large, and there is less competition present to ensure that the benefit of efficiencies will flow to consumers even in the relatively long run.
30. Respondent has failed to sustain an efficiencies defense.
31. Respondent presented a defense based on the asserted weakened financial condition of Microporous at the time of the acquisition. Evidence of the acquired firm's weakened financial condition, among other factors, may rebut the government's statistical showing of anticompetitive market concentration.
32. Respondent's "financially weakened company" defense is not supported by the facts, or by the cases on which Respondent relies.
33. The evidence presented by Respondent on entry, power buyers, efficiencies, and Microporous' financial condition fails to offset the preponderance of the evidence of reasonably likely anticompetitive effects, as proved by Complaint Counsel.
34. Complaint Counsel has met its burden of proving that the effect of Respondent's acquisition of Microporous may be substantially to lessen competition in the deep-cycle, motive, UPS, and SLI separator markets in North America. Therefore, Complaint Counsel has proved Count I of the Complaint, that, through its acquisition of Microporous, Respondent violated Section 7 of the Clayton Act and Section 5 of the FTC Act.

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35. Section 5 of the FTC Act prohibits unfair methods of competition, which include any conduct that would violate Sections 1 or 2 of the Sherman Act.
36. The charge of monopolization requires proof of: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.
37. Attempted monopolization requires proof: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving or obtaining monopoly power.
38. Monopoly power is defined as the power to control prices or exclude competition. Monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers.
39. At the time the alleged conduct occurred, Respondent had monopoly power in the motive and UPS markets and a dangerous probability of achieving monopoly power in the deep-cycle market. Because barriers to entry are substantial, there exists at all relevant times a dangerous probability that Daramic's monopoly power will persist.
40. At the time the alleged conduct occurred, Respondent did not have monopoly power or a dangerous probability of achieving monopoly power in the SLI market.
41. The mere existence of a monopoly does not violate the Sherman Act. The offense of monopolization additionally requires the willful acquisition or maintenance of that power, as distinguished from growth or development as a

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consequence of a superior product, business acumen, or historical accident.

42. A firm violates Section 2 of the Sherman Act when it maintains or attempts to maintain a monopoly by engaging in exclusionary conduct.
43. In evaluating alleged exclusionary conduct, the key factor is whether challenged conduct is or is not competition on the merits. The most important factor in determining whether challenged conduct is not competition on the merits is the proffered business justification for the act.
44. Exclusive dealing arrangements are essentially requirements contracts, whereby the buyer agrees to purchase exclusively the product of the contracting supplier. Requirements contracts have anti-trust implications because they have a tendency to foreclose or exclude other sellers from the market by tying up potential purchases of the buyer.
45. Complaint Counsel has not met its burden of proving that Respondent engaged in exclusionary conduct in the markets in which Respondent is found to have had monopoly power or a dangerous probability of achieving monopoly power, because the evidence does not show that Daramic's conduct was likely to foreclose Microporous from doing business in those markets. Accordingly, Count III of the Complaint is dismissed.
46. Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States" 15 U.S.C. § 1. Three elements must be established in order to prove a Section 1 violation: (1) the existence of a contract, combination, or conspiracy among two or more separate entities, that (2) unreasonably

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restrains trade, and (3) affects interstate or foreign commerce.

47. The first step in evaluating a challenged restraint is to determine whether it is obvious from the nature of the challenged conduct that it will likely harm consumers. When there is an agreement not to compete in terms of output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. Agreements between competitors to allocate territories to minimize competition have consistently been found to be *per se* illegal.
48. Where a restraint is found to be inherently suspect, in order to avoid liability, a respondent must either identify some reason the restraint is unlikely to harm consumers or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.
49. Complaint Counsel has met its burden of showing that the non-compete provision of the Cross Agency Agreement between Daramic and Hollingsworth & Vose (“H&V”) pursuant to which each agreed not to enter each other’s markets constitutes a horizontal market allocation agreement that is an obvious restraint of trade likely to harm consumers. Respondent has failed to show a procompetitive justification for the non-compete provision. Therefore, Complaint Counsel has met its burden of proof in support of Count II of the Complaint.
50. In an agency proceeding seeking to vindicate public rights against a respondent, the private rights of other parties can be concluded if they have had notice and an opportunity to intervene. Intervenor H&V had adequate notice that relief sought in this case would affect its rights under the Cross Agency Agreement. H&V also had the opportunity to be heard in the case, pursuant to Commission Rule 3.14 allowing intervention, and did intervene after the

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conclusion of the trial to submit a brief and proposed findings on remedy.

51. The appropriate remedy for the violation in Count II of the Complaint is to prohibit any continued performance of the unlawful horizontal market allocation agreement embodied by the non-compete provisions of the Cross Agency Agreement.
52. Divestiture is the proper remedy for the unlawful acquisition demonstrated under Count I.
53. Complete divestiture of all assets acquired in the acquisition is required to restore competition as it existed prior to the acquisition.
54. Relief designed to restore competition as it existed prior to the acquisition is appropriate.
55. Relief that is not designed to restore competition, but is designed solely to remedy alleged monopolistic conduct charged under Count III, which Complaint Counsel did not prove, and which is dismissed, is not included in the Order.
56. The Order entered herein is necessary and appropriate to remedy the violations of law found to exist.

ORDER**I.**

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

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- A. “Acquirer” means any Person approved by the Commission pursuant to this Order to acquire Microporous.
- B. “Acquisition” means the acquisition of all of the outstanding shares of Microporous by Respondent Polypore pursuant to a Stock Purchase Agreement dated February 29, 2008.
- C. “Acquisition Date” means February 29, 2008.
- D. “Battery Separator(s)” means porous electronic insulators placed between positively and negatively charged lead plates in flooded lead-acid batteries to prevent electrical short circuits while allowing ionic current to flow through the separator.
- E. “Books and Records” means all originals and all copies of any operating, financial or other books, records, documents, data and files relating to Microporous, including, without limitation: customer files and records, customer lists, customer product specifications, customer purchasing histories, customer service and support materials, Customer Approvals and Information; accounting records; credit records and information; correspondence; research and development data and files; production records; distributor files; vendor files, vendor lists; advertising, promotional and marketing materials, including website content; sales materials; records relating to any employee who accepts employment with the Acquirer; educational materials; technical information, data bases, and other documents, information, and files of any kind, regardless whether the document, information, or files are stored or maintained in traditional paper format, by means of electronic, optical, or magnetic media or devices, photographic or video images, or any other format or media; *provided*,

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however, that where documents or other materials included in the Books and Records to be divested with Microporous contain information: (1) that relates both to Microporous and to Polypore's Retained Assets or its other products or businesses and cannot be segregated in a manner that preserves the usefulness of the information as it relates to Microporous; or (2) for which the relevant party has a legal obligation to retain the original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the relevant party shall provide the Acquirer access to original documents under circumstances where copies of the documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Polypore provides the Acquirer with the above-described information without requiring Polypore to divest itself completely of information that, in content, also relates to its Retained Assets or its other products or businesses.

- F. "Commission" means the Federal Trade Commission.
- G. "Confidential Business Information" means any non-public information relating to Microporous either prior to or after the Effective Date of Divestiture, including, but not limited to, all customer lists, price lists, distribution or marketing methods, or Intellectual Property relating to Microporous and:
 - 1. Obtained by Respondent prior to the Effective Date of Divestiture; or,
 - 2. Obtained by Respondent after the Effective Date of Divestiture, in the course of performing

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Respondent's obligations under any Divestiture Agreement;

Provided, however, that Confidential Business Information shall not include:

1. Information that Respondent can demonstrate it obtained prior to the Acquisition Date, other than information it obtained from Microporous during due diligence pursuant to any confidentiality or non-disclosure agreement;
 2. Information that is in the public domain when received by Respondent;
 3. Information that is not in the public domain when received by Respondent and thereafter becomes public through no act or failure to act by Respondent;
 4. Information that Respondent develops or obtains independently, without violating any applicable law or this Order; and
 5. Information that becomes known to Respondent from a third party not in breach of applicable law or a confidentiality obligation with respect to the information.
- H. "Contracts" means all contracts or agreements of any kind related to Microporous, and all rights under such contracts or agreements, including: Microporous Customer Contracts, leases, software licenses, Intellectual Property licenses, warranties, guaranties, insurance agreements, employment contracts, distribution agreements, product swap agreements, sales contracts, supply agreements, utility contracts,

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collective bargaining agreements, confidentiality agreements, and non-disclosure agreements.

- I. “Customer” means any Person that is a direct or indirect purchaser of any Battery Separator.
- J. “Customer Approvals and Information” means, with respect to any Microporous Battery Separator(s):
 - 1. All consents, authorizations and other approvals, and pending applications and requests therefor, required by any Customer applicable or related to the research, development, manufacture, finishing, packaging, distribution, marketing or sale of any Battery Separator; and,
 - 2. All underlying information, data, filings, reports, correspondence or other materials used to obtain or apply for any of the foregoing, including, without limitation, all data submitted to and all correspondence with the Customer or any other Person.
- K. “Daramic Battery Separator(s)” means any Battery Separators manufactured or sold by Respondent as of the day before the Acquisition Date, and any Battery Separators manufactured or sold by Respondent after the Acquisition Date that do not utilize any Microporous Intellectual Property other than Shared Intellectual Property.
- L. “Direct Cost” means the cost of direct material and direct labor used to provide the relevant assistance or service.
- M. “Divestiture Agreement” means any agreement(s) between Respondent (or between a Divestiture Trustee

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appointed under this Order) and the Acquirer approved by the Commission, that effectuate the divestiture of Microporous required by Paragraphs II. or IV. of this Order, to accomplish the purpose and requirements of this Order, as well as all amendments, exhibits, attachments, agreements and schedules thereto, including, but not limited to, any Technical Assistance Agreement or Transition Services Agreement.

- N. “Divestiture Trustee” means a Person appointed pursuant to Paragraph IV. of this Order to accomplish the divestiture of Microporous.

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- O. “Effective Date of Divestiture” means the date on which the divestiture of Microporous to an Acquirer pursuant to the requirements of Paragraph II. or IV. of this Order is completed.
- P. “Employee Information” means the following, to the full extent permitted by applicable law:
1. A complete and accurate list containing the name of each Microporous Employee;
 2. With respect to each such employee, the following information:
 - a. The date of hire and effective service date;
 - b. Job title or position held;
 - c. A specific description of the employee’s responsibilities related to Microporous Battery Separators; *provided, however*, in lieu of this description, Respondent may provide the employee’s most recent performance appraisal;
 - d. The base salary or current wages;
 - e. The most recent bonus paid, aggregate annual compensation for Respondent’s last fiscal year and current target or guaranteed bonus, if any;
 - f. Employment status (i.e., active or on leave or disability; full-time or part-time); and
 - g. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and

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3. At the proposed Acquirer's option, copies of all employee benefit plan descriptions (if any) applicable to the relevant employees.

Q. "Feistritz Plant" means all property and assets, tangible and intangible, owned, leased, or operated by Respondent and located or used in connection with the research, development, manufacture, finishing, packaging, distribution, marketing or sale of any one or more of the Microporous Battery Separators at the former Microporous facility in Feistritz, Austria, at any time between the Acquisition Date and the Effective Date of Divestiture, including, but not limited to:

1. All real property interests (including fee simple and leasehold interests), including all rights, easements and appurtenances, together with all buildings, structures, facilities (including R&D and testing facilities), improvements, and fixtures, including, but not limited to, all Battery Separator production lines (including the two (2) production lines for polyethylene (PE) and/or CellForce Battery Separators);
2. All Tangible Personal Property;
3. All governmental approvals, consents, licenses, permits, waivers, or other authorizations, to the extent assignable; and
4. Inventories existing as of the Effective Date of Divestiture.

Provided, however, that the definition of "Feistritz Plant" shall not include any assets used solely to manufacture Daramic Battery Separators.

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- R. “Force Majeure Event” means whatever events, actions, occurrences or circumstances have been identified or specified as constituting “force majeure” or a “force majeure event” in a contract or agreement between the Respondent and a Customer for the supply of Battery Separators.
- S. “Governmental Entity(ies)” means any federal, provincial, state, county, local, or other political subdivision of the United States or any other country, or any department or agency thereof.
- T. “H&V Agreement” means the Cross Agency Agreement dated March 23, 2001, between Daramic, Inc. and Hollingsworth & Vose Company, and all amendments (including, but not limited to, the Renewal dated March 23, 2006), exhibits, attachments, agreements, and schedules thereto.
- U. “Intellectual Property” means Patents, Manufacturing Technology, Know-How, and Trade Names and Marks.
- V. “Inventories” means:
1. All inventories, stores and supplies of finished Battery Separators and work in progress; and,
 2. All inventories, stores and supplies of raw materials and other supplies related to the research, development, manufacture, finishing, packaging, distribution, marketing or sale of any Battery Separators.

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- W. “Jungfer Technology” means all Intellectual Property owned or licensed by Respondent as a result of its acquisition of Separatorenerzeugung GmbH (“Jungfer”) on November 16, 2001.
- X. “Know-How” means all know-how, trade secrets, techniques, systems, software, data (including data contained in software), formulae, designs, research and test procedures and information, inventions, processes, practices, protocols, standards, methods (including, but not limited to, test methods and results), customer service and support materials, and other confidential or proprietary technical, technological, business, research, development and other materials and information related to the research, development, manufacture, finishing, packaging, distribution, marketing or sale of Battery Separators, and all rights in any jurisdiction to limit the use or disclosure thereof, anywhere in the world.
- Y. “Line in Boxes” means all property and assets, tangible and intangible, related to any capacity expansions proposed, planned or under consideration by Microporous as of the Acquisition Date, including, but not limited to, all engineering plans, equipment, machinery, tooling, spare parts, and other tangible property, wherever located, relating to a proposed, planned or contemplated capacity expansion to be accomplished through installation of an additional Battery Separator production line at the Piney Flats Plant.
- Z. “Manufacturing Technology” means all technology, technical information, data, trade secrets, Know-How, and proprietary information, anywhere in the world, related to the research, development, manufacture, finishing, packaging or distribution of Battery Separators, including, but not limited to, all recipes,

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formulas, formulations, blend specifications, customer specifications, equipment (including repair and maintenance information), tooling, spare parts, processes, procedures, product development records, trade secrets, manuals, quality assurance and quality control information and documentation, regulatory communications, and all other information relating to the above-described processes.

- AA. “Microporous” means Microporous Holding Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business as of the Acquisition Date located at 100 Spear Street, Suite 100, San Francisco, CA 94111, and its joint ventures, subsidiaries, divisions, groups, and affiliates (including, but not limited to, Microporous Products, L.P. and Microporous Products, GmbH) controlled by Microporous Holding Corporation, and all assets of Microporous Holding Corporation acquired by Respondent in connection with the Acquisition, including, but not limited to:
1. All of Respondent’s rights, title and interest in and to the following property and assets, tangible and intangible, wherever located, and any improvements, replacements or additions thereto that have been created, developed, leased, purchased, or otherwise acquired by Respondent after the Acquisition Date, relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators:
 - a. the Piney Flats Plant;
 - b. the Feistritz Plant;

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- c. the Line in Boxes;
 - d. Microporous Intellectual Property;
 - e. Contracts; and
 - f. Books and Records; and
2. All rights to use Shared Intellectual Property pursuant to a Shared Intellectual Property License;
- BB. “Microporous Battery Separator(s)” means all Battery Separators in which Microporous was engaged in research, development, manufacture, finishing, packaging, distribution, marketing or sale as of the Acquisition Date, and all Battery Separators distributed, marketed or sold after the Acquisition Date using any Microporous Trade Names and Marks.
- CC. “Microporous Copyrights” means all rights to all original works of authorship of any kind, both published and unpublished, relating to Microporous Battery Separators and any registrations and applications for registrations thereof and all rights to obtain and file for copyrights and registrations thereof.
- DD. “Microporous Customer Contracts” means all open purchase orders, contracts or agreements or Terminable Contracts for Microporous Battery Separators or for Battery Separators being supplied from the Piney Flats Plant or the Feistritz Plant at any time between the Acquisition Date and the Effective Date of Divestiture except for Daramic Battery Separators.
- EE. “Microporous Employee(s)” means any Person:

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1. Employed by Microporous as of the Acquisition Date;
 2. Employed at the Piney Flats Plant at any time between the Acquisition Date and the Effective Date of Divestiture; or
 3. Employed at the Feistritz Plant at any time between the Acquisition Date and the Effective Date of Divestiture.
- FF. “Microporous Intellectual Property” means all rights, title and interest in and to all:
1. Microporous Patents;
 2. Microporous Manufacturing Technology;
 3. Microporous Know-How;
 4. Microporous Trade Names and Marks;
 5. Microporous Copyrights; and
 6. All rights in any jurisdiction anywhere in the world to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach, or otherwise to limit the use or disclosure of any of the foregoing.
- GG. “Microporous Know-How” means all Know-How relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous.

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- HH. “Microporous Manufacturing Technology” means all Manufacturing Technology relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous.
- II. “Microporous Patents” means all Patents relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous.
- JJ. “Microporous Trade Names and Marks” means all Trade Names and Marks relating to the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous, including, but not limited to, all rights to commercial names, “doing business as” (d/b/a/) names, service marks and applications for or using the words: “Microporous,” “Amerace,” “CellForce,” “FLEX-SIL,” “ACE-SIL;” and all rights in internet web sites and internet domain names using any of the above.
- KK. “Monitor Trustee” means a Person appointed with the Commission’s approval to oversee the divestiture requirements of this Order, including Respondent’s compliance with the Order’s requirements.
- LL. “Patent(s)” means all patents, patents pending, patent applications and statutory invention registrations, including reissues, divisions, continuations, continuations-in-part, substitutions, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and

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file for patents and registrations thereto, anywhere in the world.

- MM. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiaries, divisions, groups or affiliates thereof.
- NN. “Piney Flats Plant” means all property and assets, tangible and intangible, owned, leased, or operated by Respondent and located or used in connection with the research, development, manufacture, finishing, packaging, distribution, marketing or sale of any one or more of the Microporous Battery Separators at the former Microporous facility in Piney Flats, Tennessee, at any time between the Acquisition Date and the Effective Date of Divestiture, including, but not limited to:
1. All real property interests (including fee simple and leasehold interests), including all rights, easements and appurtenances, together with all buildings, structures, facilities (including R&D and testing facilities), improvements, and fixtures, including, but not limited to, all Battery Separator production lines (including the three (3) production lines for Ace-Sil, Flex-Sil, and polyethylene (PE) and/or CellForce Battery Separators), pilot lines and test lines;
 2. All Tangible Personal Property;
 3. All governmental approvals, consents, licenses, permits, waivers, or other authorizations, to the extent assignable; and

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4. Inventories existing as of the Effective Date of Divestiture.

Provided, however, that the definition of “Piney Flats Plant” shall not include any assets used solely to manufacture Daramic Battery Separators.

- OO. “Polypore” or “Respondent” means Polypore International, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Polypore International, Inc. (including, but not limited to, Daramic, LLC), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- PP. “Releasee(s)” means the Acquirer, any entity controlled by or under common control with the Acquirer, and any licensees, sublicensees, manufacturers, suppliers, and distributors of the Acquirer (“affiliates”); and any Customers of the Acquirer or of affiliates of the Acquirer.
- QQ. “Retained Asset(s)” means:
1. Any property(ies) or asset(s), tangible or intangible:
 - a. That were owned, created, developed, leased, or operated by Polypore prior to the Acquisition; or
 - b. That relate(s) solely to any Polypore product, service or business except what is included in the definition of Microporous under this Order; and

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2. Polypore's right to use, exploit, and improve Shared Intellectual Property; *provided, however*, that Polypore shall have no right to hinder, prevent, or enjoin the Acquirer's use, exploitation, or improvement of Shared Intellectual Property, or to use without the Acquirer's consent any improvements after the Effective Date of Divestiture to the Shared Intellectual Property by the Acquirer.
- RR. "Retention Bonus" means the compensation provided for each of the Microporous Employees.
- SS. "Shared Intellectual Property" means any Intellectual Property that is a Retained Asset or that has been used by Respondent in connection with a Retained Asset that was also used in connection with the research, development, manufacture, finishing, packaging, distribution, marketing, or sale of Microporous Battery Separators or otherwise used in connection with Microporous at any time between the Acquisition Date and the Effective Date of Divestiture.
- TT. "Shared Intellectual Property License" means: (i) a worldwide, royalty-free, perpetual, irrevocable, transferrable, sublicensable, non-exclusive license to all Shared Intellectual Property owned by or licensed to Respondent for any use, and (ii) such tangible embodiments of the licensed rights (including but not limited to physical and electronic copies) as may be necessary to enable the Acquirer to utilize the licensed rights.
- UU. "Tangible Personal Property" means all machinery, equipment, spare parts, tools, and tooling (whether customer specific or otherwise); furniture, office equipment, computer hardware, supplies and materials;

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vehicles and rolling stock; and other items of tangible personal property of every kind whether owned or leased, together with any express or implied warranty by the manufacturers, sellers or lessors of any item or component part thereof, and all maintenance records and other documents relating thereto.

- VV. “Technical Services Agreement” means the provision by Respondent Polypore at Direct Cost of all advice, consultation, and assistance reasonably necessary for any Acquirer to receive and use, in any manner related to achieving the purposes of this Order, any asset, right, or interest relating to Microporous.
- WW. “Terminable Contract(s)” means all contracts or agreements and rights under contracts or agreements between the Respondent and any Customer(s) for the supply of any Battery Separator in or to North America (including the entirety of any contract or agreement that includes in the same contract or agreement the supply of Battery Separators both inside and outside North America) in effect at any time between the date the Order becomes final and the Effective Date of Divestiture; *provided, however*, that “Terminable Contracts” does not include any contracts or agreements between Microporous and any Customer(s) for the supply of any Battery Separator that was entered into prior to the Acquisition Date, except to the extent such contract or agreement was amended or modified, including changes to the pricing terms, after the Acquisition Date; *provided further, however*, that such amended or modified portion of such contract or agreement shall be considered a “Terminable Contract.”
- XX. “Trade Names and Marks” means all trade names, commercial names and brand names, all registered and unregistered trademarks, including registrations and

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applications for registration thereof (and all renewals, modifications, and extensions thereof), trade dress, logos, service marks and applications, geographical indications or designations, and all rights related thereto under common law and otherwise, and the goodwill symbolized by and associated therewith, anywhere in the world.

- YY. “Transition Services Agreement” means an agreement requiring Respondent Polypore to provide at Direct Cost all services reasonably necessary to transfer administrative support services to the Acquirer of Microporous, including, but not limited to, such services related to payroll, employee benefits, accounts receivable, accounts payable, and other administrative and logistical support.

II.

IT IS FURTHER ORDERED that:

- A. Not later than six (6) months after the date the divestiture provisions of this Order become final, Respondent shall divest Microporous, 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, including pursuant to a Divestiture Agreement, that receives the prior approval of the Commission.
- B. Respondent shall comply with all terms of the Divestiture Agreement approved by the Commission pursuant to this Order, which agreement shall be deemed incorporated by reference into this Order, and any failure by Respondent to comply with any term of the Divestiture Agreement shall constitute a failure to comply with this Order. The Divestiture Agreement

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shall not reduce, limit or contradict, or be construed to reduce, limit or contradict, the terms of this Order; *provided, however*, that nothing in this Order shall be construed to reduce any rights or benefits of any Acquirer or to reduce any obligations of Respondent under such agreement; *provided further, however*, that if any term of the Divestiture Agreement varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreement, any failure to meet any condition precedent to closing (whether waived or not) or any modification of the Divestiture Agreement, without the prior approval of the Commission, shall constitute a failure to comply with this Order.

- C. Prior to the Effective Date of Divestiture, Respondent shall:
1. Restore to Microporous any assets of Microporous as of the Acquisition Date that were removed from Microporous at any time between the Acquisition Date and the Effective Date of Divestiture, other than Battery Separators sold in the ordinary course of business and Inventories consumed in the ordinary course of business;
 2. To the extent any fixtures or Tangible Personal Property have been removed from the Feistritz Plant, the Piney Flats Plant or the Line in Boxes after the Acquisition Date and not returned or replaced with equivalent assets, such fixtures or Tangible Personal Property shall be returned and restored to good working order suitable for use under normal operating conditions or replaced with equivalent assets;

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3. Secure at its sole expense all consents and waivers from Persons that are necessary to divest any property or assets, tangible or intangible (including, but not limited to, any Contract), of Microporous to the Acquirer; *provided, however*, that in instances where (i) Microporous Battery Separators are sold together with Daramic Battery Separators under the same Terminable Contract, Respondent shall only be required to obtain such consents and waivers from the Customer as necessary to divest that portion of the Terminable Contract pertaining to Microporous Battery Separators; or (ii) any Contracts (including, but not limited to, supply agreements) are utilized in connection with the manufacture of Microporous Battery Separators and Daramic Battery Separators under the same Contract, Respondent shall only be required to obtain such consents and waivers from the other contracting party as necessary to divest that portion of the Contract pertaining to Microporous Battery Separators; *provided further, however*, that if for any reason Respondent is unable to accomplish such an assignment or transfer of Contracts, it shall enter into such agreements, contracts, or licenses as are necessary to realize the same effect as such transfer or assignment; and
 4. Grant to the Acquirer a Shared Intellectual Property License for use in connection with Microporous as divested pursuant to this Order.
- D. Respondent shall take all actions reasonably necessary to assist the Acquirer in evaluating, recruiting and employing any Microporous Employees, including (at

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the Acquirer's option), but not limited to, the following:

1. Not later than thirty (30) days before the execution of a Divestiture Agreement, Respondent shall: (i) provide the Acquirer with a list of all Microporous Employees, and Employee Information for each Person on the list; (ii) provide any available contact information, including last known address for any Person formerly employed as a Microporous Employee whose employment terminated prior to execution of a Divestiture Agreement; (iii) allow the Acquirer an opportunity to interview any Microporous Employees personally, and outside the presence or hearing of any employee or agent of Respondent; and, (iv) allow the Acquirer to inspect the personnel files and other documentation relating to such Microporous Employees, to the extent permitted under applicable laws;
2. Respondent shall: (i) not directly or indirectly impede or interfere with the Acquirer's offer of employment to any Microporous Employee(s); (ii) not directly or indirectly attempt to persuade, or offer any incentive to, any Microporous Employee(s) to decline employment with the Acquirer; (iii) remove any contractual impediments and irrevocably waive any legal or equitable rights it may have that may deter any Microporous Employee from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent; *provided, however*, that Respondent may enforce confidentiality provisions related to Daramic Battery Separators; and,

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3. Respondent shall: (i) continue to extend to any Microporous Employees, during their employment prior to the Effective Date of Divestiture, all employee benefits offered by Respondent, including regularly scheduled or merit raises and bonuses, and regularly scheduled vesting of all pension benefits; (ii) pay a Retention Bonus to any Microporous Employee(s) to whom the Acquirer has made a written offer of employment who accepts a position with the Acquirer at the time of divestiture of Microporous.
- E. For a period of two (2) years from the Effective Date of Divestiture, Respondent shall not:
1. directly or indirectly solicit or induce, or attempt to solicit or induce, any Microporous Employee who has accepted an offer of employment with, or who is employed by, the Acquirer to terminate his or her employment relationship with the Acquirer; or
 2. hire or enter into any arrangement for the services of any Microporous Employee who has accepted an offer of employment with, or who is employed by, the Acquirer;

Provided, however, Respondent may do the following: (i) advertise for employees in newspapers, trade publications, or other media not targeted specifically at any one or more of the employees of the Acquirer; (ii) hire any Microporous Employee whose employment has been terminated by the Acquirer; or (iii) hire a Microporous Employee who has applied for employment with Respondent, provided that such application was not solicited or induced in violation of this Order.

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- F. Respondent shall include in any Divestiture Agreement related to Microporous the following provisions:
1. Respondent shall covenant to the Acquirer that Respondent shall not join, file, prosecute or maintain any suit, in law or equity, either directly or indirectly through a third party, against the Acquirer or any Releasees under Intellectual Property that is owned or licensed by Respondent as of the Effective Date of Divestiture, including, but not limited to, the Jungfer Technology, if such suit would have the potential to interfere with the Acquirer's freedom to practice in the research, development, manufacture, use, import, export, distribution, offer to sell or sale of Microporous Battery Separators;
 2. Upon reasonable notice and request from the Acquirer to Respondent, Respondent shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of the Respondent to assist the Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Microporous Intellectual Property or Shared Intellectual Property; and
 3. At the option of the Acquirer:
 - a. A Technical Services Agreement, *provided, however,* the term of any Technical Services Agreement shall be at the option of the Acquirer, but not longer than two (2) years from the Effective Date of Divestiture.
 - b. A Transition Services Agreement, *provided, however,* the term of the Transition Services Agreement shall be at the option of the

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Acquirer, but not longer than two (2) years from the Effective Date of Divestiture;

Provided, however, that Respondent shall not (i) require the Acquirer to pay compensation for services under such agreements that exceeds the Direct Cost of providing such goods and services, or (ii) terminate its obligation(s) under such agreements because of a material breach by the Acquirer of any such agreement in the absence of a final order by a court of competent jurisdiction, or (iii) seek to limit the damages (such as indirect, special, and consequential damages) which any Acquirer would be entitled to receive in the event of Respondent's breach of any such agreement.

G. Respondent shall:

1. submit to the Acquirer, at Respondent's expense, all Confidential Business Information;
2. deliver such Confidential Business Information as follows: (i) in good faith; (ii) as soon as practicable, avoiding any delays in transmission of the respective information; and (iii) in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Monitor Trustee (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files that contain such Confidential Business

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Information and facilitating the delivery in a manner consistent with this Order;

4. not use, directly or indirectly, any such Confidential Business Information (other than as necessary to comply with the following: (i) the requirements of this Order; (ii) the Respondent's obligations to the Acquirer under the terms of any Divestiture Agreement; or (iii) applicable Law);
5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer, the Monitor Trustee, or the Commission;
6. Respondent shall devise and implement measures to protect against the storage, distribution, and use of Confidential Business Information that is not expressly permitted by this Order. These measures shall include, but not be limited to, restrictions placed on access by Persons to information available or stored on any of Respondent's computers or computer networks; and
7. Respondent may use Confidential Business Information only (i) for the purpose of performing Respondent's obligations under this Order; or, (ii) to ensure compliance with legal and regulatory requirements; to perform required auditing functions; to provide accounting, information technology and credit-underwriting services, to provide legal services associated with actual or potential litigation and transactions; and to monitor and ensure compliance with financial, tax reporting, governmental environmental, health, and safety requirements.

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- H. The purpose of the divestiture of Microporous is to create an independent, viable and effective competitor in the markets in which Microporous was engaged at the time of the Acquisition Date, 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. Within thirty (30) days after this Order becomes final, Respondent shall retain a Monitor Trustee, acceptable to the Commission, to monitor Respondent's compliance with its obligations and responsibilities under this Order, consult with Commission staff, and report to the Commission regarding Respondent's compliance with its obligations and responsibilities under this Order.
- B. If Respondent fails to retain a Monitor Trustee as provided in Paragraph III.A. of this Order, a Monitor Trustee, acceptable to the Commission, shall be identified and selected by the Commission's staff within forty-five (45) days after this Order is final.
- C. Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor Trustee selected under Paragraph III.A or III.B. of this Order:
1. The Monitor Trustee shall have the power and authority to monitor Respondent's compliance with the terms of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee pursuant to the terms of this Order in a manner consistent with

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the purposes of the Order and in consultation with Commission's staff.

2. Within ten (10) days after the Commission's approval of the Monitor Trustee, Respondent shall execute an 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 in a manner consistent with the purposes of this Order. If requested by Respondent, the Monitor Trustee shall sign a confidentiality agreement prohibiting the use, or the disclosure to anyone other than the Commission (or any Person retained by the Monitor Trustee pursuant to Paragraph III.C.5. of this Order), of any competitively sensitive or proprietary information gained as a result of his or her role as Monitor Trustee, for any purpose other than performance of the Monitor Trustee's duties under this Order.
3. The Monitor Trustee shall serve until the expiration of the period for Customers to seek reopening and renegotiation or termination of Terminable Contracts as provided in Paragraph VI. of this Order; *provided, however*, that the Commission may modify this period as may be necessary or appropriate to accomplish the purposes of the Order.
4. Subject to any demonstrated legally recognized privilege, the Monitor Trustee shall have full and complete access to Respondent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor Trustee may reasonably request, related to

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Respondent's compliance with its obligations under the Order, including, but not limited to, its obligations related to Microporous assets. Respondent shall cooperate with any reasonable request of the Monitor Trustee and shall take no action to interfere with or impede the Monitor Trustee's ability to monitor Respondent's compliance with the Order.

5. 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 the 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.
6. 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 all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from the Monitor Trustee's gross negligence or willful misconduct. For purposes of this Paragraph III.C.6., the term "Monitor Trustee" shall include all Persons

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retained by the Monitor Trustee pursuant to Paragraph III.C.5. of this Order.

7. Respondent shall provide copies of reports to the Monitor Trustee in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission.
 8. The Monitor Trustee shall report in writing to the Commission (i) every sixty (60) days from the date the Monitor Trustee is appointed, (ii) at the time a divestiture package is presented to the Commission for its approval, and (iii) at any other time as requested by the staff of the Commission, concerning Respondent's compliance with this order.
- D. The Commission may, among other things, require the Monitor Trustee and each of the Monitor Trustee's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor Trustee's duties.
- E. If at any time the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor Trustee in the same manner as provided in this Paragraph.
- F. 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 the Order.

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- G. Respondent shall cooperate with the Monitor Trustee appointed pursuant to this Paragraph in the performance any duties and responsibilities under this Order.

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

- A. If Respondent has not divested, absolutely and in good faith, Microporous within the time period or in the manner required by Paragraph II. of this Order, then the Commission may at any time appoint a Divestiture Trustee to divest Microporous to an Acquirer and in a manner, including pursuant to a Divestiture Agreement, that satisfies the purposes and requirements of this Order.
- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order, Respondent shall consent to the appointment of a Divestiture Trustee in such action. Neither the decision of the Commission to appoint a Divestiture Trustee, nor the decision of the Commission not to appoint a Divestiture Trustee, shall preclude the Commission or the Attorney General from seeking civil penalties or any other available relief, 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. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent

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shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures and may be the same Person as the Monitor Trustee appointed under Paragraph III. of this Order. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

- D. Within ten (10) days after appointment of the Divestiture Trustee, Respondent shall execute a trust agreement (“Divestiture Trustee Agreement”) that, subject to the prior approval of the Commission transfers to the Divestiture Trustee all rights and powers necessary to effect the relevant divestiture, and to enter into any relevant agreements, required by this Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph IV. of this Order, Respondent shall consent to, and the Divestiture Trustee Agreement shall include, 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 relevant assets or enter into relevant agreements pursuant to the terms of this Order and in a manner consistent with the purposes of this Order.

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2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the Divestiture Trustee Agreement described in this Paragraph IV. of this Order to divest relevant assets pursuant to the terms of this Order. If, however, at the end of the applicable twelve-month period, the Divestiture Trustee has submitted to the Commission a plan of divestiture, or believes that divestiture can be achieved within a reasonable time, such period may be extended by the Commission, or, in the case of a court-appointed trustee, by the court.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities of Respondent related to Microporous 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. At the option of the Commission, any delays in divestiture or entering into any agreement caused by Respondent shall extend the time for divestiture under this Paragraph IV. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee Agreement shall prohibit the Divestiture Trustee, and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants from disclosing, except to the Commission (and in the

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case of a court-appointed trustee, to the court) Confidential Business Information; *provided, however*, Confidential Business Information may be disclosed to potential acquirers and to the Acquirer as may be reasonably necessary to achieve the divestiture required by this Order. The Divestiture Trustee Agreement shall terminate when the divestiture required by this Order is consummated.

5. 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 at no minimum price. The divestiture shall be made to, and a Divestiture Agreement 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.
6. The Divestiture Trustee shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other

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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. The powers, duties, and responsibilities of the Divestiture Trustee (including, but not limited to, the right to incur fees or other expenses) shall terminate when the divestiture required by this Order is consummated, and the Divestiture Trustee has provided an accounting for all monies derived from the divestiture and all expenses occurred.

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 gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee. For purposes of this Paragraph, the term "Divestiture Trustee" shall include all Persons

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retained by the Divestiture Trustee pursuant to Paragraph IV.E.6. of this Order.

8. The Divestiture Trustee shall have no obligation or authority to operate or maintain Microporous.
 9. The Divestiture Trustee shall report in writing to the Commission every two (2) months concerning his or her efforts to divest and enter into agreements related to Microporous, and Respondent's compliance with the terms of this Order.
- F. 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 IV. of this Order.
- G. 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.
- H. Respondent shall comply with all terms of the Divestiture Trustee Agreement, and any breach by Respondent of any term of the Divestiture 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:

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- A. From the date this Order becomes final until the Effective Date of Divestiture, Respondent shall take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of Microporous, and shall prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of Microporous and assets related thereto except for ordinary wear and tear, including, but not limited to, continuing in effect and maintaining Intellectual Property, Contracts, Trade Names and Marks, and renewing or extending any leases or licenses that expire or terminate prior to the Effective Date of Divestiture.
- B. Respondent shall maintain the operations of Microporous in the ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets included within Microporous). Among other things as may be necessary, Respondent shall:
1. Maintain a work force at least as equivalent in size, training, and expertise to what was associated with Microporous prior to the Acquisition Date;
 2. Assure that Respondent's employees with primary responsibility for managing and operating Microporous are not transferred or reassigned to other areas within Respondent's organizations except for transfer bids initiated by employees pursuant to Respondent's regular, established job posting policy;
 3. Provide sufficient working capital to operate Microporous at least at current rates of operation, to meet all capital calls with respect to

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Microporous and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities;

4. Make available for use by Microporous funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets of Microporous;
5. Use best efforts to preserve and maintain the existing relationships with Customers, suppliers, vendors, private and Governmental Entities, and other Persons having business relations with Microporous; and
6. Except as part of a divestiture approved by the Commission pursuant to this Order, not remove, sell, lease, assign, transfer, license, pledge for collateral, or otherwise dispose of Microporous, *provided however*, that nothing in this provision shall prohibit Respondent from such activities in the ordinary course of business consistent with past practices.

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

- A. Respondent shall allow all Customers with Terminable Contracts the right and option unilaterally to reopen and renegotiate or to terminate their contracts, solely at the Customer's option, without penalty, forfeiture or other charge to the customer, and consistent with the requirements of this Order including the following:
 1. No later than ten (10) days from the date this Order becomes final, Respondent shall notify all Customers with Terminable Contracts of their

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rights under this Order and, for each such Terminable Contract, offer the Customer the opportunity to reopen and renegotiate or to terminate their contract(s). Respondent shall send written notification of this requirement and a copy of this Order and the Complaint, by certified mail with return receipt requested to: (i) the person designated in the Terminable Contract to receive notices from Respondent; or (ii) the Chief Executive Officer and General Counsel of the Customer. Respondent shall keep a file of such return receipts for three (3) years after the date on which this Order becomes final.

2. No later than ten (10) days from the Effective Date of Divestiture, Respondent shall send written notification of the Effective Date of Divestiture to all Customers with Terminable Contracts, by certified mail with return receipt requested to: (i) the person designated in the Terminable Contract to receive notices from Respondent; or (ii) the Chief Executive Officer and General Counsel of the Customer. Respondent shall keep a file of such return receipts for three (3) years after the date on which this Order becomes final.
3. A Customer may exercise its option to reopen and renegotiate or terminate any Terminable Contract by sending by certified mail, return receipt requested, a written notice to Respondent either to: (i) the address for notice stated in the Contract; or, (ii) Respondent's principal place of business at any time prior to five (5) years after the Effective Date of Divestiture. The written notice shall identify the Terminable Contract that will be reopened or terminated, and the date upon which any termination shall be effective; *provided, however,*

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that: (a) a Customer with more than one Terminable Contract who sends written notice with regard to less than all of its Terminable Contracts shall not lose its opportunity to reopen and renegotiate or terminate any remaining Terminable Contracts; (b) any Customer who reopens and renegotiates a Terminable Contract prior to the Effective Date of Divestiture shall have a further opportunity to reopen and renegotiate or terminate such Terminable Contract after the Effective Date of Divestiture at any time prior to five (5) years after the Effective Date of Divestiture; (c) Respondent shall not be obligated to reopen and renegotiate or terminate, as the case may be, a Terminable Contract on less than thirty (30) days' notice; and (d) any request by a Customer to reopen and renegotiate or terminate a Terminable Contract on less than thirty (30) days' notice shall be treated by Respondent as a request to reopen and renegotiate or terminate, as the case may be, effective thirty (30) days from the date of the request.

4. Respondent shall not directly or indirectly:
 - a. Require any Customer to make or pay any payment, penalty, or charge for, or provide any consideration relating to, or otherwise deter, the exercise of the option to reopen and renegotiate or terminate or the reopening and renegotiation or termination of any Terminable Contract; or
 - b. Retaliate against, or take any action adverse to the economic interests of, any Customer that exercises its right under the Order to reopen and renegotiate or terminate any Terminable Contract;

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provided, however, that Respondent may enforce Contracts, or seek judicial remedies for breaches of Contracts, based upon rights or causes of action that accrued prior to the exercise by a Customer of an option to terminate a Contract.

5. Respondent shall include in the Divestiture Agreement a requirement that the Acquirer shall allow all Customers with Terminable Contracts for Microporous Battery Separators the right and option unilaterally to reopen and renegotiate or to terminate their contracts, solely at the Customer's option, without penalty, forfeiture or other charge to the Customer, and consistent with the requirements of this Paragraph of the Order as if the Terminable Contract remained with Respondent. Respondent shall include in the Divestiture Agreement a requirement that all Customers with Terminable Contracts for Microporous Battery Separators shall be third party beneficiaries of this provision of the Divestiture Agreement, with the right to enforce this provision independent of, and apart from, Respondent.

provided, however, that nothing in this Order will affect the rights and responsibilities under any Terminable Contract for any Customer who fails to notify Respondent or the Acquirer, as the case may be, within the time allotted in this Paragraph.

VII.

IT IS FURTHER ORDERED that:

- A. Respondent shall:

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1. Within fifteen (15) days after the date this Order becomes final: (a) modify and amend the H&V Agreement in writing to terminate and declare null and void, and (b) cease and desist from, directly or indirectly, or through any corporate or other device, implementing or enforcing, the covenant not to compete set forth in Section 4 of the H&V Agreement, and all related terms and definitions, as that covenant applies to North America and to actual and potential customers within North America.
 2. Within thirty (30) days after the date this Order becomes final, file with the Commission the written amendment to the H&V Agreement (“Amendment”) that complies with the requirements of Paragraph VII.A.1, it being understood that nothing in the H&V Agreement, currently or as amended in the future, or the Amendment shall be construed to reduce any obligations of the Respondent under this Order. The Amendment shall be deemed incorporated into this Order, and any failure by Respondent to comply with any term of such Amendment shall constitute a failure to comply with this Order. The Amendment shall not be modified, directly or indirectly, without the prior approval of the Commission.
- B. Respondent shall cease and desist from, directly, indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined in the Federal Trade Commission Act, inviting, entering into or attempting to enter into, organizing or attempting to organize, implementing or attempting to implement, continuing or attempting to continue, soliciting, or otherwise facilitating any combination, agreement, or understanding, either express or implied,

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with any Person currently engaged, or that might potentially become engaged, in the development, production, marketing or sale of any Battery Separator, to allocate or divide markets, customers, contracts, lines of commerce, or geographic territories in connection with Battery Separators, or otherwise to restrict the scope or level of competition related to Battery Separators.

Provided, however, that it shall not, of itself, constitute a violation of this Paragraph for Respondent to enter into a *bona fide* and written joint venture agreement with any Person to manufacture, develop, market or sell a new Battery Separator, technology or service, or any material improvement to an existing Battery Separator, technology or service, in which both Respondent and the other Person contribute significant personnel, equipment, technology, investment capital or other resources, that prohibits such Person from selling products or services in competition with the joint venture in geographic markets in which the joint venture does business or competes for a reasonable period of time. *Provided further, however,* that Respondent shall, within ten (10) days after execution, file a true and correct copy of such joint venture agreement with the Commission.

VIII.

IT IS FURTHER ORDERED that, for a period of two (2) years from the Effective Date of Divestiture, Respondent shall not advertise, market or sell any Battery Separator utilizing cross linked rubber anywhere in the world.

IX.

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IT IS FURTHER ORDERED that, no later than ten (10) days from the date on which this Order becomes final, Respondent shall provide a copy of this Order to each of Respondent's officers, employees, or agents having managerial responsibilities for any of Respondent's obligations under this Order.

X.

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

- A. any proposed dissolution of Respondent;
- B. any proposed acquisition, merger or consolidation of Respondent; or
- C. any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

XI.

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 Effective Date of Divestiture, and thereafter every sixty (60) days until the Respondent has fully complied with the provisions of Paragraphs II., III., IV., V., and VI. of this Order, Respondent shall submit to the Commission (with simultaneous copies to the Monitor Trustee and Divestiture Trustee(s), as appropriate) verified written reports setting forth in detail the manner and form in which Respondent intends to comply, is complying, and has complied with the relevant provisions of this Order.

Initial Decision

- B. Respondent shall include in its compliance reports, among other things required by the Commission, a description of all substantive contacts or negotiations for the divestiture required by this Order, the identity of all parties contacted, copies of all material written communications to and from such parties, and all reports and recommendations concerning the divestiture, the Effective Date of Divestiture, and a statement that the divestiture has been accomplished in the manner approved by the Commission.
- C. One (1) year from the date this Order becomes final on the anniversary of the date this Order becomes final, and annually until expiration or termination of Respondent's obligations under the Order, 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. Respondent shall deliver a copy of each such report to the Monitor Trustee.

XII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business 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 any matter contained in this

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Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

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

XIII.

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

Complaint

IN THE MATTER OF

DANAHER CORPORATION
AND
MDS, INC.

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

Docket No. C-4283; File No. 091 0159
Filed, January 27, 2010 — Decision, March 16, 2010

This consent order addresses the acquisition by Danaher Corporation of the stock and assets of MDS Analytical Technologies from MDS, Inc. With only four current competitors, the market for laser microdissection devices is highly concentrated. The proposed acquisition would combine Danaher's Leica brand of laser microdissection devices with MDS's Arcturus brand, leaving only three viable competitors. The elimination of the direct competition between the Leica and Arcturus devices could allow Danaher to exercise market power unilaterally by increasing prices or decreasing innovation or service, particularly to those customers who view Leica and Arcturus as their top two choices. The Consent Agreement requires Danaher to divest the assets of MDS's Arcturus business segment, which includes assets relating to the manufacture and sale of laser microdissection devices and associated reagent products, to Life Technologies Corp.

Participants

For the *Commission*: *Lynda Lao, Mark D. Seidman, and David A. Von Nirschl.*

For the *Respondents*: *Mark Kovner, Kirkland & Ellis LLP; and Matthew Hendrickson and Kenneth Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP.*

Complaint

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 Danaher Corporation (“Danaher”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire MDS Analytical Technologies (US) Inc. (“MDS Analytical Technologies”), a subsidiary of Respondent MDS, Inc. (“MDS”), 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 the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Danaher is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 2099 Pennsylvania Avenue, N.W., 12th Floor, Washington, DC 20006.

2. Respondent MDS is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its headquarters address at 2810 Matheson Blvd., Suite 500, Mississauga, Ontario L4W4V9, Canada, and the offices of its United States subsidiary, MDS Analytical Technologies at 1311 Orleans Drive, Sunnyvale, CA 94089-1136.

3. Respondents are engaged in, among other things, the production and sale of laser microdissection devices.

4. 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

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“commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. PROPOSED ACQUISITION

5. Pursuant to a Stock and Asset Purchase Agreement (the “Agreement”) dated September 2, 2009, Danaher announced its intention to acquire the stock and assets of MDS Analytical Technologies for \$650 million (the “Acquisition”).

III. RELEVANT MARKET

6. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is laser microdissection devices. Laser microdissection devices are used to separate small groups of cells from larger tissue samples in order to perform various types of downstream analyses. Although other techniques exist for separating cells, laser microdissection is the only technique that can reliably and precisely create pure cell samples.

7. For the purposes of this Complaint, the relevant geographic area in which to analyze the effects of the Acquisition on laser microdissection devices is no larger than North America. To compete in North America, a company must establish a solid reputation among North American customers, a regional sales force, and a regional service team that can quickly address customers’ repair and maintenance needs.

IV. STRUCTURE OF THE MARKET

8. The market for laser microdissection devices is highly concentrated as measured by the Herfindahl-Hirschman Index (“HHI”). In North America, there are only four suppliers of laser microdissection devices. The acquisition reduces the number of suppliers from four to three and combines Danaher and MDS, who many purchasers consider to be their preferred options for

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laser microdissection devices. Post-acquisition, the combined Danaher and MDS would have in excess of a 50 percent share of the North American market. The post-merger HHI would be 4,130 points and the acquisition will increase the HHI level by 1,277 points. This market concentration level far exceeds the range in which a proposed acquisition is likely to create market power or enhance the likelihood that it can be exercised successfully.

V. ENTRY CONDITIONS

9. Neither new entry nor entry by suppliers from outside North America sufficient to deter or counteract the anticompetitive effects of the proposed acquisition is likely to occur within two years. Developing laser microdissection products *de novo* requires a significant amount of time and resources. In order to be successful, a new entrant must develop technology that is at least equivalent to the incumbent technologies in terms of performance and reliability. A new entrant must also develop around or obtain licenses for existing intellectual property. Finally, a new entrant must engage thought leaders in the industry, ensure that articles are published using its technology, allow major institutions to evaluate its products, and establish a North American sales force as well as regional service and support. Even companies with existing laser microdissection products outside of North America face the same reputation, regional sales, and regional service barriers as new entrants. Therefore, entry into the relevant line of commerce would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition.

VI. EFFECTS OF THE ACQUISITION

10. 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:

Complaint

- a. By eliminating actual, direct, and substantial competition between Respondents in the North American laser microdissection market;
- b. By increasing the likelihood that Respondents would unilaterally exercise market power in the North American laser microdissection market;
- c. By increasing the likelihood that North American consumers would be forced to pay higher prices for laser microdissection devices; and
- d. By increasing the likelihood that consumers would experience lower levels of innovation and service in the North American laser microdissection market.

VII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of January, 2010, issues its Complaint against said Respondents.

By the Commission.

Decision and Order

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Danaher Corporation ("Danaher") of certain assets and voting securities of Respondent MDS Inc. ("MDS"), 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 that, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

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makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Danaher is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 2099 Pennsylvania Avenue, N.W., 12th Floor, Washington, DC 20006.
2. Respondent MDS Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its headquarters address at 2810 Matheson Blvd., Suite 500, Mississauga, Ontario L4W4V9, Canada, and the offices of its United States subsidiary, MDS Analytical Technologies (US) Inc. at 1311 Orleans Drive, Sunnyvale, CA 94089-1136.
3. The 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 the Order, the following definitions shall apply:

- A. “Danaher” means Danaher Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Danaher and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “MDS” means MDS Inc., its directors, officers,

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employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by MDS, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “Respondents” means Danaher and MDS, individually and collectively.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer” means the following:
 - 1. an Entity specified by name in this Order to acquire particular assets or rights that Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final; or
 - 2. an Entity approved by the Commission to acquire particular assets or rights that Respondents are required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- F. “Acquisition” means the acquisition contemplated by the Stock and Asset Purchase Agreement by and among MDS Inc., MDS Life Sciences (Singapore) Pte. Ltd., the Other Asset Sellers, MDS (US) Inc., the Other Stock Sellers, and Laboratories MDS Quebec Ltée, and DH Technologies Development Pte Ltd., and Danaher Corporation, dated as of September 2, 2009 (“Stock and Asset Purchase Agreement”).
- G. “Agency(ies)” means any government regulatory

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authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the Research and Development, manufacture, marketing, distribution, or sale of Laser Microdissection Products.

- H. “Arcturus Life Sciences Business” means Respondent MDS’s business of Research and Development, marketing, promotion, and sale of Laser Microdissection Products acquired from Arcturus Bioscience, Inc. pursuant to the Asset Purchase Agreement by and between Arcturus Bioscience, Inc. and Molecular Devices Corporation dated as of April 3, 2006, as that business has been Researched and Developed and/or improved by Respondent MDS. The term “Arcturus Life Sciences Business” shall include all improvements to Laser Microdissection Products and any product directly related to the foregoing that is in Research and Development prior to or as of the Closing Date.
- I. “Arcturus Life Sciences Business Assets” means all of Respondent MDS’s rights, title and interest in and to all assets throughout the World used in, and/or developed for use in, the Arcturus Life Sciences Business to the extent legally transferable, including, without limitation, the Research and Development, manufacture, distribution, marketing, and sale of Laser Microdissection Products, including, without limitation:
1. all Product Intellectual Property;
 2. all Freedom to Operate Searches;
 3. all Product Approvals;

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4. all Manufacturing Technology;
5. all Marketing Materials;
6. all Website(s) including, without limitation, those Domain Names and accounts listed in Appendix B to this Order entitled "Arcturus Life Sciences Business Trademarks, Trade Names, Product Names, Domain Names, Accounts;"
7. all Research and Development Records;
8. at the Acquirer's option, all Product Assumed Contracts (copies to be provided to the Acquirer on or before the Closing Date);
9. a list of all customers and targeted customers for the Arcturus Life Sciences Business and the net sales (in units and dollars) of the Laser Microdissection Products, and other products (including reagents) to such customers on either an annual, quarterly, or monthly basis;
10. at the Acquirer's option and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date, including, but not limited to, raw materials, supplies, operating materials, packaging materials, work-in-process, finished goods and merchandise, and other items of inventory used in, or produced or acquired for use in, the Arcturus Life Sciences Business;
11. copies of all unfilled customer purchase orders for the Laser Microdissection Products as of the Closing Date, to be provided to the Acquirer not later than two (2) days after the Closing Date;

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12. at the Acquirer's option, subject to any rights of the customer, all unfilled customer purchase orders for the Laser Microdissection Products;
13. at the Acquirer's option, the Laser Microdissection Production Assets; and
14. all of the Respondents' books and records, customer files, customer lists and records, vendor files, vendor lists and records, cost files and records, credit information, distribution records, business records and plans, studies, surveys, and files related to the foregoing or to the Laser Microdissection Products;

provided, however, that in cases in which documents or other materials included in the relevant assets to be divested contain information: (1) that relates both to the Laser Microdissection Products and to other products or businesses of the Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Laser Microdissection Products; or (2) for which the relevant party has a legal, tax, or accounting obligation to retain the original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the relevant party shall provide such Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the Acquirer with the above-described information without requiring Respondents completely to divest themselves of information that, in content, also relates to Retained Product(s).

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- J. “Arcturus Life Sciences Business Divestiture Agreement(s)” means the Asset Purchase Agreement by and between Danaher Corporation and Life Technologies Corporation dated as of January 12, 2010, and all amendments, exhibits, attachments, agreements, and schedules thereto.
- K. “Arcturus Life Sciences Business Releasee(s)” means the Acquirer or any Entity controlled by or under common control with such Acquirer, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of such Acquirer, or of such Acquirer-affiliated Entities.
- L. “Arcturus Life Sciences Business Licenses” means all of the following related to Laser Microdissection Products:
1. a perpetual, non-exclusive, fully paid-up and royalty-free license(s) with rights to sublicense to all Product Licensed Intellectual Property and all Manufacturing Technology related to General Manufacturing Know-How:
 - a. to Research and Develop Laser Microdissection Products for marketing, distribution or sale within the United States of America;
 - b. to use, make, have made, distribute, offer for sale, promote, advertise, or sell Laser Microdissection Products within the United States of America;
 - c. to import or export Laser Microdissection Products to the extent related to the marketing, distribution or sale of Laser Microdissection

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Products in the United States of America; and

- d. to have Laser Microdissection Products made anywhere in the World for distribution or sale within, or import into the United States of America;

provided however, that for any Product Licensed Intellectual Property that is the subject of a license from a Third Party to the Respondents, the scope of the rights granted hereunder shall only be required to be equal to the scope of the rights granted by the Third Party to the Respondents.

- M. "Closing Date" means the date on which Respondent(s) (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the Arcturus Life Sciences Business Assets to an Acquirer pursuant to this Order.
- N. "Confidential Business Information" means all information owned by, or in the possession or control of, Respondents that is not in the public domain and that is directly related to the Arcturus Life Sciences Business;

provided however, that the restrictions contained in this Order regarding the use, conveyance, provision, or disclosure of "Confidential Business Information" shall not apply to the following:

1. information that subsequently falls within the public domain through no violation of this Order or breach of confidentiality or non-disclosure agreement with respect to such information by Respondents;

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2. information related to the Arcturus Life Sciences Business that Respondent Danaher can demonstrate it obtained without the assistance of Respondent MDS prior to the Acquisition;
3. information that is required by Law to be disclosed;
4. information that does not directly relate to the Arcturus Life Sciences Business; or
5. information relating to Respondent MDS's general business strategies or practices relating to Research and Development, manufacture, marketing or sales of products that do not discuss with particularity the Laser Microdissection Products.

The term "Confidential Business Information" does not include information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

- O. "Contract Manufacture Product(s)" means any product, or ingredient or component thereof, related to the Arcturus Life Sciences Business for which any part of the manufacturing process is performed by the Respondent(s) prior to the Closing Date using production assets that are not subject to divestiture pursuant to this Order.
- P. "Copyrights" means rights to all original works of authorship of any kind directly related to the Laser Microdissection Products and any registrations and applications for registrations thereof, including, but not limited to, the following: all such rights with respect

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to all promotional, marketing and advertising materials, educational and training materials for the sales force, and sales forecasting models; copyrights in all process development data and reports relating to the Research and Development of the Laser Microdissection Products or of any materials used in the Research and Development, manufacture, marketing or sale of the Laser Microdissection Products, including copyrights in all raw data, statistical programs developed (or modified in a manner material to the use or function thereof (other than through user preferences)) to analyze research data, market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information; all records relating to employees who accept employment with the Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to the Laser Microdissection Products; all copyrights in analytical and quality control data; and all correspondence with Agencies.

- Q. "Direct Cost" means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. "Direct Cost" to the Acquirer for its use of any of Respondents' employees' labor shall not exceed the average hourly wage rate for such employee; *provided, however*, in each instance where (1) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement,

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“Direct Cost” means such cost as is provided in such Remedial Agreement.

- R. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- S. “Domain Name” means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any Entity or authority that issues and maintains the domain name registration.
- T. “Effective Date” means the date on which the Respondents close on the Acquisition pursuant to the Stock and Asset Purchase Agreement.
- U. “Employee Information” means the following, for each Laser Microdissection Product Core Employee, as and to the extent permitted by the Law:
1. a complete and accurate list containing the name of each relevant employee (including former employees who were employed by Respondents within ninety (90) days of the execution date of any Remedial Agreement);
 2. with respect to each such employee, the following information:
 - a. the date of hire and effective service date;
 - b. job title or position held;
 - c. a specific description of the employee’s responsibilities related to Laser Microdissection Products; *provided, however*, in lieu of this description, Respondents may provide the employee’s most recent

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performance appraisal;

- d. the base salary or current wages;
 - e. the most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year and current target or guaranteed bonus, if any;
 - f. employment status (*i.e.*, active or on leave or disability; full-time or part-time); and
 - g. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
3. at the Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.
- V. "Entity(ies)" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.
- W. "Freedom to Operate Searches" means all studies, analyses, reports and legal opinions that were prepared for the purposes of identifying, evaluating or analyzing potential patent barriers to the commercialization of the Laser Microdissection Products and technologies directly related to Laser Microdissection Products.
- X. "General Manufacturing Know-How" means all know-how used to manufacture a Laser Microdissection Product that is not specialized or proprietary to such

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products.

- Y. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- Z. “Interim Monitor” means any monitor appointed pursuant to Paragraph IV of this Order or Paragraph III of the related Order to Maintain Assets.
- AA. “Laser Microdissection Product(s)” means the following products of Respondent MDS:
1. all laser capture microdissection (“LCM”) instruments and Software used in or Developed or in Research and Development for use in LCM instruments;
 2. all reagents, disposable products and accessories used in connection with the LCM instruments, including reagents for nucleic acid isolation, amplification, detection and expression analysis, and micro-products for low volume capture, extraction and purification of biological molecules;
 3. all standalone products comprising any of the foregoing; and
 4. all previous and future versions, translations, modifications, enhancements, improvements, upgrades, accessories, follow-ons or outgrowths from or to any of the foregoing products that are currently in Research and Development.

The term “Laser Microdissection Products” shall include, without limitation, the following products: Veritas™ XT Microdissection System; Veritas™

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Microdissection Systems; PixCell[®]; II e LCM System; CapSure[®] LCM Caps; Paradise[®] Reagent System; Paradise[®] Whole Transcript RT Reagent System; RiboAmp[®] RNA Amplification Kit; RiboAmp[®] OA RNA Amplification Kit, RiboAmp[®] OA 1 Round RNA Amplification Kit, RiboAmp[®] HS RNA Amplification Kit; PicoPure[®] RNA Isolation Kit, PicoPure[®] DNA Extraction Kit; HistoGene[®] LCM Immunofluorescence Staining Kit; HistoGene[®] LCM Frozen Section Staining Kit; CapSure[®] HS LCM Caps; CapSure[®] Micro LCM Caps; ExtracSure™ Sample Extraction Products, Miracol™ Purification Columns; PrepStrip™ Tissue Preparation Strips and AutoPix[®] Microdissection System; and all improvements, variations or line extensions of the above-listed products that were Developed, marketed or sold on or before the Closing Date.

- BB. “Laser Microdissection Product Core Employees” means the Marketing and Business Development Employees, Manufacturing Employees, Research and Development Employees, and the Sales Employees.
- CC. “Laser Microdissection Production Assets” means all assets used in the manufacture of Laser Microdissection Products including, without limitation, all of the following: Manufacturing Equipment; other equipment; machinery; tools; spare parts; personal property; furniture; fixtures; supplies associated with each particular facility; and other tangible property, owned, leased, or operated by or on behalf of MDS, *except* for non-specialized refrigerators, tools, and work benches used in the manufacture of any Retained Product.

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- DD. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- EE. “Life Technologies” means: Life Technologies Corporation a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 5791 Van Allen Way, Carlsbad, California 92008.
- FF. “Manufacturing Employees” means all salaried employees of Respondent MDS who have directly participated in the planning, design, implementation or operational management of the Manufacturing Technology of the Laser Microdissection Products (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the three (3) year period immediately prior to the Closing Date. The term “Manufacturing Employees” shall include all individuals listed in Non-Public Appendix C to this Order identified as Manufacturing Employees.
- GG. “Manufacturing Equipment” means all fixtures, equipment (including, without limitation technical equipment and computers), and machinery that is or has been used at any time since April 3, 2006, in the Research and Development, or manufacture of a Laser Microdissection Product and that is suitable for use in the Research and Development, or manufacture of a Laser Microdissection Product as of the Effective Date.
- HH. “Manufacturing Technology” means all technology, trade secrets, know-how, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of the Laser Microdissection

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Products, including, but not limited to, the following: all product specifications, processes, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, safety, quality assurance, quality control, research records, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with compliance with Agency regulations, and labeling and all other information related to the manufacturing process, and supplier lists; tabulations, descriptions and specifications of, all raw materials inputs, and components related to the Laser Microdissection Products.

- II. “Marketing and Business Development Employees” means all management level employees of Respondent MDS who directly have participated (irrespective of the portion of working time involved) in the marketing, contracting, or promotion of the Laser Microdissection Product(s) within the three (3) year period immediately prior to the Closing Date. The term “Marketing and Business Development Employees” shall include, without limitation, all management level employees having any responsibilities in the areas of sales management, brand management, sales training, market research, and business development (but excluding administrative assistants), and all individuals listed in Non-Public Appendix C to this Order identified as Marketing and Business Development Employees.
- JJ. “Marketing Materials” means all marketing materials used specifically in the marketing or sale of a Laser Microdissection Product prior to and as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing

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lists, sales materials (*e.g.*, sales call reports, vendor lists, sales data), marketing information (*e.g.*, competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchases information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television masters and other similar materials directly related to the Laser Microdissection Products.

- KK. “Order Date” means the date that this Order becomes final.
- LL. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- MM. “Ownership Interest” means any and all rights, title, and interest, present or contingent, of the Respondent(s) to hold any voting or nonvoting stock, share capital, equity, assets or other interests or beneficial ownership in a specified Entity or specified asset(s).
- NN. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Closing Date (*except* where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary

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protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, related to any product of or owned by Respondents as of the Closing Date (*except* where this Order specifies a different time).

- OO. “Product Approval(s)” means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests thereof, required by applicable Agencies related to the Research and Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of Laser Microdissection Products.
- PP. “Product Assumed Contracts” means all of the following contracts or agreements (copies of each such contract to be provided to the Acquirer on or before the relevant Closing Date and segregated in a manner that clearly identifies the purpose(s) of each such contract):
1. that make specific reference to the Laser Microdissection Products and pursuant to which any Third Party purchases, or has the option to purchase, the Laser Microdissection Products from Respondent MDS;
 2. pursuant to which Respondent MDS purchases raw materials, inputs, components, software, or other necessary parts or had planned to purchase the raw material(s), inputs, components, software or other necessary parts from any Third Party for use in connection with the manufacture of the Laser Microdissection Products;

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3. relating to any experiments or scientific studies involving the Laser Microdissection Products;
4. with universities or other research institutions for the use of the Laser Microdissection Products in scientific research;
5. relating to the particularized marketing of the Laser Microdissection Products or educational matters relating solely to the Laser Microdissection Products;
6. pursuant to which a Third Party manufactures or packages the Laser Microdissection Products on behalf of Respondent MDS;
7. pursuant to which a Third Party provides the Manufacturing Technology related to the Laser Microdissection Products to Respondent MDS;
8. pursuant to which a Third Party is licensed by Respondent MDS to use the Manufacturing Technology;
9. constituting confidentiality agreements involving the Laser Microdissection Products;
10. involving any royalty, licensing, or similar arrangement for the Laser Microdissection Products;
11. pursuant to which a Third Party provides any specialized services necessary for the Research and Development, manufacture or distribution of the Laser Microdissection Products to Respondent MDS including, but not limited to, consultation arrangements; and

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12. pursuant to which any Third Party collaborates with Respondent MDS in the performance of Research and Development, marketing, distribution or selling of the Laser Microdissection Products or the Laser Microdissection Products business;

provided, however, that where any such contract or agreement also relates to a Retained Product(s), Respondent(s) shall assign the Acquirer all such rights under the contract or agreement as are related to the Laser Microdissection Products, but concurrently may retain similar rights for the purposes of the Retained Product(s).

QQ. “Product Intellectual Property” means all of the following related to the Laser Microdissection Products (other than Product Licensed Intellectual Property):

1. All Patents listed in Appendix A to this Order entitled “Arcturus Life Sciences Business Patents” and all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof;
2. All Patents not listed in Appendix A that are drawn to Laser Microdissection Products the practice of which would infringe one or more claims of Patents owned or controlled by Respondent(s);
3. Assignment of all rights granted to Respondent(s) under Patents owned by Third Parties;
4. Copyrights;
5. Software;

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6. Trademarks, including without limitation, all trademarks, tradenames, and product names listed in Appendix B to this Order entitled “Arcturus Life Sciences Business Trademarks, Trade Names Product Names, Domain Names, Accounts”;
7. Trade Dress;
8. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process and in final Laser Microdissection Products, protocols, methods and other confidential or proprietary technical, business, Research and Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof, other than Product Licensed Intellectual Property;
9. rights to obtain and file for patents, trademarks, and copyrights and registrations thereof; and
10. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing;

provided, however, “Product Intellectual Property” does not include the corporate names or corporate trade dress of “Danaher” or “MDS”, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondents (other than “Arcturus”, “Arcturus Bioscience” or “Arcturus Engineering”) or the related logos thereof;

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provided further, however, Product Intellectual Property shall include all customer specific product specifications for Laser Microdissection Products, licenses from customers related to the manufacture of Laser Microdissection Products for that specific customer, and all customer-specific proprietary and/or trade secret information related to Laser Microdissection Products;

provided further, however, that for any Product Intellectual Property that is the subject of a license from a Third Party to the Respondents, the scope of the rights granted hereunder shall only be required to be equal to the scope of the rights granted by the Third Party to the Respondents.

RR. "Product Licensed Intellectual Property" means the following:

1. Patents that are related to a Laser Microdissection Product that Respondent MDS can demonstrate have been routinely used, prior to the Effective Date, by Respondent MDS for a Retained Product(s) that has been marketed or sold on an extensive basis by Respondent MDS within the two-year period immediately preceding the Acquisition; and
2. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, Research and Development, and other information, and all rights to limit the use or disclosure thereof, that are related to a Laser Microdissection Product and that Respondents can demonstrate have been routinely used, prior to the

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Effective Date, by Respondent MDS for a Retained Product(s) that has been marketed or sold on an extensive basis by Respondent MDS within the two-year period immediately preceding the Acquisition;

provided however, that, in cases where the aggregate retail sales in dollars of the Retained Product(s) within the two-year period immediately preceding the Acquisition collectively are less than the aggregate retail sales in dollars within the same period of the Laser Microdissection Products collectively, the above-described intellectual property shall be considered, at the Acquirer's option, to be Product Intellectual Property and, thereby, subject to assignment to the Acquirer; *provided further, however*, that in such cases, Respondents may take a license back from the Acquirer for such intellectual property for use in connection with the Retained Products and such a license to Respondents may be perpetual, fully paid-up and royalty-free license(s) with rights to sublicense;

provided further, however, Product Licensed Intellectual Property expressly *excludes* all customer specific product specifications for Laser Microdissection Products, licenses from customers related to the manufacture of products for that specific customer, and all proprietary and/or trade secret information related to a particular customer as such property is exclusively Product Intellectual Property.

- SS. "Proposed Acquirer" means an Entity proposed by Respondents (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission to become the Acquirer of particular assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed

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by Respondents pursuant to this Order.

TT. "Remedial Agreement(s)" means the following:

1. any agreement between Respondents and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final;
2. any agreement between Respondents and a Third Party to effect the assignment of assets or rights of Respondents related to a Laser Microdissection Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final;
3. any agreement between Respondents and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, and that has

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been approved by the Commission to accomplish the requirements of this Order; and/or

4. any agreement between Respondents and a Third Party to effect the assignment of assets or rights of Respondents related to a Laser Microdissection Product to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.
- UU. “Research and Development” means all research and development activities, including, without limitation, the following: test method development; stability testing; toxicology; formulation, including without limitation, customized formulation for a particular customer(s); process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; and conducting experiments for the purpose of obtaining any and all Product Approvals. “Develop” means to engage in Development.
- VV. “Research and Development Employees” means all salaried employees of Respondents who directly have participated in the Research and Development, or regulatory approval process, or clinical studies of the Laser Microdissection Products (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the three (3) year period immediately prior to the Closing Date. The term “Research and Development Employees” shall include all individuals listed in Non-Public Appendix C to this Order identified as Research and Development Employees.

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WW. "Research and Development Records" means all research and development records directly relating to Laser Microdissection Products including, but not limited to:

1. inventory of research and development records, research history, research efforts, research notebooks, research reports, technical service reports, testing methods, invention disclosures, and know how related to the Laser Microdissection Products;
2. all correspondence within the ownership or control of Respondent MDS to and from Agencies relating to Product Approval(s) submitted by, on behalf of, or acquired by, Respondent MDS related to the Laser Microdissection Products;
3. all correspondence within the ownership or control of Respondent MDS to and from agencies of the United States Public Health Service within the Department of Health and Human Services, *i.e.*, the National Institutes of Health and the Centers for Disease Control, related to the Laser Microdissection Products;
4. annual and periodic reports related to the above-described Product Approval(s), including any safety update reports;
5. Agency-approved product labeling related to the Laser Microdissection Products;
6. currently-used product usage instructions, including, without limitation, owner manuals related to the Laser Microdissection Products;

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7. Agency-approved circulars and information related to the Laser Microdissection Products;
 8. reports relating to the protection of human safety and health related to the manufacture or use of the Laser Microdissection Products;
 9. reports relating to the protection of the environment related to the manufacture or use of the Laser Microdissection Products;
 10. summary of product complaints from customers related to the Laser Microdissection Products; and
 11. product recall reports filed with any Agency related to the Laser Microdissection Products.
- XX. “Retained Product” means any product(s) that is not subject to divestiture pursuant to this Order.
- YY. “Sales Employees” means all employees of Respondent MDS who directly have participated (irrespective of the portion of working time involved) in the marketing or promotion of the Laser Microdissection Products directly to customers within the three (3) year period immediately prior to the Closing Date. The term “Sales Employees” shall include employees trained to perform such sales activity for a Laser Microdissection Product within the three (3) year period immediately prior to the Closing Date and all individuals listed in Non-Public Appendix C to this Order identified as Sales Employees.
- ZZ. “Software” means computer programs related to the Laser Microdissection Products, including all software implementations of algorithms, models, and methodologies whether in Source Code or object code

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form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, related to any of the foregoing and the content and information contained on any Website; *provided, however*, that “Software” does not include software that is readily purchasable or licensable from sources other than the Respondents and which has not been modified in a manner material to the use or function thereof (other than through user preference settings).

- AAA. “Source Code” means code in any programming language in a form intelligible to trained programmers, including all comments and procedural code as well as all related developmental documents.
- BBB. “Supply Cost” means a cost not to exceed the manufacturer’s average direct per unit cost in United States dollars of manufacturing the Laser Microdissection Products, or raw material or ingredients related to a Laser Microdissection Product, for the twelve (12) month period immediately preceding the Effective Date. “Supply Cost” shall exclude any intracompany business transfer profit; *provided, however*, that in each instance where: (1) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement for a Laser Microdissection Product, “Supply Cost” means the cost as specified in such Remedial Agreement for that Laser Microdissection Product.
- CCC. “Third Party(ies)” means any Entity other than the Respondents or the Acquirer.
- DDD. “Trade Dress” means the current trade dress of the Laser Microdissection Products, including, without

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limitation, product packaging, and the lettering of the product trade name or brand name.

- EEE. “Trademark(s)” means all proprietary names or designations, trademarks (whether registered or unregistered), service marks (whether registered or unregistered), trade names, product names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Arcturus Life Sciences Business that are owned by Respondent MDS and that were used in or are used in the Arcturus Life Sciences Business, or that prior to the Closing Date were being evaluated by Respondent MDS for use in the Arcturus Life Sciences Business.
- FFF. “Website” means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by Respondents; *provided, however*, “Website” shall not include the following: (1) content owned by Third Parties and other intellectual property not owned by Respondents that are incorporated in such Website(s), such as stock photographs used in the Website(s), *except* to the extent that Respondents can convey their rights, if any, therein; or (2) content unrelated to the product(s).

II.

IT IS FURTHER ORDERED that:

- A. Not later than ten (10) days after the Order Date, Respondents shall divest the Arcturus Life Sciences Business Assets and grant the Arcturus Life Sciences Business Licenses, absolutely and in good faith, to

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Life Technologies pursuant to, and in accordance with, the Arcturus Life Sciences Business Divestiture Agreement(s) (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Life Technologies or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Arcturus Life Sciences Business Assets, respectively, is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents have divested the Arcturus Life Sciences Business Assets and granted the Arcturus Life Sciences Business Licenses to Life Technologies prior to the Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Life Technologies is not an acceptable purchaser of the Arcturus Life Sciences Business Assets then Respondents shall immediately rescind the transaction with Life Technologies, in whole or in part, as directed by the Commission, and shall divest the Arcturus Life Sciences Business Assets and grant the Arcturus Life Sciences Business Licenses, within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer and only in a manner that receives the prior approval of the Commission;

provided further, that if Respondents have divested the Arcturus Life Sciences Business Assets to Life Technologies prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that the manner in which the divestiture

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was accomplished is not acceptable, the Commission may direct Respondents, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Arcturus Life Sciences Business Assets or the granting of the Arcturus Life Sciences Business Licenses to Life Technologies (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Prior to the Effective Date and as a condition precedent to the consummation of the Acquisition, Respondents shall secure all consents and waivers from all Third Parties (including, without limitation, agencies of the United States Public Health Service within the Department of Health and Human Services, *i.e.*, the National Institutes of Health and the Centers for Disease Control) that are necessary to permit Respondents to divest the Arcturus Life Sciences Business Assets and grant the Arcturus Life Sciences Business Licenses to the Acquirer, and/or to permit such Acquirer to continue the Research and Development, manufacture, sale, marketing or distribution of the Laser Microdissection Products;

provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

- C. Respondents shall transfer the Manufacturing Technology to the Acquirer in an organized, comprehensive, complete, useful, timely, and meaningful manner. Respondents shall, *inter alia*:
1. designate employees of Respondents knowledgeable with respect to such Manufacturing Technology to a committee for the purposes of

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communicating directly with such Acquirer and the Interim Monitor (if any has been appointed) for the purposes of effecting such transfer;

2. prepare technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the Laser Microdissection Products, such protocols and acceptance criteria to be subject to the approval of the Acquirer;
3. prepare and implement a detailed technological transfer plan that contains, *inter alia*, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all Manufacturing Technology to the Acquirer; and
4. for a period of two (2) years from the Closing Date, upon reasonable written notice and request from the Acquirer to Respondents, provide in a timely manner, at no greater than Direct Cost, assistance and advice to enable the Acquirer (or the Designee of the Acquirer) to:
 - a. manufacture the Laser Microdissection Products in the same quality achieved by Respondent MDS;
 - b. obtain any Product Approvals necessary for the Acquirer to manufacture, sell, market or distribute the Laser Microdissection Products; and
 - c. receive, integrate, and use such Manufacturing Technology.

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D. Respondents shall:

1. upon reasonable written notice and request from the Acquirer to Respondents, Respondents shall Contract Manufacture and deliver to the Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products at Respondents' Supply Cost, for a period of time sufficient to allow the Acquirer (or the Designee of the Acquirer) to:
 - a. obtain all of the relevant Product Approvals necessary to manufacture the Contract Manufacture Products independently of Respondents; and
 - b. secure sources of supply of the ingredients, inputs and components for the Contract Manufacture Products from Entities other than Respondents;
2. make representations and warranties to the Acquirer that the Contract Manufacture Product(s) supplied through Contract Manufacture pursuant to a Remedial Agreement meet the specifications of the relevant customers;
3. for the Contract Manufacture Products supplied by Respondents, Respondents shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the product(s) supplied to the Acquirer pursuant to a Remedial Agreement by Respondents to meet customer specifications. This obligation may be made contingent upon the Acquirer giving Respondents prompt, adequate notice of such claim and cooperating fully in the

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defense of such claim. The Remedial Agreement shall be consistent with the obligations assumed by Respondents under this Order; *provided, however*, that Respondents may reserve the right to control the defense of any such litigation, including the right to settle the litigation, so long as such settlement is consistent with Respondents' responsibilities to supply the Contract Manufacture Products in the manner required by this Order; *provided further*, that this obligation shall not require Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondents to the Acquirer;

4. for the Contract Manufacture Products supplied by Respondents, make representations and warranties to the Acquirer that Respondents shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure by Respondents to deliver the products in a timely manner as required by the Remedial Agreement(s) unless Respondents can demonstrate that their failure was entirely beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents;
5. during the term of the Contract Manufacture between Respondents and the Acquirer, upon request of the Acquirer or Interim Monitor (if any has been appointed), make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate to the manufacture of the Contract Manufacture Products that are generated or created after the Closing

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Date;

6. during the term of the Contract Manufacture between Respondents and the Acquirer, maintain manufacturing facilities necessary to manufacture each of the Contract Manufacture Products; and
7. during the term of the Contract Manufacture between Respondents and the Acquirer, provide consultation with knowledgeable employees of Respondents and training, at the request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling the Acquirer (or the Designee of the Acquirer) to obtain all Product Approvals to manufacture Laser Microdissection Products manufactured with or from or that use or include the Contract Manufacture Products in the same quality achieved by the Respondents and in commercial quantities, and in a manner consistent with the relevant customer specifications, independently of Respondents, and sufficient to satisfy management of the Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of Laser Microdissection Products manufactured with or from or that use or include the Contract Manufacture Products.

The foregoing provisions, II.D.1. - 7., shall remain in effect with respect to each Contract Manufacture Product until the earliest of the following dates: (1) the date that the Acquirer (or the Designee(s) of such Acquirer) is able to manufacture such Contract Manufacture Product in commercial quantities, in a manner consistent with the relevant customer specifications, independently of Respondents; or (2) three (3) years from the Order Date.

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- E. Respondents shall:
1. submit to the Acquirer, at Respondents' expense, all Confidential Business Information;
 2. deliver such Confidential Business Information as follows:
 - a. in good faith;
 - b. in a timely manner, *i.e.*, as soon as practicable, avoiding any delays in transmission of the respective information; and
 - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
 3. pending complete delivery of all such Confidential Business Information to the Acquirer, provide the Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the Arcturus Life Sciences Business that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;
 4. not use, directly or indirectly, any such Confidential Business Information related to the Research and Development, manufacturing, marketing, or sale of the Arcturus Life Sciences Business other than as necessary to comply with the following:

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- a. the requirements of this Order;
 - b. Respondents' obligations to the Acquirer under the terms of any Remedial Agreement related to the Arcturus Life Sciences Business; or
 - c. applicable Law;
5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Entity except the Acquirer or other Entities specifically authorized by the Acquirer to receive such information; and
 6. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sale of the Laser Microdissection Products to the employees associated with business related to those Retained Products that are used or suitable for use in commerce for the same or similar purposes as the Laser Microdissection Products.
- F. Respondents shall not enforce any agreement against a Third Party or the Acquirer to the extent that such agreement may limit or otherwise impair the ability of the Acquirer to acquire the Manufacturing Technology, Product Intellectual Property, or Product Licensed Intellectual Property from the Third Party. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Manufacturing Technology, Product Intellectual Property and Product Licensed Intellectual Property.
- G. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to an agreement as described in

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Paragraph II.F. that allows the Third Party to provide the relevant Manufacturing Technology, Product Intellectual Property, or Product Licensed Intellectual Property to the Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to the Acquirer for the relevant assets.

H. Respondents shall:

1. for a period of at least twelve (12) months from the Closing Date, provide the Acquirer with the opportunity to enter into employment contracts with the Laser Microdissection Product Core Employees. Each of these periods is hereinafter referred to as the "Laser Microdissection Product Core Employee Access Period(s)";
2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (2) ten (10) days after the relevant Closing Date, provide the Acquirer or the relevant Proposed Acquirer with the Product Employee Information related to the Laser Microdissection Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Laser Microdissection Product Core Employee within the time provided herein shall extend the Laser Microdissection Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay;
3. during the Laser Microdissection Product Core Employee Access Period(s), not interfere with the hiring or employing by the Acquirer of the Laser Microdissection Product Core Employees related

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to the particular Laser Microdissection Products and assets acquired by such Acquirer, and remove any impediments within the control of Respondents that may deter these employees from accepting employment with the Acquirer, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Laser Microdissection Product or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Acquirer. In addition, Respondents shall not make any counteroffer to such a Laser Microdissection Product Core Employee who has received a written offer of employment from the Acquirer;

provided, however, that, subject to the conditions of continued employment prescribed in this Order, this Paragraph II.H.3. shall not prohibit Respondents from continuing to employ any Laser Microdissection Product Core Employee under the terms of such employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer to such employee;

4. until the Closing Date, provide all Laser Microdissection Product Core Employees with reasonable financial incentives to continue in their positions and to Research and Develop, and manufacture the Laser Microdissection Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Laser Microdissection Products and to ensure successful execution of the pre-Acquisition plans for such Laser Microdissection Products. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondent

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MDS until the Closing Date(s) for the divestiture of the Arcturus Life Sciences Business Assets has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

provided, however, that, subject to those conditions of continued employment prescribed in this Order, this Order does not require nor shall be construed to require Respondents to terminate the employment of any employee or to prevent Respondents from continuing to employ the Laser Microdissection Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year from the Closing Date, not:
 - a. directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer with any amount of responsibility related to a Laser Microdissection Product (“Laser Microdissection Product Employee”) to terminate his or her employment relationship with the Acquirer; or
 - b. hire any Laser Microdissection Product Employee; *provided, however,* Respondents may hire any former Laser Microdissection Product Employee whose employment has been terminated by the Acquirer or who independently applies for employment with Respondent, as long as such employee was not solicited in violation of the nonsolicitation requirements contained herein;

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provided, however, Respondents may do the following: (1) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Laser Microdissection Product Employees; or (2) hire a Laser Microdissection Product Employee who contacts Respondents on his or her own initiative without any direct or indirect solicitation or encouragement from Respondents.

- I. Respondents shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each Laser Microdissection Product Core Employee retained by Respondents, the direct supervisor(s) of any such employee, and any other employee retained by Respondents and designated by the Interim Monitor (if applicable) sign a confidentiality agreement pursuant to which such employee shall be required to maintain all Confidential Business Information related to the Laser Microdissection Products as strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondents (other than as necessary to comply with the requirements of Law or this Order).
- J. Not later than thirty (30) days after the Effective Date, Respondents shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Laser Microdissection Products by Respondents' personnel to all of Respondents' employees who:
 1. are or were directly involved in the Research and Development, manufacturing, distribution, sale or marketing of each of the relevant Laser Microdissection Products;

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2. are directly involved in the Research and Development, manufacturing, distribution, sale or marketing of Retained Products that are used or suitable for use in commerce for the same or similar purposes as the relevant Laser Microdissection Products; and/or
3. may have Confidential Business Information related to the Laser Microdissection Products.

Respondents shall give such notification by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for one (1) year after the relevant Closing Date. Respondents shall provide a copy of such notification to the Acquirer. Respondents shall maintain complete records of all such agreements at Respondents headquarters address within the United States and shall provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

- K. Until Respondents complete the divestitures required by Paragraph II.A. and fully transfer the related Manufacturing Technology to the Acquirer(s),
 1. Respondents shall take such actions as are necessary to:
 - a. maintain the full economic viability and marketability of the Arcturus Life Sciences Business;
 - b. minimize any risk of loss of competitive potential for such business;

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- c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the Arcturus Life Sciences Business Assets;
 - d. ensure the assets required to be divested are transferred to the Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the Arcturus Life Sciences Business; and
 - e. ensure the completeness of the transfer of the Manufacturing Technology; and
 2. Respondents shall not sell, transfer, encumber or otherwise impair the Arcturus Life Sciences Business Assets (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Arcturus Life Sciences Business.
- L. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer(s) or the Arcturus Life Sciences Releasee(s) for the Research and Development, manufacture, use, import, export, distribution, or sale of the Laser Microdissection Products under any Patent owned or licensed by Respondents as of, or at any time after, the Effective Date (*excluding* those Patents that claim inventions conceived by and reduced to practice after the Effective Date) that claim any aspect of the Research and Development, manufacture, use, import, export, distribution, or sale of a Laser Microdissection Product, or that claims a product relating to the use thereof;

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if such suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) any aspect of the Research and Development, or manufacture of a particular Laser Microdissection Product; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of a particular Laser Microdissection Product that was marketed, distributed or sold within the United States at any time prior to the Effective Date. Respondents shall also covenant to the Acquirer that as a condition of any assignment, transfer, or license to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue the Acquirer or the Arcturus Life Sciences Releasee(s) under such Patents, if the suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) any aspect of the Research and Development, or manufacture of a particular Laser Microdissection Product; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of a particular Laser Microdissection Product that was marketed, distributed or sold within the United States at any time prior to the Effective Date.

- M. Upon reasonable written notice and request from an Acquirer to Respondents, Respondents shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondents to assist the Acquirer to defend against, respond to, or otherwise participate in any litigation related to the Product Intellectual Property related to any of the Laser Microdissection Products, if such litigation would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the Research and Development, or manufacture of the

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Laser Microdissection Products; or (2) the use within, import into, export from, or the supply, distribution, or sale within the United States.

- N. For any patent infringement suit in which either Respondent is alleged to have infringed a Patent of a Third Party prior to the Closing Date or for such suit as such Respondent has prepared or is preparing as of the Closing Date to defend against such infringement claim(s), and where such a suit would have the potential to interfere with the Acquirer's freedom to practice the following: (1) the Research and Development, or manufacture of a particular Laser Microdissection Product; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the United States of the relevant Laser Microdissection Products, Respondents shall:
1. cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondents in connection with obtaining resolution of any pending patent litigation involving such Laser Microdissection Product;
 2. waive conflicts of interest, if any, to allow either Respondents' outside legal counsel to represent the Acquirer in any ongoing patent litigation involving such Laser Microdissection Product; and
 3. permit the transfer to the Acquirer of all of the litigation files and any related attorney work-product in the possession of Respondents' outside counsel relating to such Laser Microdissection Product.
- O. Respondents shall not:

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1. use the Trademarks or any mark confusingly similar to such Trademarks, as a trademark, trade name, or service mark;
 2. attempt to register such Trademarks;
 3. attempt to register any mark confusingly similar to such Trademarks;
 4. challenge or interfere with the Acquirer(s)'s use and registration of such Trademarks; or
 5. challenge or interfere with the Acquirer(s)'s efforts to enforce their trademark registrations for and trademark rights in such Trademarks against Third Parties.
- P. Respondents shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Arcturus Life Sciences Business a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.
- Q. The purpose of the divestiture of the Arcturus Life Sciences Business Assets and the transfer of the Manufacturing Technology related to the Laser Microdissection Products, respectively, and the related obligations imposed on the Respondents by this Order is:
1. to ensure the continued use of the Arcturus Life Sciences Business Assets in the Research and Development, manufacture, use, import, export, distribution, and sale of each of the respective Laser Microdissection Products;

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2. to provide for the future use of the Arcturus Life Sciences Business Assets for the Research and Development, manufacture, use, import, export, distribution, and sale of each of the respective Laser Microdissection Products;
3. to create a viable and effective competitor, who is independent of the Respondents in the Research and Development, manufacture, use, import, export, distribution, or sale of each of the Laser Microdissection Products; and
4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that for a period commencing on the Order Date and continuing for ten (10) years, Respondents shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any Ownership Interest in the Arcturus Life Sciences Business or any Entity that engages in scientific Research and Development, manufacture, distribution, marketing, or selling of the Laser Microdissection Product(s). Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of the Respondents and not of any other party to the transaction. Respondents shall provide two (2)

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complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition; *provided, however*, that the provisions of this Paragraph III shall not apply to any transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C.18a.

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

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets, and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Danaher, which consent shall not be unreasonably withheld. If Respondent Danaher has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Danaher of the identity of any proposed Interim Monitor, Respondents shall be deemed to have

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consented to the selection of the proposed Interim Monitor.

- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.
- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
1. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission;
 2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission; and
 3. the Interim Monitor shall serve until, the later of:
 - a. the date of completion by Respondents of the divestiture of all Arcturus Life Sciences Business Assets and the transfer of the Manufacturing Technology, Product Intellectual Property, and Product Licensed Intellectual Property in a manner that fully

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satisfies the requirements of this Order; and

- b. with respect to each Laser Microdissection Product, the date the Acquirer (or the Designee(s) of such Acquirer) has obtained all Product Approvals necessary to manufacture, market, import, export, and sell such Laser Microdissection Product and is able to manufacture such Laser Microdissection Product independently of Respondents;

provided, however, that the Interim Monitor's service shall not exceed five (5) years from the Order Date;

provided further, that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.

- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Order, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Order.
- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such

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reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

- G. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
- H. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by each Respondent, and any reports submitted by the Acquirer with respect to the performance of each Respondent's obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by each Respondent of its obligations under the Order; *provided, however*, beginning one hundred twenty (120) days after each Respondent has filed its final report pursuant to Paragraph VII.B., and every one hundred twenty (120) days thereafter, the Interim Monitor shall report in

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writing to the Commission concerning progress by the Acquirer toward:

1. obtaining all of the relevant Product Approvals necessary to manufacture and sell, the Laser Microdissection Products independently of Respondents and;
 2. securing sources of supply of the inputs and components for the Laser Microdissection Products from Entities other than Respondents.
- I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
 - J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
 - K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
 - L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the

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Order.

- M. The Interim Monitor appointed pursuant to this Order may be the same Entity appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

V.

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Arcturus Life Sciences Business Assets and grant the Arcturus Life Sciences Business Licenses as required by this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to assign, grant, license, divest, transfer, deliver or otherwise convey the assets required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed pursuant to each of the relevant Paragraphs in a manner that satisfies the requirements of each such Paragraph. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*l*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*l*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to

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comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Danaher, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be an Entity with experience and expertise in acquisitions and divestitures. If Respondent Danaher 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 Danaher of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed;

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2. the Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times;
3. subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;
4. the Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional

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obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring Entity selected by Respondents from among those approved by the Commission; and, *provided further, however*, that Respondents 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 Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant

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assets that are required to be divested by this Order;

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee;
7. the Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; *provided, however,* that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Entity appointed as Interim Monitor pursuant to the relevant provisions of the Order to Maintain Assets in this matter;
8. the Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

VI.

IT IS FURTHER ORDERED that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, Respondents shall assure that Respondents' counsel (including in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

- A. To assure Respondents' compliance with any Remedial Agreement, this Order, any Law (including, without limitation, any requirement to obtain regulatory licenses or approvals, and rules promulgated by the Commission), any data retention requirement of any applicable Government Entity, or any taxation requirements; or
- B. To defend against, respond to, or otherwise participate in any litigation, investigation, audit, process,

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subpoena or other proceeding relating to the divestiture or any other aspect of the Laser Microdissection Products or assets and businesses associated with those Laser Microdissection Products;

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

provided further, however, that pursuant to this Paragraph VI, Respondents shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the relevant Acquirer (but shall not be deemed to have violated this requirement if such Acquirer withholds such agreement unreasonably); and (2) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VII.

IT IS FURTHER ORDERED that:

- A. Within five (5) days of the Acquisition, Respondent Danaher shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondents have fully complied with the following:
 1. Paragraphs II.A , II.B., II.C., II.E., II.G., II.J.; and
 2. all of their responsibilities to render transitional services to the Acquirer as provided by this Order and the Remedial Agreement(s);

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

- C. One (1) year after the Order Date, annually for the next nine years on the anniversary of the Order Date, and at other times as the Commission may require, Respondent Danaher shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.

VIII.

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

- A. any proposed dissolution of Respondent Danaher;

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- B. any proposed acquisition, merger or consolidation of Respondent Danaher; or
- C. any other change in Respondent Danaher, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

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

- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by Respondents to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- C. Respondents shall include in each Remedial Agreement related to each of the Laser Microdissection Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of Respondents' obligations to the Acquirer(s) pursuant to this Order.
- D. Respondents shall also include in each Remedial Agreement a representation from the Acquirer that such Acquirer shall use commercially reasonable efforts to secure the Product Approval(s) necessary to manufacture, or to have manufactured by a Third Party, Laser Microdissection Products and to have any such manufacture to be independent of Respondents, all as soon as reasonably practicable.
- E. Respondents shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

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X.

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

- A. access, during business office hours of such Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of such Respondent related to compliance with this Order, which copying services shall be provided by such Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on March 16, 2020.

By the Commission.

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APPENDIX A
ARCTURUS LIFE SCIENCES BUSINESS PATENTS**APPENDIX A**
ARCTURUS LIFE SCIENCES BUSINESS PATENTS

	<u>PATENT TITLE</u>	<u>COUNTRY</u>	<u>STATUS</u>	<u>PATENT NO.</u>	<u>APP TYPE</u>	<u>PUBLICATION NO.</u>
1.	Low volume filtration column devices and method of filtering therewith	United States	Issued	7229595	Utility (Regular)	US 2002-0192656 A1
2.	Low volume filtration column devices and method of filtering therewith	United States CIP	Issued	7556733	Continuation in Part (CIP)	US 2006-0037903 A1
3.	Low volume filtration column devices and method of filtering therewith	European	Pending		Nationalized PCT	EP1572318
4.	Low volume filtration column devices and method of filtering therewith	United States CIP	Pending		Continuation in Part (CIP)	US 2003-0069413 A1
5.	Filtration Columns for different vessel sizes and use	European	Pending		Nationalized PCT	EP 1399727 A2
6.	Nucleic acid amplification	United States	Issued	6794141	Utility (Regular)	US 2003-0022194 A1
7.	Nucleic acid amplification	United States			Continuation	Unpublished
8.	3' Biased Microarrays	United States	Filed		Continuation	US 2009-0270271 A1
9.	3' Biased Microarrays	European	Pending		Nationalized PCT	EP1633891
10.	Consumable for laser capture microdissection	Japan	Granted	4125481	Nationalized PCT	JP 2001518615T
11.	Consumable for laser capture microdissection	Hong Kong	Issued		Nationalized PCT	HK 1029623 A1
12.	Consumable for laser capture microdissection	United Kingdom (GB)	Issued	1021700	European Nationalized PCT	EP 1021700 A2
13.	Consumable for laser capture microdissection	European	Issued	1021700	Nationalized PCT	EP 1021700 A2
14.	Consumable for laser capture microdissection	France	Issued	1021700	European Nationalized PCT	EP 1021700 A2
15.	Consumable for laser capture microdissection	Canada	Issued	2306030	Nationalized PCT	CA 2306030 A1
16.	Method of manufacturing consumable for laser capture microdissection	United States	Issued	5985085	Continuation in Part (CIP)	
17.	Consumable for laser capture microdissection	Germany (DE)	Issued	69821508	European Nationalized PCT	EP 1021700 A2
18.	Consumable for laser capture microdissection	United States	Issued	7075640	Continuation in Part (CIP)	US 2001-0038449 A1

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APPENDIX A (continued)

	<u>PATENT TITLE</u>	<u>COUNTRY</u>	<u>STATUS</u>	<u>PATENT NO.</u>	<u>APP TYPE</u>	<u>PUBLICATION NO.</u>
1 9.	Consumable for laser capture microdissection and method of manufacture	United States	Issued	7221447	Divisional 1	US 2006-0148070 A1
2 0.	Consumable for laser capture microdissection	European	Pending		Divisional 2	EP 1260807 A1
2 1.	Consumable for laser capture microdissection	European	Pending		Divisional 1	EP 1304556 A2
2 2.	Consumable for Laser Capture microdissection and method of manufacture thereof	Japan	Published		Divisional 1	2008-157967
2 3.	Automated microdissection instrument	United States	Pending		Continuation in Part (CIP)	US 2006-0139621 A1
2 4.	Automated laser capture microdissection	United States	Issued	6690470	Utility (Regular)	
2 5.	Automated laser capture microdissection	United States	Issued	6870625	Divisional 1	
2 6.	Automated laser capture microdissection	United States	Issued	7027133	Divisional 2	US 2005-0089949 A1
2 7.	Automated laser capture microdissection	United States	Issued	7148966	Divisional 3	US 2006-0114456 A1
2 8.	Apparatus and method for heating microfluidic volumes and moving fluids	United States	Issued	7049558	Utility (Regular)	US 2005-0028587 A1
2 9.	Broadband energy absorbing film for laser capture microdissection	United States	Issued	6495195	Utility (Regular)	US 2001-0003009 A1
3 0.	Laser capture microdissection (LCM) extraction device and device carrier and method for Post-LCM fluid processing	European	Pending		Nationalized PCT	EP1279020
3 1.	Laser capture microdissection (LCM) extraction device and carrier and method for LCM fluid processing	European	Pending		Divisional 1	EP1672349
3 2.	Laser capture microdissection (LCM) extraction device and device carrier, and method for post-LCM fluid processing	United States	Pending		Utility (Regular)	US 2002-0001837 A1
3 3.	Interactive and automated tissue image analysis with global training database and variable-abstraction processing in...	Australia	Granted	2003270687	Nationalized PCT	AU 2003270687
3 4.	Interactive and automated tissue image analysis with global training database and variable-abstraction processing in...	United States	Pending		Utility (Regular)	US 2004-0093166 A1

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APPENDIX A (continued)

	<u>PATENT TITLE</u>	<u>COUNTRY</u>	<u>STATUS</u>	<u>PATENT NO.</u>	<u>APP TYPE</u>	<u>PUBLICATION NO.</u>
5 3.	Gene expression profiling from FFPE samples	China	Pending		Nationalized PCT	CN 1714157 A
5 4.	Gene expression profiling from FFPE samples	Canada	Pending		Nationalized PCT	CA 2500603 A1
5 5.	Gene expression profiling from FFPE samples	Australia	Pending		Nationalized PCT	AU 2003282608 A1
5 6.	Gene expression profiling from FFPE samples	European	Pending		Nationalized PCT	EP 1549769 A2
5 7.	Gene expression profiling from FFPE samples	Mexico	Pending		Nationalized PCT	MX PA05003818
5 8.	Global linear non-biased nucleic acid amplification	United Kingdom (GB)	Granted	1608784	European Nationalized PCT	
5 9.	Global linear non-biased nucleic acid amplification	European	Granted	1608784	Nationalized PCT	EP 1608784 A2
6 0.	Global linear non-biased nucleic acid amplification	France	Granted	1608784	European Nationalized PCT	
6 1.	Global linear non-biased nucleic acid amplification	Germany (DE)	Granted	60 2004 019 059.4-08	European	
6 2.	Global linear non-biased nucleic acid amplification	Japan	Pending		Nationalized PCT	JP 2006520603T
6 3.	Improved nucleic acid amplification	Canada	Pending		Nationalized PCT	CA 2477670 A1
6 4.	Nucleic acid amplification	United States	Pending		Nationalized PCT	US 2006-0246434 A1
6 5.	Processing technology for LCM samples	United States	Issued	6528248	Utility (Regular)	US 2002-0132222 A1
6 6.	Laser capture microdissection method and apparatus	Switzerland	Issued	0958491	European Nationalized PCT	EP 0958491
6 7.	Laser capture microdissection method and apparatus	Italy	Issued	0958491	Utility (Regular)	
6 8.	Laser capture microdissection method and apparatus	Luxembourg	Issued	0958491	European Nationalized PCT	EP 0958491
6 9.	Laser capture microdissection method and apparatus	Monaco	Issued	0958491	European Nationalized PCT	EP 0958491
7 0.	Laser capture microdissection method and apparatus	Ireland	Issued	0958491	European Nationalized PCT	EP 0958491
7 1.	Laser capture microdissection method and apparatus	France	Issued	0958491	European Nationalized PCT	EP 0958491

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APPENDIX A (continued)

	<u>PATENT TITLE</u>	<u>COUNTRY</u>	<u>STATUS</u>	<u>PATENT NO.</u>	<u>APP TYPE</u>	<u>PUBLICATION NO.</u>
3 5.	Interactive and automated tissue image analysis with global training database and variable-abstraction processing in...	European	Pending		Nationalized PCT	EP 1537533
3 6.	Interactive and automated tissue image analysis with global training database and variable-abstraction processing in...	Canada	Pending		Nationalized PCT	CA 2500805
3 7.	Fluidic extraction of microdissected samples	United States	Issued	7473401	Continuation	
3 8.	Fluidic extraction of microdissected samples	Japan	Pending		Nationalized PCT	JP 2002521668T T
3 9.	Fluidic extraction of microdissected samples	Mexico	Pending		Nationalized PCT	MX PA01000691 A
4 0.	Laser capture microdissection on inverted polymer films	United States	Issued	7456938	Utility (Regular)	US 2006-0023201 A1
4 1.	Transfer film for laser microcapture	United States	Issued	6887703	Utility (Regular)	US 2001-0028934 A1
4 2.	Laser capture microdissection analysis vessel	Canada	Issued	2280087	Nationalized PCT	CA 2280087 A1
4 3.	Laser capture microdissection analysis vessel	United States	Issued	5859699	Utility (Regular)	
4 4.	Laser capture microdissection analysis vessel	United States	Issued	6157446	Continuation	
4 5.	Laser capture microdissection analysis vessel	European	Pending		Nationalized PCT	EP 0974044 A1
4 6.	Laser microdissection apparatus and method	European	Filed		Utility (Regular)	EP1787101
4 7.	Laser microdissection apparatus and method	Canada	Filed		Utility (Regular)	CA 2580025
4 8.	Laser capture microdissection method and apparatus	United States	Pending		Utility (Regular)	US 2006-0087643 A1
4 9.	Laser capture microdissection apparatus and method		Pending		PCT	WO 2006/031574
5 0.	Gene expression profiling from FFPE samples	United States	Filed		Continuation	US 2009-0082215 A1
5 1.	Gene expression profiling from FFPE samples	New Zealand	Granted	539124	Nationalized PCT	
5 2.	Gene expression profiling from FFPE samples	United States	Issued	7364846	Utility (Regular)	US 2004-0072305 A1

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APPENDIX A (continued)

	<u>PATENT TITLE</u>	<u>COUNTRY</u>	<u>STATUS</u>	<u>PATENT NO.</u>	<u>APP TYPE</u>	<u>PUBLICATION NO.</u>
7 2.	Laser capture microdissection method and apparatus	United Kingdom (GB)	Issued	0958491	European Nationalized PCT	
7 3.	Laser capture microdissection method and apparatus	European	Issued	1288645	Divisional 1	EP 1288645
7 4.	Laser capture microdissection method and apparatus	Canada	Issued	2279992	Nationalized PCT	CA 2279992
7 5.	Laser capture microdissection method and apparatus	Japan	Issued	3786711	Nationalized PCT	2001-526795
7 6.	Laser capture microdissection pressure plate and transfer arm	United States	Issued	6184973	Continuation	
7 7.	Laser capture microdissection optical system	United States	Issued	6215550	Continuation	
7 8.	Laser capture microdissection method and apparatus	United States	Issued	6469779	Utility (Regular)	US 2001-0001574 A1
7 9.	Laser capture microdissection optical system	United States	Issued	6512576	Continuation	
8 0.	Laser capture microdissection translation stage joystick	United States	Issued	6639657	Continuation	US 2002-0154288 A1
8 1.	Laser capture microdissection vacuum hold-down	United States	Issued	6697149	Continuation	US 2002-0001074 A1
8 2.	Laser capture microdissection optical system	United States	Issued	6700653	Divisional 1	US 2003-0058430 A1
8 3.	Laser capture microdissection vacuum hold-down	United States	Issued	6924889	Divisional 1	US 2004-0106206 A1
8 4.	Laser capture microdissection method and apparatus	Germany (DE)	Issued	69814041	European Nationalized PCT	
8 5.	Laser capture microdissection translation stage joystick	United States	Issued	7012676	Divisional 1	US 2004-0027556 A1

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APPENDIX B
ARCTURUS LIFE SCIENCES BUSINESS
TRADEMARKS, TRADE NAMES PRODUCT NAMES
DOMAIN NAMES, ACCOUNTS

TRADEMARKS:

1. AUTOPIX
2. CAPSURE
3. IDSTOGENE
4. PARADISE
5. PICOPURE
6. PIXCELL
7. RIBOAMP
8. SYSTEMS FOR MICROGENOMICS
9. VERITAS
10. ARCTURUS & DESIGN
11. ARCTURUS & DESIGN
12. ARCTURUS & DESIGN
13. EXTRACSURE
14. PREPSTRIP
15. MIRACOL

TRADE NAMES:

Arcturus
Arcturus Bioscience
Arcturus Engineering

PRODUCT NAMES:

Veritas XT Microdissection System
Veritas Microdissection System
PixCell® IIe LCM System.
CapSure® LCM Caps
Paradise® Reagent System
Paradise® Whole Transcript RT Reagent System
RiboAmp® RNA Amplification Kit

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RiboAmp® OA RNA Amplification Kit
RiboAmp® OA 1 Round
RNA Amplification Kit

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APPENDIX B (continued)

RiboAmp® HS RNA Amplification Kit
PicoPure® RNA Isolation Kit
PicoPure® DNA Extraction Kit
HistoGene® LCM Immunofluorescence Staining Kit
HistoGene® LCM Frozen Section Staining Kit
Capsure® HS LCM Caps
CapSure® Macro LCM Caps
ExtracSure Sample Extraction Devices
Miracol Purification Columns
Turbo Labeling
PrepStrip Tissue Preparation Strips
Autopix® Micro Dissection System

DOMAIN NAMES; ACCOUNTS:

www.arctur.com
www.arcturuseurope.com
www.arctureurope.com
www.arcturusag.com
www.arcturusbioscience.com
http:www.arcturusbiosciences.com
http:www.arcturusengineering.com
webmail.arctur.com
mail.arctur.com
pop.arctur.com
smtp.arctur.com
mail.argturusag.com
www.arcturusdx.com

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FEDERAL TRADE COMMISSION DECISIONS
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**NON-PUBLIC APPENDIX C
LASER MICRODISSECTION PRODUCT
CORE EMPLOYEES**

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

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

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

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

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Danaher is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters

Order to Maintain Assets

address at 2099 Pennsylvania Avenue, N.W., 12th Floor, Washington, DC 20006.

2. Respondent MDS Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its headquarters address at 2810 Matheson Blvd., Suite 500, Mississauga, Ontario L4W4V9, Canada, and the offices of its United States subsidiary, MDS Analytical Technologies (US) Inc. at 1311 Orleans Drive, Sunnyvale, CA 94089-1136.
3. The 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 to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. "Danaher" means Danaher Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Danaher and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "MDS" means MDS Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by MDS, and the respective directors, officers, employees,

Order to Maintain Assets

agents, representatives, successors, and assigns of each.

- C. "Respondents" mean Danaher and MDS, individually and collectively.
- D. "Commission" means the Federal Trade Commission.
- E. "Decision and Order" means the:
 - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
 - 2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- F. "Interim Monitor" means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph IV of the Decision and Order.
- G. "Orders" means the Decision and Order and this Order to Maintain Assets.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

- A. Until the Closing Date, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Arcturus Life Sciences Business, to minimize any risk of loss of competitive potential for the Arcturus Life

Order to Maintain Assets

Sciences Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Arcturus Life Sciences Business except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Arcturus Life Sciences Business Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the Arcturus Life Sciences Business.

- B. Until the Closing Date, Respondents shall maintain the operations of the Arcturus Life Sciences Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of such Arcturus Life Sciences Business and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; customers; Agencies; employees; and others having business relations with the Arcturus Life Sciences Business. Respondents' responsibilities shall include, but are not limited to, the following:
1. providing the Arcturus Life Sciences Business with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for the Arcturus Life Sciences Business;
 2. continuing, at least at their scheduled pace, any additional expenditures for the Arcturus Life Sciences Business authorized prior to the date the Consent Agreement was signed by Respondents

Order to Maintain Assets

including, but not limited to, all Research and Development, manufacturing, distribution, marketing and sales expenditures;

3. providing such resources as may be necessary to respond to competition against each of the Laser Microdissection Products and/or to prevent any diminution in sales of each of the Laser Microdissection Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Arcturus Life Sciences Business Assets to an Acquirer;
4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Laser Microdissection Products;
5. making available for use by the Arcturus Life Sciences Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business, including without limitation, the Arcturus Life Sciences Business Assets;
6. providing the Arcturus Life Sciences Business with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Arcturus Life Sciences Business;
7. providing such support services to the Arcturus Life Sciences Business as were being provided to such business by Respondent(s) as of the date the Consent Agreement was signed by Respondents; and

Order to Maintain Assets

8. maintaining a work force at least as equivalent in size, training, and expertise to what has been associated with the Laser Microdissection Products for the relevant Laser Microdissection Product's last fiscal year.
- C. Until Respondents fully and finally transfer and deliver a particular Arcturus Life Sciences Business Asset to the Acquirer, Respondents shall maintain the full economic viability, marketability and competitiveness of such Arcturus Life Sciences Business Asset, shall prevent its destruction, removal, wasting, deterioration, or impairment and shall maintain such Arcturus Life Sciences Business Asset in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance).
- D. Until the Closing Date, Respondents shall provide all the related Laser Microdissection Product Core Employees with reasonable financial incentives to continue in their positions and to Research and Develop, and manufacture the Laser Microdissection Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of such Laser Microdissection Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent(s) until the Closing Date, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by Law), and additional incentives as may be necessary to prevent any diminution of the relevant Laser Microdissection Product's competitiveness.
- E. Respondents shall:
1. for a period of twelve (12) months from the Closing Date, provide the Acquirer with the

Order to Maintain Assets

opportunity to enter into employment contracts with the Laser Microdissection Product Core Employees. Each of these periods is hereinafter referred to as the "Laser Microdissection Product Core Employee Access Period(s)";

2. not later than the earlier of the following dates: (1) ten (10) days after notice by staff of the Commission to Respondents to provide the Employee Information; or (2) ten (10) days after written request by an Acquirer, provide such Acquirer or Proposed Acquirer(s) with the Employee Information related to the Laser Microdissection Product Core Employees. Failure by Respondents to provide the Employee Information for any Laser Microdissection Product Core Employee within the time provided herein shall extend the Laser Microdissection Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay; and
3. during the Laser Microdissection Product Employee Access Period(s), not interfere with the hiring or employing by the relevant Acquirer of the Laser Microdissection Product Core Employees, and shall remove any impediments within the control of Respondent(s) that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondent(s) that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Laser Microdissection Product Core Employee who receives a written offer of employment from the Acquirer;

Order to Maintain Assets

provided, however, that, subject to the conditions of continued employment prescribed in the Orders, this Paragraph II.E.3. shall not prohibit Respondents from continuing to employ any Laser Microdissection Product Core Employee under the terms of such employee's employment with Respondent(s) prior to the date of the written offer of employment from the Acquirer to such employee.

- F. Respondents shall:
1. not use, directly or indirectly, any Confidential Business Information related to the Research and Development, manufacturing, marketing, or sale of the Arcturus Life Sciences Business other than as necessary to comply with the following:
 - a. the requirements of the Orders;
 - b. Respondents' obligations to the Acquirer under the terms of any Remedial Agreement related to the Arcturus Life Sciences Business; or
 - c. applicable Law;
 2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Entity except the Acquirer or other Entities specifically authorized by the Acquirer to receive such information;
 3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Laser Microdissection Products to the employees associated with business related to

Order to Maintain Assets

those Retained Products that are used or suitable for use in commerce for the same or similar purposes as the Laser Microdissection Products; and

4. institute procedures and requirements to ensure that the above-described employees:
 - a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of the Orders; and
 - b. do not solicit, access or use any Confidential Business Information that they are prohibited under the Orders from receiving for any reason or purpose.
- G. Not later than thirty (30) days following the Closing Date, Respondents shall provide to all of Respondents' employees and other personnel who may have access to Confidential Business Information related to the Arcturus Life Sciences Business written or electronic notification of the restrictions on the use of such information by Respondents' personnel. At the same time, if not provided earlier, Respondents shall provide a copy of such notification by e-mail with return receipt requested or similar transmission, and keep an electronic file of such receipts for one (1) year after the Closing Date. Respondents shall provide a copy of the form of such notification to the Acquirer, the Interim Monitor, and the Commission. Respondents shall also obtain from each employee covered by this Paragraph II.G. an agreement to abide by the applicable restrictions. Respondents shall maintain complete records of all such agreements at Respondents' registered office within the United States and shall

Order to Maintain Assets

provide an officer's certification to the Commission stating that such acknowledgment program has been implemented and is being complied with. Respondents shall monitor the implementation by its employees and other personnel of all applicable restrictions, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by the Orders. Respondents shall provide the relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondents' employees and other personnel.

- H. Respondents shall adhere to and abide by the Remedial Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of the Orders, it being understood that nothing in the Orders shall be construed to reduce any obligations of Respondents under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.
- I. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Arcturus Life Sciences Business through its full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Arcturus Life Sciences Business and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Arcturus Life Sciences Business Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

Order to Maintain Assets

- A. At any time after Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Danaher, which consent shall not be unreasonably withheld. If Respondent Danaher has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Danaher of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondents shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents’ compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.
- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
 - 1. the Interim Monitor shall have the power and authority to monitor Respondents’ compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall

Order to Maintain Assets

exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission; and
3. the Interim Monitor shall serve until, the later of:
 - a. the date of completion by Respondents of the divestiture of all Arcturus Life Sciences Business Assets and the transfer of the Manufacturing Technology, Product Intellectual Property, and Product Licensed Intellectual Property in a manner that fully satisfies the requirements of the Decision and Order; and
 - b. with respect to each Laser Microdissection Product, the date the Acquirer (or the Designee(s) of such Acquirer) has obtained all Product Approvals necessary to manufacture, market, import, export, and sell such Laser Microdissection Product and is able to manufacture such Laser Microdissection Product independently of Respondents;

provided, however, that the Interim Monitor's service shall not exceed five (5) years from the date on which the Decision and Order becomes final;

provided further, that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.

Order to Maintain Assets

- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.
- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
- G. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim

Order to Maintain Assets

Monitor.

- H. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of each Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by each Respondent of its obligations under the Orders; *provided, however*, beginning one hundred twenty (120) days after each Respondent has filed its final report pursuant to Paragraph VII.B. of the Decision and Order, and every one hundred twenty (120) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by the Acquirer toward:
1. obtaining all of the relevant Product Approvals necessary to manufacture and sell, the Laser Microdissection Products independently of Respondents and;
 2. securing sources of supply of the inputs and components for the Laser Microdissection Products from entities other than Respondents.
- I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the

Order to Maintain Assets

Commission.

- J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- M. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same Entity appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every thirty (30) days thereafter until Respondents have fully complied with their obligations to assign, grant, license, divest, transfer, deliver or otherwise convey relevant assets as required by Paragraph II.A. of the Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order to Maintain Assets

Order to Maintain Assets

and the related Decision and Order; *provided, however*, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondents pursuant to Paragraph VII of the Decision and Order.

V.

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

- A. any proposed dissolution of a Respondent;
- B. any proposed acquisition, merger or consolidation of a Respondent; or
- C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VI.

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

- A. access, during business 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 such Respondent related to compliance with the

Order to Maintain Assets

Orders, which copying services shall be provided by such Respondent at the request of authorized representative(s) of the Commission and at the expense of the Respondent; and

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

VII.

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

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The later of:
 - 1. The day after the divestiture of all of the Arcturus Life Sciences Business Assets, as required by and described in the Decision and Order, has been completed and each Interim Monitor (if appointed), in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated; or
 - 2. Three (3) days after the related Decision and Order becomes final.

By the Commission.

Analysis to Aid Public Comment

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDERS TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted from Danaher Corporation (“Danaher”) and MDS, Inc. (“MDS”), subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”), which is designed to remedy the anticompetitive effects resulting from Danaher’s acquisition of the stock and assets of MDS Analytical Technologies (US) Inc. (“MDS Analytical Technologies”), a subsidiary of MDS.

Under the terms of the Consent Agreement, Danaher will divest the assets of MDS’s Arcturus business segment, which includes assets relating to the manufacture and sale of laser microdissection devices and associated reagent products, to Life Technologies Corp. (“Life Technologies”) within 10 days after the date the Decision and Order (“Order”) becomes final. The proposed Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed Consent Agreement and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make it final.

On September 2, 2009, Danaher entered into an agreement to acquire the stock and assets of MDS Analytical Technologies from MDS. The Commission’s complaint alleges the facts described below and that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by lessening competition in the market for laser microdissection devices.

Analysis to Aid Public Comment

II. The Parties

Danaher, headquartered in Washington, DC, is a global supplier of professional, medical, industrial, commercial, and consumer products. Danaher's Leica Microsystems ("Leica") business operates within its Medical Technologies segment. Leica manufactures and sells laser microdissection devices.

Headquartered in Mississauga, Ontario, MDS is a life sciences company that operates three core businesses, MDS Analytical Technologies, MDS Nordion, and MDS Pharma Services. MDS's Arcturus business, which assembles and sells laser microdissection devices and chemical reagents, is a part of MDS Analytical Technologies.

III. Laser Microdissection Devices

Laser microdissection devices are used to separate small groups of cells – or even a single cell – from larger tissue samples for specialized tests, such as DNA analysis, RNA analysis, or protein profiling. These devices are fully integrated machines that incorporate a laser, a computer, and a monitor with a microscope. Laser microdissection is a particularly useful technique in the fields of molecular pathology, cell biology, oncology, and forensic medicine where scientists and researchers must separate small cell samples from heterogeneous tissue in order to analyze disease progression and develop more targeted treatments. For these scientists and researchers, the evidence indicates that laser microdissection devices constitute a relevant market for antitrust inquiry. Although other techniques exist for separating cells or proteins, none are as precise or reliable as laser microdissection. Accordingly, if the price of laser microdissection devices were to increase by five or ten percent, customers would not switch to any other technique or device.

The relevant geographic area in which to evaluate the market for laser microdissection devices is no larger than North America. Customers are unwilling to consider laser microdissection device

Analysis to Aid Public Comment

suppliers that do not have a service and support infrastructure that can provide a timely response to a maintenance call. Additionally, customers in North America strongly prefer laser microdissection suppliers that have an established reputation among their colleagues in the United States and the rest of North America. Whether the geographic market is defined as North America or the United States, however, is unlikely to have any impact on the ultimate antitrust analysis because the same firms compete in each area.

With only four current competitors, the market for laser microdissection devices is highly concentrated. The proposed acquisition would combine Danaher's Leica brand of laser microdissection devices with MDS's Arcturus brand, leaving only three viable competitors. Laser microdissection devices are generally purchased through a competitive evaluation process. The four available products are highly differentiated, which leads to competition in a number of areas, including features, reliability, performance, price, and service. The elimination of the direct competition between the Leica and Arcturus devices could allow Danaher to exercise market power unilaterally by increasing prices or decreasing innovation or service, particularly to those customers who view Leica and Arcturus as their top two choices.

Neither new entry nor repositioning and expansion sufficient to deter or counteract the anticompetitive effects of the proposed acquisition in the laser microdissection market is likely to occur within two years. A *de novo* entrant to the laser microdissection market would face significant impediments to timely and sufficient entry. A firm would have to design, develop, and test a product with at least comparable functionality to the existing devices, which would also require navigating around the patents of the current competitors. Furthermore, a new entrant would have to establish a service and support infrastructure in North America. Perhaps most importantly, a new entrant would have to engage leading researchers and practitioners to develop a reputation for quality and reliability. For existing foreign firms

Analysis to Aid Public Comment

that currently sell laser microdissection devices outside of North America, cultivating the necessary reputation is a major barrier to competitively significant entry into the North American market. It can take several years to acquire a reputation on par with the current laser microdissection device brands in order to make a significant market impact. Accordingly, entry by a foreign firm is unlikely to make a significant market impact sufficient to counteract any anticompetitive effects from the proposed transaction within the next two years

IV. The Consent Agreement

The proposed Consent Agreement eliminates the competitive concerns raised by Danaher's proposed acquisition of MDS Analytical Technologies by requiring the divestiture of MDS's assets relating to the manufacture and sale of laser microdissection devices. Danaher and MDS have agreed to sell the Arcturus assets, including the laser microdissection device business, as well as a related reagents business, to Life Technologies within 10 days after the date the Order becomes final.

Life Technologies possesses the knowledge, experience, and financial viability to successfully purchase and manage the divestiture assets and replace MDS as an effective competitor in the laser microdissection market. Headquartered in Carlsbad, California, Life Technologies is a life sciences company that manufactures and sells scientific research equipment that it distributes throughout the world. Life Technologies does not currently compete against Danaher and MDS in the sale of laser microdissection devices, but it does manufacture and sell reagents for downstream analysis using tissue samples obtained through laser microdissection. The Arcturus business would be a natural fit into Life Technologies's product portfolio, since both sets of products are marketed to the same customer base.

Pursuant to the Consent Agreement, Life Technologies would receive all the assets necessary to operate MDS's current laser

Analysis to Aid Public Comment

microdissection business, including equipment used to assemble the Arcturus laser microdissection device, Arcturus software, and reagents that are sold as complementary downstream products to Arcturus customers. In addition to key Arcturus employees, who would be made available to Life Technologies, the Consent Agreement requires MDS to provide Life Technologies with access to certain other employees who may be needed to facilitate the transition of the Arcturus laser microdissection assets. The Consent Agreement also requires MDS to transfer all the Arcturus intellectual property, including patent licenses for infrared laser microdissection device technology. Divestiture of all of the Arcturus laser microdissection assets will ensure that Life Technologies has a full line of high-quality laser microdissection devices, enabling it to compete immediately with the merged entity.

The Commission may appoint an interim monitor to oversee the divestiture of the Arcturus laser microdissection business at any time after the Consent Agreement has been signed. In order to ensure that the Commission remains informed about the status of the proposed divestitures, the proposed Consent Agreement requires the parties to file periodic reports with the Commission until the divestiture is accomplished. If the Commission determines that Danaher has not fully complied with its obligations under the Order within 10 days after the date the Order becomes final, the Commission may appoint a divestiture trustee to divest the Arcturus assets to a Commission-approved acquirer.

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

Complaint

IN THE MATTER OF

M. CATHERINE HIGGINSCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4286; File No. 051 0252
Filed, March 30, 2010 — Decision, March 30, 2010

This consent order addresses M. Catherine Higgins' orchestrating and implementing agreements among competing physician members of Boulder Valley Individual Practice Association to fix the prices at which BVIPA physicians contract with health plans as the executive director of the BVIPA. From approximately 2001 through 2006, Ms. Higgins negotiated with numerous payers on behalf of BVIPA physicians and successfully extracted higher fees from them and, in order to maximize BVIPA's bargaining leverage, Ms. Higgins exhorted BVIPA members to contract jointly through BVIPA, rather than individually. Beginning in late in 2007 and continuing until early 2009, Ms. Higgins, as BVIPA's executive director, negotiated and consulted for some of BVIPA's physician members who sought to contract individually with a payer, thereby facilitating the exchange of rate information among them, and facilitating the coordination of rates during the individual negotiations. Shortly after BVIPA signed the consent agreement, Ms. Higgins represented physicians in her individual capacity. The consent order prohibits Ms. Higgins from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payers on any physician's behalf; (2) to refuse to deal, or threaten to refuse to deal, with payers in furtherance of any prohibited conduct or agreement (3) on any terms on which a physician is willing to deal with any payer; or, (4) not to deal individually with any payer, or not to deal with any payer other than through BVIPA. The order also prohibits Ms. Higgins from facilitating exchanges of information between physicians concerning any physician's willingness to deal with a payer or the terms or conditions, including price terms, on which the physician is willing to deal with a payer. Ms. Higgins is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as a "Qualified Risk-Sharing Joint Arrangement" or a "Qualified Clinically-Integrated Joint Arrangement," however, the arrangement must not restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payers outside of the arrangement.

Complaint

Participants

For the *Commission*: *Robert Canterman and Constance Salemi.*

For the *Respondents*: *James E. Hartley, Holland and Hart.*

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 Respondent M. Catherine Higgins (“Ms. Higgins” or “Respondent”), Executive Director of Boulder Valley Individual Practice Association (“BVIPA”), 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 the conduct of the executive director of a physician practice association in orchestrating agreements among competing physicians in Boulder County, Colorado, to fix the prices and other terms under which the physicians would participate in health plans offered by health insurance firms and other third-party payers (“payers”). As a result of the actions of Respondent Higgins, Executive Director of BVIPA, consumers in the Boulder County area have been forced to pay higher prices for physician services.

2. BVIPA signed a consent agreement with the Commission on or about December 8, 2008. Under its terms, the Commission ordered BVIPA and its employees, among other things, to cease and desist from facilitating agreements among physicians

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regarding price terms or collective refusals to deal. Ms. Higgins was not named as a respondent in the BVIPA Consent Agreement.

3. Shortly after the BVIPA Consent Agreement was signed, Ms. Higgins took the position that she could continue to negotiate fees on behalf of BVIPA physicians, declaring, "I could do this as an individual, not with my BVIPA hat, but as an individual. I'm not named in the settlement. There's nothing that precludes me from doing my own work. I could just do it outside."

4. Absent an order against Ms. Higgins individually, there is a substantial danger that she will continue to orchestrate unlawful price fixing agreements among physicians in the Boulder County area and that consumers will continue to suffer the adverse effects of her conduct.

THE RESPONDENT

5. Ms. Higgins (a/k/a/ Mary C. Higgins), the Executive Director of BVIPA, is an individual with a principal place of business at 6560 Gunpark Drive, Suite B, Boulder, CO 80301.

JURISDICTION

6. Ms. Higgins is a "person" within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

7. BVIPA is organized for the purpose, among others, of serving the interests of its members. BVIPA exists, and operates, and at all times relevant to this complaint has existed and operated, in substantial part for the pecuniary benefit of its physician members.

8. BVIPA is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act.

9. The general business practices of Ms. Higgins on behalf of

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BVIPA's physician members, including the acts and practices herein alleged, are in or affecting "commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

10. Except to the extent that competition has been restrained as alleged herein, BVIPA's physician members have been, and are now, in competition with one another for the provision of physician services in the Boulder County area.

**OVERVIEW OF PHYSICIAN CONTRACTING
WITH PAYERS**

11. Physicians often contract with payers to establish the terms and conditions, including price terms, under which they render services to the payers' enrollees. Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payers' relationships with enrollees. These contracts between physicians and payers may reduce payers' costs and enable them to lower the price of insurance, and thereby result in lower medical-care costs for enrollees. Payers contract with physicians to ensure their enrollees have access to the medical care and services of those physicians.

12. Absent agreements among competing physicians on the terms, including price, on which they will provide services to payers' enrollees, competing physicians decide individually whether to enter into contracts with payers, and what prices they will accept pursuant to such contracts.

13. Competing physicians may use a "messenger" to facilitate their contracting with payers in ways that do not constitute an unlawful agreement on prices and other competitively significant terms. Such an arrangement, however, will not avoid a horizontal agreement if the "messenger" or another agent: (1) negotiates fees and other competitively significant terms on behalf of the

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participating physicians, or (2) facilitates the physicians' coordinated responses to contract offers by, for example, electing not to convey a payer's offer to them based on the agent's, or the participants', opinion on the appropriateness, or lack thereof, of the offer.

BVIPA

14. BVIPA is an association of approximately 365 independent primary care and specialist physicians in solo or small group practices in the Boulder County area that contracts with payers on behalf of its physician members. BVIPA was formed in 1979, in part, to coordinate "the delivery of medical care and other health services to persons enrolled in prepaid health service plans and other contractual health services arrangements."

15. BVIPA physician members represent a substantial percentage of the physicians who practice in the Boulder County area. Payers doing business in the Boulder County area have difficulty offering marketable and competitive health plans without contracting with at least a substantial portion of the BVIPA physician members.

16. Pursuant to BVIPA's Amended and Restated By-laws, ten to fifteen physician members sit on BVIPA's Board of Directors and manage the affairs of the organization. Physician members elect Board members for three-year terms at BVIPA's annual meeting.

17. When joining BVIPA, physician members sign agreements, entitled "Physician Provider Services Agreement." Pursuant to the Physician Provider Services Agreement, physician members authorize BVIPA to contract with payers on their behalf and agree to accept and adhere to such contracts.

ANTICOMPETITIVE CONDUCT

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18. Ms. Higgins became BVIPA's Executive Director in or about 1999. BVIPA's by-laws allow its Executive Director to sign contracts upon Board authorization.

19. BVIPA's Board granted Ms. Higgins blanket authority to negotiate contracts with payers on behalf of BVIPA and its physician members, including the authority to enter into contracts without obtaining approval from the BVIPA Board, Finance Committee, or any of its members.

**MS. HIGGINS ORCHESTRATED BVIPA'S ACTIONS
TO FIX PRICES AND THREATEN TO TERMINATE
CONTRACTS WITH PAYERS**

20. From approximately 2001 through 2006, Ms. Higgins, in combination and conspiracy with BVIPA's members, conducted negotiations with numerous payers on behalf of BVIPA physicians and successfully extracted higher fees from them. These payers included United Healthcare of Colorado, PacifiCare of Colorado, Aetna Inc., Sloans Lake Managed Care, Inc. and CIGNA.

21. Ms. Higgins has exhorted BVIPA members to contract jointly through BVIPA, rather than individually, in order to maximize their bargaining leverage and increase the price that BVIPA members can obtain for providing physician services to payers. For example, in a 2002 BVIPA newsletter, Ms. Higgins reminded BVIPA members that "our strength will lie in contracting together, not separately." In the same newsletter, Higgins provided an example of BVIPA members' combined leverage, reporting that BVIPA had accepted a contract at a favorable rate. According to Ms. Higgins, "This is due to your support of our efforts and [the payer's] inability to get providers to sign individual contracts. Thank you for your support!!"

22. Under Ms. Higgins' leadership, BVIPA members have used their combined negotiating leverage to increase the prices

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that they are paid for physician services. According to BVIPA's medical director, "BVIPA contracts for our physicians with the large insurance companies that do business in Boulder County. We think we negotiate the best contracts with the highest reimbursements for our physicians in general."

23. By approximately June 2006, Ms. Higgins had renegotiated BVIPA's fees on a number of occasions with United Healthcare of Colorado; PacifiCare of Colorado; Aetna Inc.; Sloans Lake Managed Care, Inc.; CIGNA; and others, and signed agreements with those payers memorializing the rate increases on behalf of BVIPA's physician members.

24. Beginning in late in 2007 and continuing until early 2009, Ms. Higgins, as BVIPA's executive director, negotiated and consulted for some of BVIPA's physician members who sought to contract individually with a payer, thereby facilitating the exchange of rate information among them, and facilitating the coordination of rates during the individual negotiations.

25. As a result of Ms. Higgins' collective negotiations of physician fees for BVIPA members, payers contracted with and reimbursed BVIPA members for physician services in Boulder County at rates approximately 15 to 27 percentage points higher than those paid in individual contracts with non-member physicians in Boulder County.

**MS. HIGGINS OFFERED PAYERS FICTITIOUS
CONTRACTING CHOICES**

26. In 2004, BVIPA purported to begin offering payers three options for contracting with BVIPA. Ms. Higgins described the three options in a so-called "white paper" that she drafted and gave to payers at the start of a renegotiation. The white paper's contracting options through BVIPA included a collectively-negotiated contract that "delivered the entire BVIPA network," and a "modified messenger model" that "may or may not deliver our entire network." A third option included direct contracting

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with individual members outside the IPA. Although Ms. Higgins' white paper appeared to offer payers a choice of contracting methods, BVIPA's contracting practices, and Ms. Higgins' conduct, did not change.

27. Despite purporting to offer a "modified messenger model," BVIPA did not forward proposals to BVIPA's individual members for review, unless Ms. Higgins deemed the prices acceptable.

28. Instead, Ms. Higgins used the same collective bargaining approach with each payer. She initiated contact with the payer and then proposed a price increase for physician services over those provided for in the current contract. If the payer agreed, Ms. Higgins signed a contract with the payer on behalf of BVIPA and all of its physician members, at the rate that she had negotiated. If and when a payer submitted a counter-offer, Ms. Higgins accepted or rejected the offer without messengering it to BVIPA's physician members.

29. When a payer did not cooperate with her demands to either begin negotiation or agree to a price increase, Ms. Higgins reported that payer to the BVIPA Board. The BVIPA Board then voted to threaten the payer with termination of its contract with BVIPA.

30. Despite purporting to offer payers the option of contracting with individual members outside of the BVIPA framework, when payers have approached individual BVIPA physician members, many of these physicians have refused to discuss contracting on an individual basis, instead, referring the payers to BVIPA.

31. Other physicians have offered to negotiate individual contracts, but with Ms. Higgins representing them in their individual capacity.

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NEGOTIATIONS WITH SPECIFIC PAYERS

32. United first signed a contract with BVIPA in approximately 2001 in order to contract with certain BVIPA specialists. By 2003, United had agreed to increase rates on approximately two occasions.

33. In January 2003, Ms. Higgins demanded another increase and United responded that it was willing to negotiate a smaller increase. Ms. Higgins rejected United's proposal and proposed instead "meeting in the middle." United then asked Ms. Higgins to go "to each of your physicians and let them make their individual decisions based on their practice." Higgins refused to do so and replied instead that her "goal was to present a proposal that most (if not all) physicians will agree to." Ms. Higgins met with the BVIPA Finance Committee to report United's rejection of her demands. The Committee minutes reported that "the increase is too low and Cathy [Higgins] will continue to follow up with United." United agreed to a rate increase that was acceptable to Ms. Higgins.

34. In 2004, Ms. Higgins demanded another increase. She gave United a copy of the white paper containing BVIPA's contracting options. Higgins reported to the Board that "they [United] . . . have requested to use the Messenger Model sending individual contracts to each physician." Despite this, Higgins did not use a messenger model but continued to negotiate a rate increase with United. When United balked at Higgins' demands, Higgins told the Board that negotiations with United have "stalled," and the Board "may have to send a termination letter if the representatives at United do not become more responsive." Thereafter, United agreed to an increase.

35. PacifiCare first contracted with BVIPA in approximately 2001. Ms. Higgins renegotiated BVIPA's contract several times by 2004. During the 2004 negotiations for an increase in rates, negotiations with PacifiCare stalled. Ms. Higgins brought

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PacifiCare to the table by notifying it that BVIPA intended to terminate its contract with PacifiCare for one of its products. Thereafter, PacifiCare agreed to an increase.

36. Aetna first contracted with BVIPA in 2000. In the fall of 2001, Ms. Higgins began to negotiate an increase in the contract rate. By February 2002, BVIPA's Board agreed that "the IPA should give Aetna an [sic] timeline under which an agreement must be met, otherwise face a termination letter from the IPA." Aetna agreed to a rate increase for 2003.

37. In 2004, when Ms. Higgins demanded another rate increase, Aetna countered stating that BVIPA fees were already high and that "[o]ther physicians have not requested yearly increases." Notwithstanding its complaint to Ms. Higgins, Aetna agreed an increase that was acceptable to Ms. Higgins.

38. Ms. Higgins demanded another increase during 2005. Aetna suggested a much smaller rate increase, reminding Ms. Higgins again that BVIPA's rates were substantially above other rates in the market. Despite this, Aetna agreed to an increase that was acceptable to Ms. Higgins.

**MS. HIGGINS' CONDUCT ON BEHALF OF BVIPA
MEMBERS IS NOT JUSTIFIED**

39. BVIPA and its physician members have not undertaken any programs or activities that create any integration among their members in the delivery of physician services sufficient to justify their acts or practices, or Ms. Higgins' negotiations on their behalf, as described in the foregoing paragraphs. BVIPA members do not share any financial risk in providing physician services, do not collaborate in a program to monitor and modify their clinical practice patterns to control costs or ensure quality, or otherwise integrate their delivery of care to patients.

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**MS. HIGGINS' CONDUCT CONSTITUTES AN
UNLAWFUL RESTRAINT OF TRADE**

40. BVIPA's participating physicians constitute numerous discrete economic interests. BVIPA's conduct, including that of Ms. Higgins on BVIPA's behalf, constitutes combined or concerted action by its participating physicians.

41. Ms. Higgins, in combination and conspiracy with BVIPA physician members, has acted to restrain competition in the Boulder County, Colorado area in the following ways, among others:

- a. facilitating, negotiating, entering into, and implementing agreements and coordination among physician members on price and other competitively significant terms;
- b. refusing or threatening to refuse to deal with payers except on collectively agreed-upon terms; and
- c. collectively negotiating price and other competitively significant terms in payer contracts for physician members and refusing to messenger payer offers to physician members for their individual consideration about whether to participate.

**MS. HIGGINS' ACTIONS ON BEHALF OF BVIPA
MEMBERS HAVE HAD SUBSTANTIAL
ANTICOMPETITIVE EFFECTS**

42. Ms. Higgins' actions, in concert with BVIPA's physician members, have had, or tend to have had, the effect of unreasonably restraining trade and hindering competition in the provision of physician services in the Boulder County area, in the following ways, among others:

- a. unreasonably restraining price and other forms of

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competition among physicians;

- b. increasing prices for physician services; and
- c. depriving health plans, employers, and individual consumers of the benefits of competition among physicians.

**VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT**

43. 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 March, 2010, issues its complaint against Respondent.

By the Commission, Commissioner Rosch dissenting.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of M. Catherine Higgins, hereinafter referred to as Respondent, and Respondent having been furnished thereafter with a copy of the draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, her 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 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 said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement, 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:

1. Respondent M. Catherine Higgins is Executive Director of Boulder Valley Individual Practice

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Association. Her principal address is 6676 Gunpark Drive, Suite B, Boulder Valley, CO 80301.

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. "BVIPA" means Boulder Valley Individual Practice Association, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. "Limited Messenger" means a Person who acts as an agent, or as a messenger, on behalf of any Physician or any Medical Group Practice to receive a contract offer from a Payer, timely conveys without comment or analysis such offer to some or all of the Participating Physicians and Medical Group Practices as directed by the Payer, receives from each Participant his, her or its independent, unilateral decision to accept or reject the Payer's contract offer, and timely conveys each such response without comment or analysis to the Payer.
- C. "Medical Group Practice" means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, or

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employees, or in which only one physician practices medicine.

- D. “Non-exclusive Arrangement” means an arrangement that does not restrict the ability of, or facilitate the refusal of, physicians who participate in it to deal with payers on an individual basis or through any other arrangement.
- E. “Participate” in an entity or an arrangement means (1) to be a partner, shareholder, owner, member, or employee of such entity or arrangement, or (2) to provide services, agree to provide services, or offer to provide services to a Payer through such entity or arrangement. This definition applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”
- F. “Payer” means any person that pays, or arranges for payment, for all or any part of any Physician services for itself or for any other person, as well as any person that develops, leases, or sells access to networks of Physicians.
- G. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- H. “Physician” means a doctor of allopathic medicine (“M.D.”), a doctor of osteopathic medicine (“D.O.”), or a doctor of podiatric medicine (“D.P.M.”).
- I. “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.

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- J. “Qualified Clinically-Integrated Joint Arrangement” means an arrangement to provide Physician services in which:
1. all Physicians who 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 that result from such integration through the arrangement.
- K. “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 at a capitated rate,
 - b. the provision of Physician services for a predetermined percentage of premium or revenue from Payers,

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- 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, when 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 that result from such integration through the arrangement.
- L. "Qualified Arrangement" means a Qualified Clinically-Integrated Joint Arrangement or a Qualified Risk-Sharing 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

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Physicians with respect to their provision of Physician services:

1. to negotiate on behalf of any Physician with any Payer;
 2. to refuse to deal, or threaten to refuse to deal with any Payer, in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order;
 3. regarding any term, condition, or requirement upon which any Physician deals, or is willing to deal, with any Payer, including, but not limited to, price terms; or
 4. not to deal individually with any Payer, or not to deal with any Payer other than through BVIPA;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among Physicians concerning any Physician's willingness to deal with a Payer, or the terms or conditions, including price terms, on which the Physician is willing to deal with a Payer;
- 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 this Paragraph II shall prohibit any agreement or conduct involving Respondent that, subject to the requirements of Paragraphs VII and VIII of this

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Order, is reasonably necessary to form, Participate in, or take any action in furtherance of, a Qualified Arrangement, so long as such Qualified Arrangement is a Non-exclusive Arrangement.

III.

IT IS FURTHER ORDERED that for one (1) year from the date this Order becomes final, Respondent cease and desist from acting as an agent, or as a messenger, except, subject to the requirements of Paragraphs V and VI, acting as a Limited Messenger, on behalf of any Physician or any Medical Group Practice with any Payer regarding contracts.

Provided, however, that nothing in this Paragraph III shall prohibit Respondent from informing any Physician, Medical Group Practice, or Payer that a contract for the provision of Physician services includes or does not include terms required by Colorado state law.

IV.

IT IS FURTHER ORDERED that, for two (2) years from the date the Order becomes final, 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. Negotiating on behalf of any Physician that Participates or has Participated in BVIPA with any Payer, notwithstanding whether such conduct also is prohibited by Paragraph II of this Order; and
- B. Advising any Physician that Participates, or has Participated, in BVIPA to accept or reject any contract, offer, contract term, condition, or requirement of dealing with any Payer, notwithstanding whether such

Decision and Order

conduct also is prohibited by Paragraph II of this Order.

Provided, however, that nothing in this Paragraph IV shall prohibit Respondent from informing any Physician, Medical Group Practice, or Payer that a contract for the provision of Physician services includes or does not include terms required by Colorado state law.

Provided further, however, that, if Respondent ceases to be employed by BVIPA, nothing in this Paragraph IV shall prohibit Respondent, once each calendar year, from becoming an employee of any one Physician or of any one Medical Group Practice and from negotiating on behalf of only that employer with any Payer regarding contracts.

V.

IT IS FURTHER ORDERED that Respondent: (a) for one (1) year from the date this Order becomes final, at least sixty (60) days prior to acting as a Limited Messenger; and (b) beginning one (1) year from the date this Order becomes final, for an additional two (2) years, at least sixty (60) days prior to acting as an agent, or as a messenger on behalf of any Physician or any Medical Group Practice with any Payer regarding contracts, shall notify the Commission in writing ("Paragraph V Notification") of the arrangement for which Paragraph V Notification is required. The Paragraph V Notification shall include the number of proposed Physician Participants in the proposed arrangement; the proposed geographic area in which the proposed arrangement would operate; a copy of any proposed Physician Participation agreement; a description of the proposed arrangement's purpose and function; a description of any resulting efficiencies expected to be obtained through the proposed arrangement; and a description of procedures to be implemented to limit possible anticompetitive effects of the proposed arrangement, such as those prohibited by this Order.

Decision and Order

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

- A. If, within sixty (60) days from the date of the Commission's receipt of the Paragraph V Notification, a representative of the Commission makes a written request to Respondent, then Respondent shall not Participate in the proposed arrangement prior to the expiration of thirty (30) days after substantially complying with such request, or such shorter waiting period as may be granted in writing from the Bureau of Competition;
- B. 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 the proposed arrangement does or does not violate this Order or any law enforced by the Commission;
- C. The absence of notice that the proposed arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed arrangement has been approved;
- D. Receipt by the Commission of any Paragraph V Notification is not to be construed as a determination by the Commission, or its staff, that the proposed arrangement does or does not violate this Order or any law enforced by the Commission; and
- E. Paragraph V Notification shall not be required prior to Participating in any arrangement for which Paragraph V Notification has previously been given.

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VII.

IT IS FURTHER ORDERED that for three (3) years from the date this Order becomes final, pursuant to each Qualified Arrangement in which Respondent is a Participant, that Respondent shall notify the Commission in writing (“Paragraph VII Notification”) at least sixty (60) days prior to:

- A. Participating in, organizing, or facilitating any discussion or understanding with or among any Physicians or Medical Group Practices in such Qualified Arrangement relating to price or other terms or conditions of dealing with any Payer; or
- B. Contacting a Payer, pursuant to a Qualified Arrangement to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any Payer, on behalf of any Physician or Medical Group Practice in such Qualified Arrangement.

VIII.

IT IS FURTHER ORDERED that:

- A. Paragraph VII Notification shall include the following information regarding the Qualified Arrangement pursuant to which Respondent intends to engage in the above identified conduct:
 - 1. the total number of Physicians and the number of Physicians in each specialty Participating in the Qualified Arrangement;

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2. a description of the Qualified Arrangement, including its purpose and geographic area of operation;
 3. a description of the nature and extent of the integration and the efficiencies resulting from the Qualified 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 Qualified Arrangement;
 5. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Qualified 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 any relevant market, including, but not limited to, the market share of Physician services in any relevant market.
- A. If, within sixty (60) days from the Commission's receipt of the Paragraph VII Notification, a representative of the Commission makes a written request for additional information, then Respondent shall not Participate in any arrangement described in Paragraph VII.A or Paragraph VII.B 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;
- B. The expiration of any waiting period described herein without a request for additional information, or

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without the initiation of an enforcement proceeding, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission;

- C. The absence of notice that the proposed Qualified Arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualified Arrangement has been approved;
- D. Receipt by the Commission of any Paragraph VII Notification regarding Participation pursuant to a proposed Qualified Arrangement is not to be construed as a determination by the Commission that any such proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission; and
- E. Paragraph VII Notification shall not be required prior to Participating in any Qualified Arrangement for which Paragraph VII Notification has previously been given.

IX.

IT IS FURTHER ORDERED that Respondent shall file a verified written report within sixty (60) days from 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 report shall include:

- A. A detailed description of the manner and form in which Respondent has complied and is complying with the Order; and

Decision and Order

- B. If Respondent no longer is an employee of BVIPA, then with regard to each request made by a Payer to her to act as a Limited Messenger, or as an agent or messenger, on behalf of her then current employer regarding a contract with that Payer, and in accordance with Paragraph III of this Order:
1. A copy of all communications with the Payer regarding that request; and
 2. A copy of all communications with any Physician or any Medical Group Practice regarding that request.

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

Respondent shall notify the Commission of any change in her 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, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, that Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at her expense.

Decision and Order

XII.

IT IS FURTHER ORDERED that this Order shall terminate on March 30, 2030.

By the Commission, Commissioner Rosch dissenting.

Analysis to Aid Public Comment

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 M. Catherine Higgins (“Ms. Higgins”), the eExecutive dDirector of the Boulder Valley Individual Practice Association (“BVIPA”). The agreement settles charges that Ms. Higgins violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by, among other things, orchestrating and implementing agreements among competing physician members of BVIPA to fix the prices at which BVIPA physicians contract with health plans.

This matter relates to the Commission’s prior actions against BVIPA. In December 2008, the Commission accepted for public comment a proposed consent order to settle charges that BVIPA orchestrated and carried out illegal agreements to set prices and other terms that BVIPA physicians would accept from health plans. The accompanying complaint against BVIPA alleged that the IPA’s executive director, Ms. Higgins, played a key role in the challenged conduct; the complaint but did not, however, name her as a respondent. The order against BVIPA, by its terms, applies to Ms. Higgins’ conduct as the executive director of BVIPA but does not apply to her actions in her individual capacity.

Based on Ms. Higgins’ conduct after BVIPA signed its consent order, the Commission has reason to believe that Ms. Higgins may attempt to evade the order’s prohibitions by acting in her individual capacity. There is evidence, that – shortly after the BVIPA signed the consent agreement – Ms. Higgins represented physicians in her individual capacity. As alleged in today’s complaint (“Complaint”), Ms. Higgins told an insurer that she could continue to negotiate fees on behalf of BVIPA physicians, declaring:

I could do this as an individual, not with my BVIPA hat, but as an individual. I’m not named in the settlement.

Analysis to Aid Public Comment

There's nothing that precludes me from doing my own work. I could just do it outside.

Absent an order against Ms. Higgins in her individual capacity, there is a substantial danger that she will continue to orchestrate unlawful price fixing agreements among physicians in the Boulder County area and that consumers will continue to suffer the adverse effects of her conduct.¹

The proposed consent order ("Proposed 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 to 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 Order has been entered into for the settlement purposes only and does not constitute an admission by Ms. Higgins that she violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

¹ The U.S. Supreme Court has clearly held that it is appropriate for the Commission to name individuals, as well as organizations, where evidence exists that an individual otherwise would be likely to "evade orders by the Commission." *Federal Trade Comm'ission v. Standard Education Soc.*, 302 U.S. 112, 119 (1937).

Analysis to Aid Public Comment

The Complaint

The allegations of the Complaint are summarized below.

Ms. Higgins is the Executive Director of BVIPA, an association of approximately 365 independent primary care and specialist physicians in solo or small group practices in the Boulder County area that contracts with payers on behalf of its physician members. As part of her Ms. Higgins' duties, BVIPA's Board granted her Ms. Higgins blanket authority to negotiate contracts with payers on behalf of BVIPA and its physician members, including the authority to enter into contracts without obtaining approval from the BVIPA Board, Finance Committee, or any of its members.

The Complaint challenges Ms. Higgins' conduct starting in 2001, when she began negotiating the prices and other terms at which that BVIPA's otherwise competing physicians would deal with payers. From approximately 2001 through 2006, Ms. Higgins negotiated with numerous payers on behalf of BVIPA physicians and successfully extracted higher fees from them. In order to maximize BVIPA's bargaining leverage, Ms. Higgins exhorted BVIPA members to contract jointly through BVIPA, rather than individually. For example, in a 2002 BVIPA newsletter, Ms. Higgins reminded BVIPA members that "our strength will lie in contracting together, not separately." In reporting that BVIPA had signed a new contract at a favorable rate, Ms. Higgins noted that "[t]his is due to your support of our efforts and [the payer's] inability to get providers to sign individual contracts. Thank you for your support!!"

Beginning in late in 2007 and continuing until early 2009, Ms. Higgins, as BVIPA's executive director, negotiated and consulted for some of BVIPA's physician members who sought to contract individually with a payer, thereby facilitating the exchange of rate information among them, and facilitating the coordination of rates during the individual negotiations.

Analysis to Aid Public Comment

As a result of Ms. Higgins' collective negotiations of physician fees for BVIPA members, payers contracted with and reimbursed BVIPA members for physician services in Boulder County at rates approximately 15 to 27 percentage points higher than those paid in individual contracts with non-member physicians in Boulder County.

In 2004, Ms. Higgins drafted and gave a "white paper" to payers at the start of a renegotiation, which purported to offer three options for contracting with BVIPA members: a single-signature contract that "delivered the entire BVIPA network"; a "modified messenger model" that "may or may not deliver our entire network"; and direct contracting with individual members outside the IPA. BVIPA's contracting practices and Ms. Higgins' conduct, however, did not change. BVIPA still sent proposals to BVIPA's individual members for review only after Ms. Higgins deemed the prices acceptable. Further, many BVIPA physicians have refused to discuss contracting on an individual basis, instead, referring the payers to BVIPA, and others have offered to negotiate individual contracts with Ms. Higgins representing them in their individual capacity.

Ms. Higgins' conduct had the effect of unreasonably restraining trade and hindering competition in the provision of physician services by unreasonably restraining price and other forms of competition among physicians; increasing prices for physician services; and depriving health plans, employers, and individual consumers of the benefits of competition among physicians. BVIPA members did not engage in any efficiency-enhancing integration of their practices sufficient to justify Ms. Higgins' challenged conduct. Accordingly, the Complaint alleges that Ms. Higgins 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 to prevent its recurrence. To

Analysis to Aid Public Comment

preserve the ability to engage in potentially procompetitive conduct while ensuring that physicians reach contracting decisions independently, the Proposed Order also includes certain “fencing-in” limitations on Ms. Higgins’ activities. The Proposed Order is otherwise similar to prior those consent orders that the Commission has issued to settle charges that individuals, as well as physician groups, engaged in unlawful agreements to raise the fees that physician groups receive from health plans.

The Proposed Order’s specific provisions are as follows:

Paragraph II.A prohibits Ms. Higgins from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payers on any physician’s behalf; (2) to refuse to deal, or threaten to refuse to deal, with payers in furtherance of any conduct or agreement prohibited by any other provision of Paragraph II; (3) on any terms on which a physician is willing to deal with any payer; or, (4) not to deal individually with any payer, or not to deal with any payer other than through BVIPA.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits Ms. Higgins from facilitating exchanges of information between physicians concerning any physician’s willingness to deal with a payer or the terms or conditions, including price terms, on which the physician is willing to deal with a payer. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D. proscribes Ms. Higgins from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing collective bargaining on behalf of providers with health -care purchasers, Paragraph II excludes certain kinds of agreements from its prohibitions. Thus, Ms. Higgins is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as a “Qualified Risk-Sharing Joint Arrangement” or a “Qualified Clinically-Integrated Joint Arrangement.” The

Analysis to Aid Public Comment

arrangement, however, must not restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payers outside of the arrangement.

As defined in the Proposed Order, a “Qualified Risk-Sharing Joint Arrangement” possesses two characteristics. First, all physician participants must share substantial financial risks 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 prices or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph III, one of the fencing-in prohibitions, limits for one year Ms. Higgins’ activities as an agent or messenger with regard to payer contracts. Subject to the notification requirement of Paragraph V, Ms. Higgins may only receive and transmit offers and responses to those offers between payers and physicians. Paragraph VI sets out the information necessary to make the notification complete.

Paragraph IV, another fencing-in provision, for two years prohibits Ms. Higgins for two years from negotiating on behalf of or advising any physician member of BVIPA with regard to any

Analysis to Aid Public Comment

payer contract offer or term. Both Paragraphs III and Paragraph IV exclude from their prohibitions, however, information Ms. Higgins may provide regarding whether any contract for proposed physician services includes terms required by Colorado state law. Paragraph IV further excludes from its prohibition certain negotiations should Ms. Higgins cease to be employed by BVIPA.

Paragraph V requires Ms. Higgins to notify the Commission, for one year before acting as a Limited Messenger, and for an additional two years before acting as a messenger or agent, with payers regarding contracts. Paragraph VI sets out the information necessary to make the notification complete.

Paragraph VII, for three years, requires Ms. Higgins for three years to notify the Commission before participating in contracting with health plans on behalf of either a Qualified Risk-Sharing or a Qualified Clinically-Integrated Joint Arrangement. Paragraph VIII sets out the information necessary to satisfy the notification requirement.

Paragraphs IX, X, and XI impose various obligations on Ms. Higgins to report or provide access to information to the Commission to facilitate the monitoring of compliance with the Order. Finally, Paragraph XII provides that the Proposed Order will expire in 20 years.

Complaint

IN THE MATTER OF

**BOULDER VALLEY INDIVIDUAL PRACTICE
ASSOCIATION**

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

*Docket No. C-4285; File No. 051 0252
Filed, April 2, 2010 — Decision, April 2, 2010*

This consent order addresses Boulder Valley Individual Practice Association's orchestrating and implementing agreements among competing physician members of BVIPA to fix the price at which BVIPA physicians contract with health plans. The Complaint challenges BVIPA's conduct starting in 2001, when BVIPA, on behalf of its members, began to negotiate the prices and terms in payer contracts at which its otherwise competing physician members would provide services to subscribers of health plans. BVIPA actively discouraged members from contracting directly with payers and threatened payers facing rate increases with termination of their contracts when they refused to negotiate or otherwise respond to BVIPA's demands. BVIPA members did not engage in any efficiency-enhancing integration of their practices sufficient to justify the its challenged conduct. The order prohibits BVIPA from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payers on any physician's behalf; (2) to refuse to deal, or threaten to refuse to deal, with payers in furtherance of any prohibited conduct or agreement (3) on any terms on which a physician is willing to deal with any payer; or (4) not to deal individually with any payer, or not to deal with any payer other than through BVIPA. However, BVIPA is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." The arrangement, however, must not restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payers outside of the arrangement.

Participants

For the *Commission*: *Robert Canterman and Constance Salemi.*

Complaint

For the *Respondents: James E. Hartley, Holland and Hart;*
and *Thomas B. Leary and Robert Leibenluft, Hogan & Hartson,*
L.L.P.

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 Respondent Boulder Valley Individual Practice Association, hereinafter referred to as "Respondent" or "BVIPA," 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 action concerns horizontal agreements among approximately 365 competing independent physicians and physician practice groups ("physician members") acting through BVIPA to fix prices and engage in collective bargaining with payers offering coverage for health care services in the Boulder County, Colorado area. Respondent BVIPA orchestrated and carried out these illegal agreements, and its physician members participated in these illegal agreements, which have increased prices for consumers of physician services in the Boulder County area and have no legitimate justification.

THE RESPONDENT

2. Respondent BVIPA is a not-for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its principal place of business at 6560 Gunpark Drive, Suite B, Boulder, Colorado 80301.

Complaint

3. BVIPA is a type of organization commonly referred to in the health care industry as an “independent practice association” because its members consist of independent physicians in solo and small group practices.

JURISDICTION

4. BVIPA is organized for the purpose, among others, of serving the interest of its members. BVIPA exists, and operates, and at all times relevant to this Complaint has existed and operated, in substantial part for the pecuniary benefit of its physician members.

5. BVIPA is a “corporation” within the meaning of Section 4 of the Federal Trade Commission Act.

6. At all times relevant to the Complaint, BVIPA has been engaged in the business of contracting with payers, on behalf of its physician members, for the provision of physician services to persons for a fee.

7. Except to the extent that competition has been restrained as alleged herein, BVIPA’s physician members have been, and are now, in competition with one another for the provision of physician services in the Boulder County area.

8. The general business practices of BVIPA and its physician members, including the acts and practices herein alleged, affect the interstate movement of patients, the interstate purchase of supplies and products, and the interstate flow of funds, and are in or affecting “commerce” as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Complaint

**OVERVIEW OF PHYSICIAN CONTRACTING WITH
PAYERS**

9. Physicians often contract with health plans and other third-party payers (“payers”) to establish the terms and conditions, including price terms, under which they render physician services to the payers’ enrollees. Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payers’ relationships with enrollees. These contracts may reduce payers’ costs and enable them to lower the price of insurance, and thereby result in lower medical-care costs for enrollees.

10. Absent agreements among competing physicians on the prices at which they will provide services to payers’ enrollees, competing physicians decide unilaterally whether to participate in the payers’ provider networks based on the price and other terms and conditions offered by the payers.

11. To be marketable and competitive in the Boulder County area, a payer’s health plan must include in its physician network a large number of primary care and specialist physicians offering services to customers in a sufficient number of practice fields at convenient or accessible locations and at affordable prices. Because a substantial number of the primary care and specialist physicians who practice in the Boulder County area are members of BVIPA, payers doing business in the Boulder County area have significant difficulty offering marketable and competitive health plans without having at least a substantial portion of BVIPA’s physician members in their provider networks.

ANTICOMPETITIVE CONDUCT

12. BVIPA, acting as a combination of its physician members, and in conspiracy with them, has acted to restrain competition by, among other things, facilitating, negotiating and entering into, and implementing agreements to fix the prices on which their physician members contract with payers; threatening to terminate

Complaint

contracts with payers who refuse to deal with BVIPA; and refraining from negotiating individually with payers.

THE AGREEMENT AMONG BVIPA'S PHYSICIAN MEMBERS TO COORDINATE PRICES

13. BVIPA was formed in 1979 purportedly to coordinate the delivery of medical care and other health care services. Pursuant to BVIPA's Amended and Restated By-Laws, ten to 15 physician members sit on BVIPA's Board of Directors and manage the affairs of the IPA. Physician members elect Board members for three-year terms at BVIPA's annual meeting. The By-Laws also authorize the Board to appoint an executive director to supervise BVIPA activities, subject to the control of the Board.

14. Physicians agree to participate in the contracts that BVIPA signs with payers by joining BVIPA and signing a "Physician Provider Services Agreement." In accordance with the Physician Provider Services Agreement, physician members grant BVIPA the authority to contract with payers on their behalf and they agree to accept payment for their services according to the terms negotiated by BVIPA with payers.

15. Physician members may weigh in on BVIPA's contract negotiations through BVIPA's Finance Committee. The Finance Committee acts as a sounding board where physician members may state their views on the rate level under negotiation. The Finance Committee communicates the physician members' views on whether the rate level is acceptable to the Board and BVIPA's executive director, who actually conducts the negotiations with payers.

BVIPA ENGAGED IN PRICE-FIXING AND THREATENED TO TERMINATE CONTRACTS WITH PAYERS

Complaint

16. Between 2001 and 2006, BVIPA authorized its executive director to negotiate and sign agreements on behalf of its physician members with approximately 17 payers. After signing the contracts, BVIPA then conducted periodic renegotiations of its contracts with large payers to obtain rate increases. When renegotiating a rate, BVIPA's executive director signed an agreement only when the new rate was deemed to be sufficiently high. BVIPA threatened payers facing rate increases with termination of their contracts when they refused to negotiate or otherwise respond to BVIPA's demands.

17. BVIPA used the same *modus operandi* in all its contract renegotiations. The executive director initiated contact with the payer, usually proposed a fee increase of 4.5 to 5%, and rejected counterproposals that were deemed too low. After reaching agreement with a payer on an acceptable price level, the executive director signed a contract with the payer on behalf of BVIPA's physician members.

18. To give its executive director clout in the renegotiations, BVIPA newsletters discouraged members from contacting directly with payers. A 2002 newsletter reminded physician members that BVIPA's "strength will lie in contracting together, not separately" and reported that BVIPA was able to pressure a payer into signing its single-signature contract at the rate demanded by BVIPA because of the payer's "inability to get providers to sign individual contracts." A 2005 BVIPA newsletter reminded members that "BVIPA's negotiating strength lies with our members," and regarding contracting with payers, BVIPA "would like to emphasize that the IPA can do its best when we have maximum provider participation and support."

19. Some of BVIPA's physician members with specialties that are particularly important for the marketing of a provider network refused to contract with payers outside BVIPA. Consequently, payers had to negotiate and sign contracts with BVIPA to ensure that these physicians would participate in the payers' health plans.

Complaint

20. In 2004, BVIPA purported to begin offering payers three options for contracting with BVIPA. The executive director described the three options in a white paper that she drafted and gave to payers at the start of a renegotiation. The contracting options through BVIPA include a single-signature contract that “delivered the entire BVIPA network,” and a “modified messenger model” that “may or may not deliver our entire network.” A third option included direct contracting with individual members outside the IPA.

21. Although BVIPA's white paper appeared to offer payers a choice of contracting methods, the method that BVIPA used was the single-signature contract. Despite purporting to offer a “modified messenger model,” BVIPA did not develop or use a messenger model at all times relevant to this complaint.

22. In those instances when a payer did not cooperate with BVIPA's demands to either begin a renegotiation or agree to certain price levels during a renegotiation, BVIPA's executive director would report that payer to the Board. The Board in turn would vote to threaten the payer with termination of its contract with BVIPA. Payers threatened by the Board with termination ultimately yielded to BVIPA's price demands.

23. By approximately June 2006, BVIPA had renegotiated physician rates on a number of occasions with United Healthcare of Colorado; PacifiCare of Colorado; Aetna Inc.; Sloans Lake Managed Care, Inc.; CIGNA; and others, and signed agreements with those payers memorializing the rate increases on behalf of BVIPA's physician members.

Complaint

RESPONDENT'S CONDUCT IS NOT JUSTIFIED

24. BVIPA and its physician members have not undertaken any programs or activities that create any integration among their members in the delivery of physician services sufficient to justify their acts or practices described in the foregoing paragraphs. BVIPA members do not share any financial risk in providing physician services, do not collaborate in a program to monitor and modify their clinical practice patterns to control costs or ensure quality, or otherwise integrate their delivery of care to patients.

**RESPONDENT'S ACTIONS HAVE HAD SUBSTANTIAL
ANTICOMPETITIVE EFFECTS**

25. Respondent's actions have had, or tend to have had, the effect of unreasonably restraining trade and hindering competition in the provision of physician services in the Boulder County, Colorado area, in the following ways, among others:

- a. unreasonably restraining price and other forms of competition among physicians;
- b. increasing prices for physician services; and
- c. depriving health plans, employers, and individual consumers of the benefits of competition among physicians

**VIOLATION OF THE FEDERAL TRADE COMMISSION
ACT**

26. 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.

Decision and Order

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this second day of April, 2010, issues its Complaint against Respondent.

By the Commission.

DECISION AND ORDER
[Public Record Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Boulder Valley Individual Practice Association, hereinafter referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, 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 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

Decision and Order

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated 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 comments received from interested persons, 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 is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its principal address at 6676 Gunpark Drive, Suite B, Boulder Valley, CO 80301.
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**I.**

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

- A. "Respondent" means Boulder Valley Individual Practice Association, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.

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- B. "Medical Group Practice" means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, or employees, or in which only one physician practices medicine.
- C. "Non-exclusive Arrangement" means an arrangement that does not restrict the ability of, or facilitate the refusal of, physicians who participate in it to deal with payors on an individual basis or through any other arrangement.
- D. "Participate" in an entity or an arrangement means (1) to be a partner, shareholder, owner, member, or employee of such entity or arrangement, or (2) to provide services, agree to provide services, or offer to provide services to a Payor through such entity or arrangement. This definition applies to all tenses and forms of the word "participate," including, but not limited to, "participating," "participated," and "participation."
- E. "Payor" means any person that pays, or arranges for payment, for all or any part of any Physician services for itself or for any other person, as well as any person that develops, leases, or sells access to networks of Physicians.
- F. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- G. "Physician" means a doctor of allopathic medicine ("M.D."), a doctor of osteopathic medicine ("D.O."), or a doctor of podiatric medicine ("D.P.M.").

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- H. “Preexisting Contract” means a contract for the provision of Physician services 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 BVIPA pursuant to Paragraphs VII.2.b and VII.2.c of this Order of such Payor’s right to terminate such contract.
- I. “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.
- J. “Qualified Clinically-Integrated Joint Arrangement” means an arrangement to provide Physician services in which:
1. all Physicians who 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 that result from such integration through the arrangement.
- K. “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

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managing the provision of Physician services such as risk-sharing involving:

- a. the provision of Physician services at a capitated rate,
 - 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, when 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 that result from such integration through the arrangement.
- L. "Qualified Arrangement" means a Qualified Clinically-Integrated Joint Arrangement or a Qualified Risk-Sharing Joint Arrangement.

II.

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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 with respect to their provision of Physician services:
1. to negotiate on behalf of any Physician with any Payor;
 2. to refuse to deal, or threaten to refuse to deal with any Payor, in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order;
 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 other than through any Respondent(s);
- 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 with a Payor;

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- 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 this Paragraph II shall prohibit any agreement or conduct involving Respondent that, subject to the requirements of Paragraphs V and VI of this Order, is reasonably necessary to form, Participate in, or take any action in furtherance of, a Qualified Arrangement, so long as such Qualified Arrangement is a Non-exclusive Arrangement.

III.

IT IS FURTHER ORDERED that, for three (3) years from the date this Order becomes final, for any arrangement under which Respondent would act as an agent, or as a messenger, on behalf of any Physician or any Medical Group Practice with any Payor regarding contracts, Respondent shall notify the Commission in writing ("Paragraph III Notification") at least sixty (60) days prior to entering into the arrangement for which Paragraph III Notification is required. The Paragraph III Notification shall include the number of proposed Physician Participants in the proposed arrangement; the proposed geographic area in which the proposed arrangement would operate; a copy of any proposed Physician Participation agreement; a description of the proposed arrangement's purpose and function; a description of any resulting efficiencies expected to be obtained through the proposed arrangement; and a description of procedures to be implemented to limit possible anticompetitive effects of the proposed arrangement, such as those prohibited by this Order.

IV.

Decision and Order

IT IS FURTHER ORDERED that:

- A. If, within sixty (60) days from the date of the Commission's receipt of the Paragraph III Notification, a representative of the Commission makes a written request to Respondent providing such notification for additional information, then Respondent shall not Participate in the proposed arrangement prior to the expiration of thirty (30) days after substantially complying with such request, or such shorter waiting period as may be granted in writing from the Bureau of Competition;
- B. 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 the proposed arrangement does or does not violate this Order or any law enforced by the Commission;
- C. The absence of notice that the proposed arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed arrangement has been approved;
- D. Receipt by the Commission of any Paragraph III Notification is not to be construed as a determination by the Commission, or its staff, that the proposed arrangement does or does not violate this Order or any law enforced by the Commission; and
- E. Paragraph III Notification shall not be required prior to Participating in any arrangement for which Paragraph III Notification has previously been given.

Decision and Order

V.

IT IS FURTHER ORDERED that for three (3) years from the date this Order becomes final, pursuant to each Qualified Arrangement in which Respondent is a Participant, Respondent shall notify the Commission in writing ("Paragraph V Notification") at least sixty (60) days prior to:

- A. Participating in, organizing, or facilitating any discussion or understanding with or among any Physicians or Medical Group Practices in such Qualified Arrangement relating to price or other terms or conditions of dealing with any Payor; or
- B. Contacting a Payor, pursuant to a Qualified 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 or Medical Group Practice in such Qualified Arrangement.

VI.

IT IS FURTHER ORDERED that:

- A. Paragraph V Notification shall include the following information regarding the Qualified Arrangement pursuant to which Respondent intends to engage in the above identified conduct:
 - 1. the total number of Physicians and the number of Physicians in each specialty Participating in the Qualified Arrangement;
 - 2. a description of the Qualified Arrangement, including its purpose and geographic area of operation;

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3. a description of the nature and extent of the integration and the efficiencies resulting from the Qualified 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 Qualified Arrangement;
 5. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Qualified 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 any relevant market, including, but not limited to, the market share of Physician services in any relevant market.
- B. If, within sixty (60) days from the Commission's receipt of the Paragraph V Notification, a representative of the Commission makes a written request to Respondent for additional information, then Respondent shall not Participate in any arrangement described in Paragraph V.A or Paragraph V.B 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;
- C. 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 the proposed Qualified

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Arrangement does or does not violate this Order or any law enforced by the Commission;

- D. The absence of notice that the proposed Qualified Arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualified Arrangement has been approved;
- E. Receipt by the Commission of any Paragraph V Notification regarding Participation pursuant to a proposed Qualified Arrangement is not to be construed as a determination by the Commission that any such proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission; and
- F. Paragraph V Notification shall not be required prior to Participating in any Qualified Arrangement for which Paragraph V Notification has previously been given.

VII.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days after the date on which this Order becomes final:
 - 1. send a copy of this Order and the Complaint by first-class mail with delivery confirmation or electronic mail with return confirmation to:
 - a. every Physician who Participates, or has Participated, in Respondent at any time since January 1, 2001; and

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- b. each current officer, director, manager, and employee of Respondent;
 2. send by first-class mail, return receipt requested to the chief executive officer of each Payor with whom Respondent has record of being in contact since January 1, 2001, regarding contracting for the provision of Physician services:
 - a. a copy of this Order and the Complaint;
 - b. with the exception of those Payors identified at Confidential Appendix B to this Order, the letter attached as Appendix A to this Order; and
 - c. the letter attached as Appendix C to this Order to those Payors identified at Confidential Appendix B to this Order.
- B. Terminate, without penalty or charge, and in compliance with any applicable laws:
 1. any Preexisting Contract with any Payor who is sent the letter attached as Appendix A to this Order, at the earlier of: (1) receipt by Respondent of a written request to terminate such contract from any Payor that is a party to the contract, or (2) the earliest termination date, renewal date (including any automatic renewal date), or the anniversary date of such contract; and
 2. any Preexisting Contract with any Payor who is sent the letter attached as Appendix C to this Order upon receipt by Respondent of a written request to terminate such contract from any Payor that is a party to the contract.

Decision and Order

Provided, however, a Preexisting Contract with a Payor to be terminated pursuant to Paragraph VII.B.1 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 Paragraph VII.B.1 of this Order, to terminate the Preexisting Contract at any time.

- C. Within ten (10) days of receiving a written request to terminate from a Payor, pursuant to Paragraph VII.B of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each Physician Participating in such contract as of the date that Respondent receives such request to terminate; and
- D. For three (3) years from 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

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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 who contracts with Respondent for the provision of Physician services, 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 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 position;
2. Annually publish in any official report or newsletter sent to all Physicians who Participate in Respondent a copy of this Order and the Complaint with such prominence as is given to regularly featured articles.

Decision and Order

VIII.

IT IS FURTHER ORDERED that Respondent shall file verified written reports within sixty (60) days from 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 report shall include, among other information that may be necessary:

- A. The name, address, and telephone number of each Payor with which Respondent has had any contact during the one (1) year period preceding the date for filing such report;
- B. The identity of each Payor sent a copy of the letter attached as Appendix A, the response of each Payor to that letter, and the status of each contract to be terminated pursuant to that letter;
- C. A copy of any request to terminate a contract from a Payor identified at Confidential Appendix B, and the status of each contract to be terminated pursuant to that letter;
- D. Copies of the delivery confirmations or electronic mail with return confirmations required by Paragraph VII.A.1, and copies of the signed return receipts required by Paragraphs VII.A.2, VII.C, and VII.D; and
- E. A detailed description of the manner and form in which Respondent has complied and is complying with this Order.

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IX.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

- A. Of any change in its Principal Address within twenty (20) days of such change in address; and
- B. At least thirty (30) days prior to any proposed: (a) dissolution of Respondent; (b) acquisition, merger, or consolidation of Respondent; or (c) any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and
- B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

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XI.

IT IS FURTHER ORDERED that this Order shall terminate on April 2, 2030

By the Commission.

Decision and Order

APPENDIX A

[letterhead of BVIPA]

[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 BVIPA ("Boulder Valley").

Pursuant to Paragraph VIII.B.1 of the Order, BVIPA must allow you to terminate, upon your written request, without any penalty or charge, any contracts with BVIPA that are in effect as of the date you receive this letter.

If you do not make a written request to terminate the contract, Paragraph VIII.B. further provides that the contract will terminate on the earlier of the contract's termination date, renewal date (including any automatic renewal date), or anniversary date, which is [date].

You may, however, ask BVIPA to extend the contract beyond [date], the termination, renewal, or anniversary date, to any date no later than [date], one (1) year after the date the Order becomes final.

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,

[BVIPA to fill in information in brackets]

Decision and Order

CONFIDENTIAL APPENDIX B

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

APPENDIX C

[letterhead of BVIPA]

[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 BVIPA ("Boulder Valley").

Pursuant to Paragraph VIII.B.2 of the Order, BVIPA must allow you to terminate, upon your written request, without any penalty or charge, any contracts with BVIPA that are in effect as of the date you receive this letter.

Any request to terminate the contract should be made in writing, and sent to me at the following address: [address].

Sincerely,

Decision and Order

[BVIPA to fill in information in brackets]

**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 Boulder Valley Individual Practice Association (“BVIPA”). The agreement settles charges that BVIPA violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by, among other things, orchestrating and implementing agreements among competing physician members of BVIPA to fix the price at which BVIPA physicians contract with health plans.

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 to 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 the proposed respondent 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.

BVIPA is a type of organization commonly referred to in the health care industry as an “independent practice association” because its members consist of independent physicians in solo and

Analysis to Aid Public Comment

small group practices. BVIPA is controlled by its approximately 365 physician members in the Boulder County, Colorado area.

The Complaint challenges BVIPA's conduct starting in 2001, when BVIPA, on behalf of its members, began to negotiate the prices and terms in payer contracts at which its otherwise competing physician members would provide services to subscribers of health plans. BVIPA is governed by a board of directors consisting of physician members elected by the membership. Physicians joining BVIPA sign an agreement that gives BVIPA the authority to contract with health plans on their behalf, and they agree to accept the payment for their services that BVIPA negotiates. Members can provide input to BVIPA on whether a proposed rate level was acceptable.

Between 2001 and 2006, BVIPA, on behalf of its members, negotiated and signed agreements with approximately 17 payers and conducted periodic renegotiations of its contracts with large payers to obtain rate increases. BVIPA threatened payers facing rate increases with termination of their contracts when they refused to negotiate or otherwise respond to BVIPA's demands. Payers threatened with termination ultimately yielded to BVIPA's price demands.

BVIPA actively discouraged members from contracting directly with payers. Some payers attempted to contract with some of BVIPA's physician members with specialties that were important for the marketing of a provider network, and found that the providers refused to contract with payers outside BVIPA. Consequently, payers had to negotiate and sign contracts with BVIPA to ensure that these physicians would participate in the payers' health plans.

In 2004, BVIPA purported to offer payers three options for contracting with BVIPA members: a single-signature contract that "delivered the entire BVIPA network," a "modified messenger model" that "may or may not deliver our entire network;" and

Analysis to Aid Public Comment

direct contracting with individual members outside the IPA. Although BVIPA claimed to offer payers a choice of contracting methods, BVIPA did not develop or use a messenger model, and it continued to encourage its members not to contract outside the IPA.

BVIPA's conduct had the effect of unreasonably restraining trade and hindering competition in the provision of physician services by unreasonably restraining price and other forms of competition among physicians; increasing prices for physician services; and depriving health plans, employers, and individual consumers of the benefits of competition among physicians. BVIPA members did not engage in any efficiency-enhancing integration of their practices sufficient to justify the its challenged conduct. Accordingly, the Complaint alleges that BVIPA 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, while leaving BVIPA free to engage in legitimate, potentially procompetitive conduct. 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 BVIPA from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payers on any physician's behalf; (2) to refuse to deal, or threaten to refuse to deal, with payers in furtherance of any conduct or agreement prohibited by any other provision of Paragraph II, (3) on any terms on which a physician is willing to deal with any payer; or (4) not to deal individually with any payer, or not to deal with any payer other than through BVIPA.

Analysis to Aid Public Comment

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits BVIPA from facilitating exchanges of information between physicians concerning any physician's willingness to deal with a payer or the terms or conditions, including price terms, on which the physician is willing to deal with a payer. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A, or II.B, and Paragraph II.D. proscribes BVIPA from 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, Paragraph II excludes certain kinds of agreements from its prohibitions. First, BVIPA is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." The arrangement, however, must not restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payers outside of the arrangement.

As defined in the proposed Order, a "qualified risk-sharing joint arrangement" possesses two characteristics. First, all physician participants must share substantial financial risks 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

Analysis to Aid Public Comment

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 BVIPA to notify the Commission before it enters into any arrangements to act as a messenger or an agent on behalf of any physicians, with payers regarding contracts. Paragraph IV sets out the information necessary to make the notification complete.

Paragraph V, for three years, requires BVIPA to notify the Commission before participating in contracting with health plans on behalf of either a qualified risk-sharing or a qualified clinically-integrated joint arrangement. Paragraph VI sets out the information necessary to satisfy the notification requirement.

Paragraph VII imposes other notification obligations on BVIPA and requires the termination of certain contracts that were entered into illegally. Paragraphs VII.A requires BVIPA to distribute the Complaint and the Order to (1) physicians who have participated in BVIPA since 2001; (2) to various past and current personnel of BVIPA; and (3) to payers with whom BVIPA has dealt since 2001. Paragraph VII.B requires BVIPA, at any payer's request and without penalty, to terminate its existing contracts with the payer for the provision of physician services. Paragraph VII.B. allows certain contracts currently in effect to be extended at the written request of the payer no longer than one year from the date that the Order becomes final. Paragraph VII.C requires BVIPA to distribute payer requests for contract termination to physicians who participate in the contract. Paragraph VII.D requires BVIPA, for three years, to provide new members, personnel, and payers not previously receiving a copy, a copy of the Order and the Complaint. Paragraph VII.D also requires BVIPA to publish annually a copy of the Order and the Complaint in its newsletter.

Analysis to Aid Public Comment

Paragraphs VIII, IX, and X impose various obligations on BVIPA to report or provide access to information to the Commission to facilitate the monitoring of compliance with the Order. Finally, Paragraph XI provides that the Order will expire in 20 years.

Paragraphs VIII, IX, and X impose various obligations on BVIPA to report or provide access to information to the Commission to facilitate the monitoring of compliance with the Order. Finally, Paragraph XI provides that the Order will expire in 20 years.

Complaint

IN THE MATTER OF

**THE M GROUP, INC ALSO DOING BUSINESS AS
BAMBOOSA
AND
MINDY JOHNSON, MICHAEL MOORE, AND
MORRIS SAINTSING**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT AND THE
TEXTILE FIBER PRODUCTS IDENTIFICATION ACT*Docket No. 9340; File No. 082 3184
Filed, August 7, 2009 — Decision, April 2, 2010*

This consent order addresses The M Group, Inc., also doing business as Bamboosa, a corporation, and Mindy Johnson, Michael Moore, and Morris Saintsing's marketing and sale of textile fiber products purportedly made of bamboo fiber. Respondents made false claims that their textile fiber products are bamboo fiber; retain the anti-microbial properties of the bamboo plant; and will completely break down and return to the elements found in nature within a reasonably short period of time after customary disposal. The respondents also failed to have substantiation for the foregoing claims. The order prohibits respondents from failing to comply with the Textile Act or the Textile Rules. Respondents are specifically prohibited from representing that any textile fiber product (1) is made of bamboo or bamboo fiber; (2) is anti-microbial or retains the anti-microbial properties of any material from which it is made; or (3) is degradable, biodegradable, or photodegradable, unless such representations are true, not misleading, and substantiated by competent and reliable scientific evidence. The order also prohibits respondents from making claims about the benefits, performance, or efficacy of any textile fiber product, unless at the time the representation is made, it is truthful and not misleading, and is substantiated by competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence.

Participants

For the *Commission*: *Melinda Claybaugh and Korin Ewing.*

For the *Respondents*: *Philip G. Clarke, III, Esq., Charleston, SC.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that The M Group, Inc., also doing business as Bamboosa (“Bamboosa”), and Mindy Johnson, Michael Moore, and Morris Saintsing, individually and as the members of the corporation (“Respondents”), have violated the provisions of the Federal Trade Commission Act, 15 U.S.C. § 41, *et seq.*, the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.*, and the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent The M Group, Inc., also doing business as Bamboosa, is a South Carolina corporation. Its street address is 32 Seaboard Road, Andrews, South Carolina 29510, and its mailing address is PO Box 1239, Andrews, South Carolina, 29510.

2. Respondents Mindy Johnson, Michael Moore, and Morris Saintsing are the members of the corporate respondent. Individually or in concert with others, they formulate, direct, or control the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. Their principal offices or places of business are the same as that of Bamboosa.

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, 15 U.S.C. § 44.

4. Respondents manufacture, advertise, market, promote, offer to sell, sell, and distribute textile fiber products, including a line of clothing and accessories for infants called BambooBaby, throughout the United States, using both Bamboosa’s website, www.bamboosa.com, and other retailers.

Complaint

5. Respondents price the textile fiber products that they manufacture, market, promote, distribute, and sell at a premium compared to other, similar products in the marketplace.

6. In advertisements to induce consumers to purchase their textile fiber products, Respondents make or have made various claims, on their website and elsewhere, concerning the fiber content, biodegradability, and anti-microbial characteristics of their textile fiber products, including, but not limited to, the following:

A. **Bamboosa Website (www.bamboosa.com)**

1. **Doing It Better**

Bamboo Fiber - All of our clothing and baby products are 100% organic bamboo fiber or high content organic bamboo fiber blended with cotton. Bamboo fiber contributes heavily to the quality, performance, comfort and durability of our apparel.

("Doing It Better" page, Exhibit A at 1-2).

2. **Why Bamboo?**

Why Do We Use Bamboo?

Organic Bamboo fiber is the new innovation in textile fibers with remarkable characteristics:

* * *

● **Protective and Hygienic**

Unlike other anti-microbial fabrics, which require a chemical treatment, organic bamboo fiber clothing is naturally anti-microbial requiring no added harmful chemicals. It contains an agent, "bamboo kun," that

Complaint

prevents bacteria from cultivating on it. Bamboo apparel is thermal regulating, anti-fungal, anti-static and will keep you cooler, drier, warmer and odor free.

* * *

- **Natural and Chemical-Free**

. . . Bamboo fiber is 100% biodegradable.

(“Why Bamboo?” page, Exhibit A at 3-4).

3. **About Bamboo for Babies**

Order a gift of bamboo baby clothing or a BambooBaby Gift Set for a special baby you know that will provide comfort, warmth and the softest fabric against baby’s tender skin. Our fabric, produced from certified organically grown bamboo, is naturally anti-microbial, hypoallergenic, bacteriostatic, thermal regulating and odor free. What more could you want for your new baby or the baby you want to welcome into the world?

(“About Bamboo for Babies” page, Exhibit A at 5).

4. **Product Descriptions**

Bamboo Pique Knit Polo

Blended 70% bamboo and 30% cotton pique knit polo

* * *

Bamboo/Cotton Short Sleeve Tee

Comfortable style made from our 70% organic bamboo and 30% cotton jersey fabric.

Complaint

* * *

100% Bamboo Fine Jersey Slim Fit Tee

100% organic bamboo fine jersey fabric in the most comfortable tee you'll ever wear.

(Product pages, Exhibit A at 6-7).

B. Product Hangtag

- **Anti-bacterial & Odor free**

Natural anti-bacterial agent makes bamboo fiber apparel odor-resistant

* * *

- **Natural & Eco-Friendly**

Bamboo, a natural cellulose fiber is 100% biodegradable & grown without pesticides

(Exhibit B at 1).

C. Product Package Insert**Bamboosa Products**

- **Natural & Hypoallergenic:** because bamboo contains a natural and unique anti-bacteria and bacteriostatic agent called "bamboo kun," bamboo fiber clothing does not need any antimicrobial chemical additives, which often cause skin allergies and other irritations
- **Anti-bacterial and & Odor free:** even after 50 washes, bamboo fiber fabric has a 70% elimination rate when

Complaint

incubated with bacteria – this natural anti-bacteria function along with the excellent permeability and evaporation of moisture makes bamboo apparel odor-free

* * *

- Biodegradable & Eco-Friendly: as a natural cellulose fiber, bamboo is 100% biodegradable and the decomposition process does not cause any pollution to the environment – compared to a fabric such as polyester which comes from petroleum, a depleting source and not biodegradable

(Exhibit C at 1).

D. **Product label**

100% Bamboo

Bamboo Fiber Products

(Exhibit B at 1).

7. The textile fiber products manufactured, marketed, promoted, distributed, and sold by Respondents consist of rayon and not actual bamboo fibers woven into fabric.

8. Rayon is the generic name for a type of regenerated, or manufactured, fiber made from cellulose. Rayon is manufactured by taking purified cellulose from a plant source, also called a cellulose precursor, and converting it to a viscous solution by dissolving it in one or more chemicals, such as sodium hydroxide. The chemical solution is then forced through spinnerets and into an acidic bath where it solidifies into fibers.

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9. The process used to manufacture rayon from cellulose involves hazardous chemicals. *See* 40 C.F.R. Part 63 (“National Emissions Standards for Hazardous Air Pollutants: Cellulose Products Manufacturing”).

10. “[H]azardous air pollutants (HAP) emitted from cellulose products manufacturing operations” include carbon disulfide, carbonyl sulfide, ethylene oxide, methanol, methyl chloride, propylene oxide, and toluene. 40 C.F.R. § 63.5480.

11. Many plant sources may be used as cellulose precursors for rayon fabric, including cotton linters (short cotton fibers), wood pulp, and bamboo. Regardless of the source of the cellulose used, however, the manufacturing process involves the use of hazardous chemicals and the resulting fiber is rayon and not cotton, wood, or bamboo fiber.

12. Respondents do not state that their textile fiber products are rayon, nor, assuming that bamboo is the source of the cellulose used in their textile fiber products, do Respondents state that their textile fiber products are rayon made from bamboo. Moreover, on the pages of their website stating the claims set forth in Paragraph 6, Respondents do not provide any description of the chemical process used to manufacture their textile fiber products.

13. The opening page, or homepage, of Respondents’ website provides seven different categories of webpages on its site: “Bamboosa,” “BamboosaBaby,” “Products,” “Checklist,” “Engage,” “Bamboo,” and “Registry.” The “Bamboo” category offers a choice of eight webpages, including one titled “Bamboo Fiber Processing,” where, as part of a series of questions and answers, Respondents acknowledge that, (a) “[t]he fiber produced chemically is what [Bamboosa] use[s] and what most companies are using at this time,” and (b) “[t]he main chemical used in the processing [of Bamboosa’s textile fiber products] is sodium hydroxide also known as caustic soda.” (“Bamboo Fiber Processing” page, Exhibit A at 8-9).

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14. These statements are not clear and conspicuous, nor are they in close proximity to either the website's individual product pages or any of the advertisements set forth in Paragraph 6, above.

15. Respondents do not define, describe, or qualify their claim that their textile fiber products are biodegradable.

16. Approximately 91 percent of total municipal solid waste in the United States is disposed of in either landfills, incinerators, or recycling facilities. These disposal methods do not present conditions that would allow for Respondents' textile fiber products to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

VIOLATIONS OF SECTION 5 OF THE FTC ACT**FALSE OR MISLEADING REPRESENTATIONS**

17. Through the means described in Paragraph 6, Respondents represent or have represented, expressly or by implication, that:

- a. Their textile fiber products are bamboo fiber;
- b. Their textile fiber products retain anti-microbial properties of the bamboo plant; and
- c. Their textile fiber products will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal.

18. In truth and in fact:

- a. Respondents' textile fiber products are not bamboo fiber, but instead are rayon, a regenerated cellulose fiber;

Complaint

- b. Respondents' textile fiber products do not retain anti-microbial properties of the bamboo plant; and
- c. Respondents' textile fiber products will not completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal because a substantial majority of total household waste is disposed of by methods that do not present conditions that would allow for Respondents' textile fiber products to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

19. Therefore, the representations set forth in Paragraph 17 were, and are, false or misleading, and the making of such representations constitutes a deceptive act or practice, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

UNSUBSTANTIATED REPRESENTATIONS

20. Through the means described in Paragraph 6, Respondents represent or have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 17, at the time the representations were made.

21. In truth and in fact, Respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 17, at the time the representations were made.

22. Therefore, the representation set forth in Paragraph 20 was, and is, false or misleading, and the making of such representation constitutes a deceptive act or practice, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

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**TEXTILE FIBER PRODUCTS IDENTIFICATION ACT
AND RULES AND REGULATIONS**

23. The Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.* (“Textile Act”), governs, *inter alia*, the labeling and advertising of textile fiber products introduced, manufactured for introduction, delivered for introduction, sold, advertised, or offered for sale in commerce. *See* 15 U.S.C. § 70a.

24. Under the Textile Act, a textile fiber product is “misbranded if it is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.” 15 U.S.C. § 70b(a).

25. Pursuant to the Textile Act, 15 U.S.C. § 70e(c), the Federal Trade Commission has promulgated Rules and Regulations for its administration and enforcement (“Textile Rules and Regulations”). *See* 16 C.F.R. Part 303. The Textile Rules and Regulations state:

- a. All textile fiber products must carry permanent, affixed labels stating the recognized generic names of the constituent fibers, as well as indicating, among other things, the “percentages by weight of the constituent fibers present in the textile fiber product, excluding permissive ornamentation, in amounts of 5 percent or more,” as well as the “name of the country where such product was processed or manufactured.” 16 C.F.R. § 303.16(a)(1), (a)(3); *see also* 16 C.F.R. §§ 303.6, 303.15 and 303.33;
- b. In advertising and labeling textile fiber products, no generic name for a manufactured fiber may be used until such generic name has been “established or otherwise recognized by the Commission,” 16 C.F.R. § 303.8, and such generic names must be used when

Complaint

identifying the fiber content in the information required in such labels and advertisements, 16 C.F.R. § 303.6;

- c. The only generic terms for fibers manufactured from regenerated cellulose that have been established or otherwise recognized by the FTC are rayon, viscose, modal, cupro, and lyocell. *See* 16 C.F.R. § 303.7(d);
- d. “Words, coined words, symbols or depictions, (a) which constitute or imply the name or designation of a fiber which is not present in the product, (b) which are phonetically similar to the name or designation of such a fiber, or (c) which are only a slight variation of spelling from the name or designation of such a fiber shall not be used in such a manner as to represent or imply that such fiber is present in the product.” 16 C.F.R. § 303.18. Any term used in advertising, including internet advertising, that constitutes or connotes the name or presence of a textile fiber is deemed to be an implication of fiber content. 16 C.F.R. § 303.40; and
- e. Any information or representations included in advertising or labeling of a textile fiber product that is not required under the Textile Act or the Textile Rules and Regulations “shall in no way be false, deceptive, or misleading as to fiber content and shall not include any names, terms, or representations prohibited by the [Textile] Act and regulations. Such non-required information or representations shall not be set forth or so used as to interfere with, minimize, or detract from the required information.” 16 C.F.R. § 303.42(b); 16 C.F.R. § 303.41(d); *see also* 16 C.F.R. § 303.17.

26. A violation either of the Textile Act or of the Textile Rules and Regulations constitutes an unfair and deceptive act or practice

Complaint

in violation of the Federal Trade Commission Act. *See* 15 U.S.C. §§ 70a and 70e.

**VIOLATIONS OF THE TEXTILE ACT AND THE
TEXTILE RULES AND REGULATIONS**

27. As set forth in Paragraph 6, Respondents have:

- a. labeled their textile fiber products as consisting of bamboo; and
- b. advertised the fiber content of their textile fiber products using the terms “bamboo” and “bamboo fiber.”

28. In truth and in fact, Respondents' textile fiber products are not bamboo fiber but are rayon, a regenerated cellulose fiber.

29. Through the means described in Paragraph 6, Respondents have manufactured for introduction, introduced, advertised, offered for sale, or sold textile fiber products that are misbranded or falsely or deceptively advertised, as prohibited by Sections 70a and 70b of the Textile Act, 15 U.S.C. § 70, *et seq.*, and in violation of Sections 303.6, 303.8, 303.16, 303.17, 303.18, 303.40, 303.41, and 303.42 of the Textile Rules and Regulations, 16 C.F.R. Part 303.

30. Respondents' violations of the Textile Act and of the Textile Rules and Regulations constitute deceptive acts or practices, in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

NOTICE

Proceedings on the charges asserted against the respondents named in this complaint will be held before an Administrative Law Judge of the Federal Trade Commission, under Part 3 of the Commission's Rules of Practice, 16 C.F.R. Part 3, as amended by

Complaint

the Commission's Interim Final Regulations, 74 Fed. Reg. 1804 (Jan. 13, 2009). A copy of Part 3 of the Commission Rules is enclosed with this complaint, and the Rules are also accessible on the Commission Website at [FTC Rules \(16 CFR 0-999\)](#).

Notice is hereby given that the seventh day of April, 2010, at 10:00 a.m., is hereby fixed as the time, and the Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Federal Trade Commission an answer to this complaint on or before the 14th day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense, and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under § 3.46 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the

Complaint

allegations of the complaint and to authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge will schedule an initial prehearing scheduling conference to be held not later than 10 days after the answer is filed by the last answering respondent in the complaint. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, but in any event no later than five days after the answer is filed by the last answering respondent. Rule 3.31(b) obligates counsel for each party, within five days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

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

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

Complaint

are relevant to consider the necessity and appropriateness of such action.

Complaint

EXHIBIT A

Doing it Better

http://www.bamboosa.com/boombosa.php?PID=17

Home | Shopping Cart | My Account | Order Status | Contact Us



Bamboosa Bamboobaby Products Checklist Engage Bamboo Registry

Bamboosa

- Bamboosa - Find a Store
- Bamboosa Press
- Why Bamboo?
- Wholesale Inquiries
- Doing it Better
- About Us
- Bamboosa News
- Change Round-Up
- Bamboosa Up-Close

Doing it Better

We always envisioned that when we had our own company we would make higher quality, better performing, really comfortable, longer lasting, sweatshop-free, competitively priced, American Made apparel and baby products that are a better choice for the environment. We also said we would do it responsibly and as good corporate citizens. We do, we are and here is how:

Organic Bamboo Fiber - All of our clothing and baby products are 100% organic bamboo fiber or high content organic bamboo fiber blended with cotton. Bamboo fiber contributes heavily to the quality, performance, comfort and durability of our apparel. To see our organic certifications, click here.

Yarn - Sometimes, new technology is not the best technology. Up until the early 1970s the manufacturing of yarn (spinning) was done on ring spinning equipment. This process makes a yarn that produces a very soft fabric and is used in some of the finest knits. However, because it is a slower process, it is more costly. So, in an effort to increase plant efficiencies (read: profits), open end spinning was developed. While spinning open end yarn is highly efficient, the end product is not so soft. That is why we have chosen to use only ring spun yarns for our products.

Knitting - We use the highest needle count machines available for our knitting. Why? To oversimplify, the more needles in the knitting machine, the better the fabric. Generally, more needles = smaller diameter yarns = more threads per inch = better fabric and less shrinkage.

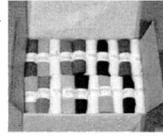
Dyeing - We have eliminated the use of chlorine in our bleaching or pre-bleaching process. Using chlorine releases dioxins, which are known carcinogens, into the air. When dyeing our fabrics, we do not use any banned AZO dyes in our fiber reactive dyes. Our dyes consume less water and less energy and generate less waste, and therefore have a lower impact than non fiber reactive dyes. Also, because bamboo fabric accepts and holds dye well, we do not use any dye-fixing agents, which often contain heavy metals and formaldehyde.

Sewing - Our apparel is sewn in Andrews, South Carolina at our factory that employs many second and third generation sewers that are accustomed to making apparel to the highest standards. All of our products are engineered with durability and comfort in mind. We reinforce all stress seams and topstitch all neck and sleeve seams for enhanced appearance.

Recycled Packaging - All of our packaging materials, from the shipping carton to the hangtag to the return form enclosure are from 100% recycled paper with a minimum of 30% post consumer waste (PCW) and higher value PCW where available. Each order is wrapped in white, printed wrapping tissue that is manufactured from 100% recycled material and contains 30% post-consumer material. (Post consumer is sorted, used office paper.)

Why Not?

We asked ourselves that question.
Why not make a difference?
Why not give something back?
Why not give a sustainable business?
Why not embrace and promote local talent?
Why not provide a better life for all of our employees?
Why not ask people to think about the world in which we live?
Why not encourage the responsible use of our natural resources?
Only in the spirit of giving can we accomplish our goals.
Through our dedication to community causes,
our participation in the Fair Trade movement,
and giving our employees the chance
to make a difference, we can
answer the question.
Why not?



Complaint

EXHIBIT A (continued)

Doing it Better

<http://www.bamboosa.com/boombosa.php?PID=17>

All of Bamboosa's products are made in the USA. We buy some yarn in China and also import the fiber from China and have yarn made in South Carolina. All fabric production as well as dyeing and sewing are also done in South Carolina. Bamboosa is committed to U.S. jobs, increased sustainability, social responsibility, environmental awareness and good corporate citizenship. We encourage our employees, our vendors, and our customers to consider their choices and to make decisions consistent with making a positive impact.

These are just some of the ways that Bamboosa is working to do it better.

We can find common ground only by moving to higher ground. - Jim Wallis, The Soul of Politics

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Complaint

EXHIBIT A (continued)

Why Bamboo?

<http://www.bamboosa.com/boombosa.php?PID=13>



Bamboosa

- Bamboosa - Find a Store
- Bamboosa Press
- Why Bamboo?
- Wholesale Inquiries
- Doing It Better
- About Us
- Bamboosa News
- Change Round-Up
- Bamboosa Up-Close

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[Bamboosa](#) | [BambooBaby](#) | [Products](#) | [Checklist](#) | [Engage](#) | [Bamboo](#) | [Registry](#)

Why Bamboo?

Why Do We Use Bamboo?
Organic Bamboo fiber is the new innovation in textile fibers with remarkable characteristics:

• ***Soft and Comfortable***

Organic Bamboo fiber is softer than the softest cotton, has a natural sheen to the surface and feels similar to silk or cashmere. Bamboo absorbs water 3-4 times better than cotton, keeping skin comfortable, rather than sticky, in hot weather. Bamboo stays 2-3 degrees cooler in hot temperatures and warmer in cold temperatures.

• ***Protective and Hygienic***

Unlike other anti-microbial fabrics, which require a chemical treatment, organic bamboo fiber clothing is naturally anti-microbial requiring no added harmful chemicals. It contains an agent, "bamboo kun", that prevents bacteria from cultivating on it. Bamboo apparel is thermal regulating, anti-fungal, anti-static and will keep you cooler, drier, warmer and odor free.

Bamboo fiber also has natural UV protection. In April of 2005, we sent out our Purely Natural 100% bamboo jersey to the Suncare Research Laboratories in Winston Salem, N.C. for UV Protection testing. The UPF label rate is 15. The fabric scored 18.3 on the UPF scale with 94.15% UVA block and 93.17% UVB block.

The UPF system was created specially for sun protective fabrics. UPF measurements of fabrics are generally tested by spectrophotometer equipment and are not tested using human subjects. The UPF rate indicates how much of the sun's UV radiation is absorbed by the fabric.

The advantage of the UPF standard is that both UVB and UVA are measured.

• ***Natural and Chemical-Free***

Bamboo is grown without using pesticides or chemical fertilizers. Bamboo fiber is 100% biodegradable. At Bamboosa we choose to not use any bleach on our fabrics before dye. We offer many Purely Natural products without any dye at all.

Bamboo is one of the world's most prolific and fastest-growing plants, and is able to reach maturity in about four years, compared to the typical 25 to 70 years for commercial tree species in the U.S. Though most people are generally familiar with this beautiful and graceful plant, the average person is usually astounded when learning that there are more than 1000 documented uses of bamboo.

Bamboo is nature's most sustainable resource and is naturally regenerative. Bamboo is actually a tropical grass, with an extensive root system that sends out an average of four to six new shoots per year, naturally replenishing itself and growing to heights of 60 feet or more. Some bamboo species grow up to 4 feet per day and can be harvested every 3 to 4 years.



At Bamboosa, we will...

Give something back.
Through our participation in The For The Planet, our donations to community causes, and the encouragement given to our employees to make a difference, we believe that only in the spirit of giving can we accomplish our goals.

Conserve.
and ask our customers and employees to do the same.
If you don't need it, don't buy it.
If you're not using it, give it to someone who will.
When you are finished with it, give it new life as something else.

Make a sustainable product -
A product that is comfortable and that feels. The longer you want to wear our product, the less the impact.



Complaint

EXHIBIT A (continued)

Why Bamboo?

<http://www.bamboosa.com/boombosa.php?PID=13>

In Asia, bamboo has been used in the traditional hand-made production of paper for centuries. Now, through modern manufacturing processes, bamboo pulp is capable of producing bamboo fiber for use in yarn and fabric. Certain species of bamboo have the tensile strength equivalent to that of steel.

Bamboo is planted and grown on family-owned farms that have been in agricultural use for generations. None of the fiber comes from tropical forests. Over 2.5 billion people work with or depend on bamboo as a natural resource.

Why Bamboosa?

All of Bamboosa's clothing and baby products are made in America. The quality of our fabrics and workmanship is superior in every way.

Once you've worn Bamboosa, you'll want to wear more. If not, all of our products are guaranteed. We'll pay the postage.

Notice that the stiffest tree is most easily cracked, while the bamboo or willow survives by bending with the wind. - Bruce Lee

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EXHIBIT A (continued)

About Bamboo for Babies

http://www.bamboosa.com/bamboobaby.php?PID=3

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Bamboosa® Bamboosa Bamboobaby Products CheckOut Engage EcoTime Registry

Bamboobaby

- About Bamboo for Babies
- About Our Baby Gift Sets
- Blue Lizard for Baby
- Green + Organic for Baby
- Green Gifts for Baby
- Pandas and Bamboo
- Organic Bamboo Clothing
- Sleep Tips for Every Child

About Bamboo for Babies

Surprise everyone at the next baby shower with Bamboo Baby clothing that is unique and a good choice for the environment. Bamboosa makes fluffy hooded towels, absorbent washcloths and cozy, soft baby bamboo blankets with the health and protection of babies in mind.

Bamboosa for Baby Blankets and Bamboosa for Baby hooded towels are gifts that will be used for years. Order a gift of bamboo baby clothing or a Bamboobaby Gift Set for a special baby you know that will provide comfort, warmth and the softest fabric against baby's tender skin. Our fabric, produced from certified organically grown bamboo, is naturally anti-microbial, hypoallergenic, bacteriostatic, thermal regulating and odor free. What more could you want for your new baby or the baby you want to welcome into the world? We'll wrap your gift and include a personalized message!

One of our customers, Eltit Abel, sent a Bamboobaby gift with this wonderful message:

Welcome to the world young August. Here is the first item you'll need in your fight for a better, greener world. A bamboo baby blanket! (It can also be used as a cape if necessary). Love, Eliot

Bamboobaby also has comfy bamboo baby bodysuits, snugly bamboo baby beanies to keep little heads warm - and soft, cozy bamboo baby socks for those tiny toes. Wrap your baby or a baby you love in the comfort and softness of bamboo fabric.

"You are now my favorite website for baby gifts and I am telling all my friends."
 Barbara - Coral Gables, Florida

Bamboosa Hooded Towel
Recommended by
The Opinionated Parents

If your baby is "beautiful and perfect, never cries or fusses, sleeps on schedule and burps on demand, an angel all the time," you're the grandma.
 - Theresa Bloomingdale



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EXHIBIT A (continued)

Bamboosa - Fine clothing and baby products made from bamboo :: B... https://www.bamboosa.com/store/cart.php?m=product_detail&p=134



Home | Shopping Cart | Affiliate Login | My Account | Order Status | Contact Us

Bamboosa BambooBaby Products Checklist Engage Bamboo Registry

Categories

- BambooBaby Products
- BambooBaby Gift Sets
- BambooBaby Panda
- Bamboo Powder Soapbars
- Accessories
- Bamboo Socks
- Women's Tops
- Men's Tees
- Adult Gift Sets
- Gift Certificates
- Sale

Bamboo Pique Knit Polo



Back to List

\$48.00

SKU: MS01

Size: s/m/l/xl/xxl

Qty:

Color:

Bamboo Green

Size: Small

Add to Cart

Add to Wishlist

Email a Friend



Free Shipping on orders over \$100

Blended 70% bamboo and 30% cotton pique knit polo. Knitted collar, 3 button placket, banded sleeves, drop tail and side vents. Full cut sizing. Breathable and comfortable, this shirt will be your favorite at work or around the house.

Machine Wash Cold and Tumble Dry.
Our bamboo fabric is free of chlorine and formaldehyde.
Made in the USA!

Related Products

100% Bamboo Fine Jersey
Slim Fit Tee



\$26.00

Details

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EXHIBIT A (continued)

Bamboosa - Fine clothing and baby products made from bamboo :: Pr...

https://www.bamboosa.com/store/cart.php?m=product_list&c=6



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Bamboosa BambooBaby Products Checklist Engage Bamboo Registry

Categories

- BambooBaby Products
- BambooBaby Gift Sets
- BambooBaby Panda
- Bamboo Powder
- Soylbars
- Accessories
- Bamboo Socks
- Women's Tops
- Men's Tops
- Adult Gift Sets
- Gift Certificates
- Sale

Products > Men's Tops

Short sleeve and long sleeve Tee's for Men. See size chart under "Checklist".

Displaying 1 - 5 of 5 Product(s):

Sort By: Default



Bamboo Pique Knit Polo

Blended Bamboo/Cotton Polo Shirt. Full-cut sizing.

\$48.00



Bamboo/Cotton Short Sleeve Tee

Comfortable style made from our 70% organic bamboo and 30% cotton jersey fabric.

\$26.00



Bamboo/Cotton Long Sleeve Tee

Another great men's style made from our 70% organic bamboo/ 30% cotton jersey fabric.

\$28.00



100% Bamboo Fine Jersey Long Sleeve Tee

Same great, 100% organic bamboo fine jersey fabric in a long sleeve tee.

\$28.00



100% Bamboo Fine Jersey Slim Fit Tee

100% organic bamboo fine jersey fabric in the most comfortable tee you'll ever wear.

\$26.00

Page: 1

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EXHIBIT A (continued)Bamboo Fiber Processing <http://www.bamboosa.com/bamboo.php?PID=63r1>

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Bamboosa BambooBaby Products CheckOut Engage Bamboo Registry

Bamboosa®

- Bamboo
- Bamboo Shopping
- About Bamboosa
- Bamboo Bazaar
- Bamboo Bazaar
- Bamboo Growers
- Bamboo Fiber Processing
- Organic Certification for Bamboo

Bamboo Fiber Processing

Your products are made in the USA, but where is your bamboo grown?

Our bamboo is grown on managed farms/plantations in Southeastern China. Since all of the bamboo fiber is processed in China and there is an abundance of bamboo growing in China, we use the bamboo grown there.

Bamboosa imports the fiber from China and completes the manufacturing processes (spinning, knitting, dyeing, and sewing) in South Carolina. Occasionally, we buy yarn from China, as opposed to fiber, and then complete the manufacturing in S.C.

I have read that they are clear cutting old growth forest in China to make way for more bamboo farms. Is that true?

We have found absolutely no evidence of any cutting of timber to plant bamboo. In fact, we have found that in 2007 the forest area in China grew by 12.84 million acres or the equivalent of nearly 2.3 billion trees. On January 14, 2008, China announced plans to plant more than 2.5 billion trees in 2008 covering an additional 13.09 million acres. The National Forest Restoration Program in China also has strict protection in place for existing forest land.

We have heard there is more than one type of bamboo fiber. If that is true, what are the different types and do you use all of them? If not, which types do you use?

There are two main types of bamboo fiber. The first is usually described as mechanical and the second as chemical. Very little of the mechanical fiber is in circulation and is not widely used. The fiber produced chemically is what we use and what most companies are using at this time.

What chemicals are used in the processing of your bamboo fiber and are they hazardous?

The main chemical used in the processing is sodium hydroxide also known as caustic soda. Caustic soda is one of the most widely used chemicals in the world. It is used in food production, soap making, manufacturing of bio diesel, production of paper, and is used on nearly all cotton fabrics, including organic cotton, during wet processing. Caustic soda is approved for use on textiles under the Global Organic Textile Standard (GOTS).

While caustic soda is a strong chemical it poses no health hazard if used and disposed of properly.

Some other manufacturers of bamboo fiber clothing say their apparel is Oeko Tex 100 certified, which means that no harmful chemicals were used in the production of their product and that their product is certified to be chemical free. Are your products certified to the Oeko Tex 100 Standard?

There seems to be a fair amount of confusion regarding the Oeko Tex 100 Standard and what it means. The Oeko Tex 100 Standard is a certification of a product at a given point in the manufacturing process. The certification states that there are no chemicals present in the product, at that point in the processing, that would be harmful to human health, including that of babies. It does not certify that no chemicals were used in the processing nor does it make any evaluation of what processes were used or any evaluation of the facilities that participated. There are other Oeko Tex certifications, such as 1000 and 100+ that certify processes or facilities but Oeko Tex 100 does not.

To our knowledge, all of the bamboo fiber produced is Oeko Tex 100 certified. We know for sure that the fiber that we purchase has achieved that certification. Bamboosa currently has no further certifications past the point of the fiber. However, the facility where we do our wet processing (dyeing and finishing of fabrics) is working on GOTS certification. We can assure our customers there are no chemicals used in our wet processing (dyeing and finishing) that are not approved for use by GOTS.

Complaint

EXHIBIT A (continued)Bamboo Fiber Processing <http://www.bamboosa.com/bamboo.php?PID=63rl>

We do know that there are some purveyors of bamboo apparel who state that their apparel is certified, when what they actually mean is that the fiber is certified. If companies selling bamboo fiber apparel have additional certifications past the fiber stage they would have the documentation for those certifications.

Because of the processing, should bamboo fiber still be considered "green"?

The production of bamboo fiber can and should be improved. R&D is underway to improve the process. Hopefully, a process similar to lyocel using organic solvents will someday be the standard for bamboo production. In the meantime, to discount all of the known positives of bamboo because it is not the darkest shade of green or 100% eco-friendly would be as bad of a decision as saying that organic cotton is not green or eco-friendly because of the amount of water used to grow it or because caustic soda is used in the processing.

Some facts to consider about the greenness of bamboo would be:

- Bamboo is grown without pesticides or chemical fertilizers
- Bamboo requires no irrigation
- Bamboo rarely needs replanting
- Bamboo grows rapidly and can be harvested in 3-5 years
- Bamboo produces 35% more oxygen than an equivalent stand of trees
- Bamboo is a critical element in the balance of oxygen and carbon dioxide in the atmosphere
- Bamboo is an excellent soil erosion inhibitor

Additionally, bamboo fiber fabric is antimicrobial, thermal regulating, wicks moisture better than polyester performance fabrics, will not hold color, is resistant to mold and mildew, and is absorbent and fast drying keeping you dryer and more comfortable than any cotton or polyester fabrics.

Why do some bamboo fabrics not always feel as soft as other bamboo fabrics?

The first possibility would be that the bamboo fiber that was used is the mechanically produced variety, which does not produce a soft fabric, as opposed to the chemically produced type, which produces a very soft fabric.

In addition, even if the fiber was of the chemically produced variety, other factors can dramatically impact the softness of the finished fabric, as they can with any fiber. The type of yarn, open end or ring spun is a major contributing factor to how a fabric feels. Ring spinning causes the fibers to lay down in a parallel fashion, where open end yarns tend to have more fibers that have exposed ends, making that yarn less soft to the touch than ring spun.

Finally, during wet processing (the scouring/bleaching/dyeing and finishing process) many variables exist. Some of these could certainly result in a change in the hand on the fabric. A pH level that is too high, temperatures exceeding the limits of the fiber, any surface applications such as anti-curling agents, flame retardants, softeners, etc.; any of these could impact the look and the feel of the finished fabric.

Is bamboo organically grown?

Yes, our bamboo fiber is Certified Organic and you can see our certifications and read about them here on our website. The farm where the bamboo is grown is certified by the OCIA and the bamboo crops are certified by the USDA organic seal.

The activist is not the man who says the river is dirty. The activist is the man who cleans up the river. - Ross Perot

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Complaint

EXHIBIT B

The exhibit shows five clothing labels for Bamboosa products. Three labels are for sizes MD, XL, and LG, and two are for sizes MD and XL. Each label includes care instructions, material composition, and the Bamboosa logo. Below the labels is a list of product benefits.

MD
wash cold separately
tumble dry low
warm iron no steam
75% bamboo
25% cotton
Made in America
bamboosap.com
www.bamboosa.com

XL
wash cold separately
tumble dry low
warm iron no steam
95% bamboo
5% spandex
Made in America
bamboosap.com
www.bamboosa.com

LG
wash cold separately
tumble dry low
warm iron no steam
100% bamboo
Made in America
bamboosap.com
www.bamboosa.com

MD
wash cold separately
tumble dry low
warm iron no steam
75% bamboo
25% cotton
Made in America
bamboosap.com
www.bamboosa.com

XL
wash cold separately
tumble dry low
warm iron no steam
95% bamboo
5% spandex
Made in America
bamboosap.com
www.bamboosa.com

Bamboosa
Bamboo
Products
Made in USA

- **Anti-bacterial & Odor free**
Natural anti-bacterial agent makes bamboo fiber apparel odor-resistant
- **Safe & Hypoallergenic**
Bamboo fabric is not chemically treated preventing skin allergies and irritations
- **Breathable & Cool**
Bamboo clothing is highly breathable providing a cool, light texture and feel
- **Absorbent & Fast-drying**
Bamboo fiber micro-holes provide moisture absorption & ventilation
- **Soft & Silky**
Fabric from bamboo is softer than the finest cotton - similar to silk or cashmere
- **Natural & Eco-friendly**
Bamboo, a natural cellulose fiber is 100% biodegradable & grown without pesticides

Complaint

EXHIBIT C**Bamboo** 

- The fastest growing plant in the world - growing as fast as 47.6 inches in a 24-hour period
- More than 1200 species all over the planet, native to every continent except Europe and the poles
- Tolerates extremes of drought and drowning and can be harvested in 3-5 yrs versus 10-20 yrs
- A tensile strength superior to steel and a weight-to-strength ratio surpassing that of graphite
- Releases 35% more oxygen than equivalent stands of trees
- Earth's most sustainable plant; needs no replanting and grows without fertilizers or pesticides
- Bamboo and its related industries provide income, food and housing to over 2.2 billion people

Bamboosa products 

- **Natural & Hypoallergenic:** because bamboo contains a natural and unique anti-bacteria and bacteriostatic agent called 'bamboo kun', bamboo fiber clothing does not need any antimicrobial chemical additives, which often cause skin allergies and other irritations
- **Anti-bacterial & Odor free:** even after 50 washes, bamboo fiber fabric has a 70% elimination rate when incubated with bacteria - this natural anti-bacteria function along with the excellent permeability and evaporation of moisture makes bamboo apparel odor-free
- **Breathable & Cool:** the cross-section of bamboo fiber is filled with various micro-gaps and micro-holes which provides better moisture absorption and enhanced ventilation
- **Biodegradable & Eco-friendly:** as a natural cellulose fiber, bamboo is 100% biodegradable and the decomposition process does not cause any pollution to the environment - compared to a fabric such as polyester which comes from petroleum, a depleting source and not biodegradable
- **Absorbent & Fast-drying:** bamboo apparel is highly breathable and absorbent providing a distinctive cool, light texture and feel
- **Soft & Silky:** along with the environmental benefits, fabric made from bamboo fiber is softer than cotton, feels similar to silk or cashmere and has a beautiful sheen

BambooBaby 

- Safe, soft and natural products for your baby's comfort and health
- Wicks moisture away from baby's skin and stays dry
- Chemical and pesticide free fabric against your baby's tender skin

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having heretofore issued its complaint charging respondents The M Group, Inc., also d/b/a Bamboosa, a corporation, and Mindy Johnson, Michael Moore, and Morris Saintsing, individually and as members of the corporation (“respondents”), with violations of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*, the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.*, and the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303, 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 a consent order, an admission by respondents of all jurisdictional facts set forth in the aforesaid complaint, a statement that the signing of the 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 any of 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 § 3.25(c) of its Rules, 16 C.F.R. § 3.25(c) (2010); and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter from interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, 16 C.F.R. § 3.25(f) (2010), the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent The M Group, Inc., also doing business as Bamboosa, is a South Carolina corporation. Its street

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address is 32 Seaboard Road, Andrews, South Carolina 29510, and its mailing address is PO Box 1239, Andrews, South Carolina 29510.

2. Respondents Mindy Johnson, Michael Moore, and Morris Saintsing are the members of The M Group, Inc. Individually or in concert with others, they formulate, direct, or control the policies, acts, or practices of the corporation. Their principal offices or places of business are the same as that of Bamboosa.
3. The 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. "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.
3. "Covered product" shall mean any or all of the following: (1) any article of wearing apparel, costume or accessory, drapery, floor covering, furnishing, bedding, or other textile good of a type customarily used in a household, regardless of where used in fact, that is made, in whole or in part, of yarn or fabric; or (2) any

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fiber, yarn or fabric, whether in the finished or unfinished state, used or intended for use in any such textile good.

4. "Fiber trademark" shall mean a word or words used to identify a particular fiber sold by a person and to distinguish it from fibers of the same generic class sold by others, as defined in 16 C.F.R. § 303.1(r).
5. "Generic name of any manufactured fiber" shall mean any name for a textile fiber established and defined by the Commission pursuant to Section 70e(c) of the Textile Fiber Products Identification Act, as set forth in 16 C.F.R. § 303.7.
6. "Is degradable, biodegradable, or photodegradable" shall mean that the entire product will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.
7. "Manufactured fiber" shall mean any fiber derived by a process of manufacture from any substance which, at any point in the manufacturing process, is not a fiber, as defined in 15 U.S.C. § 70(d).
8. "Required information" shall mean such information as is required to be disclosed on labels or invoices and in advertising under the Textile Fiber Products Identification Act, 15 U.S.C. § 70 *et seq.*, and under the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303, as defined in 16 C.F.R. § 303.1(e).
9. Unless otherwise specified, "respondents" shall mean The M Group, Inc., also doing business as Bamboosa, a corporation, its successors and assigns and its officers and members; Mindy Johnson, Michael Moore, and Morris Saintsing, individually and as members of the corporation; and each of the above's agents,

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representatives, and employees.

I.

IT IS ORDERED that respondents, 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 covered product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication:

- A. That such covered product
 - 1. is made of bamboo or bamboo fiber, including, but not limited to, through the use of a fiber trademark or other descriptive term or name for a product or product line, *e.g.*, BambooBaby;
 - 2. is anti-microbial or retains the anti-microbial properties of any material from which it is made; or
 - 3. is degradable, biodegradable, or photodegradable,unless the representation is true, non-misleading, and, at the time it is made, respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation; or
- B. About the benefits, performance, or efficacy of such covered product, unless the representation is true, non-misleading, and, at the time it is made, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

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PROVIDED, HOWEVER, that nothing in this order shall prohibit respondents from describing a covered product using the generic name of any manufactured fiber and identifying bamboo as the cellulose source for such fiber, *e.g.*, rayon made from bamboo, so long as such representation is true, non-misleading, complies with the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.* (“Textile Act”) and with the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303 (“Textile Rules”), and, at the time such representation 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, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product in or affecting commerce, shall not fail to comply with any provision of the Textile Fiber Products Identification Act, 15 U.S.C. § 70, *et seq.* (“Textile Act”), or of the Rules and Regulations promulgated thereunder, 16 C.F.R. Part 303 (“Textile Rules”), copies of which are attached hereto as “Appendix A,” or of the Textile Act or Textile Rules as they may hereafter be amended, including but not limited to:

- A. Selling, offering for sale, or advertising in commerce any covered product that is falsely or deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constituent fibers contained therein, 15 U.S.C. §§ 70a, 70b;
- B. Selling, offering for sale, or advertising in commerce any covered product that does not have a stamp, tag, label, or other means of identification on or affixed to the inside center of the neck midway between the shoulder seams or, if such product does not contain a

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neck, in the most conspicuous place on the inner side of such product, unless it is on or affixed on the outer side of such product, or in the case of hosiery items on the outer side of such product or package, 15 U.S.C. § 70b(j);

- C. Failing to use the recognized generic name of any manufactured fiber in the required information in any labels, invoices, or advertising of any covered product, 16 C.F.R. §§ 303.6 and 303.7;
- D. Failing to include all required information on labels for any covered product and in any written advertisement disseminated for a covered product that is used to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of such covered product, including identifying:
 - 1. the generic names and percentages by weight of the constituent fibers present in the covered product, in amounts of 5 percent or more and in the order of predominance set forth in 16 C.F.R. § 303.16(a)(1);
 - 2. the name or registered identification number issued by the Commission of the manufacturer or of one or more persons marketing or handling the covered product; and
 - 3. the name of the country where such covered product was processed or manufactured, as provided for in § 303.33, 15 U.S.C. § 70b(b); 16 C.F.R. §§ 303.16 and 303.42(a);
- E. Failing to ensure that any fiber trademark or generic name used on the label of or in any advertising for any covered product:

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1. is not false, deceptive, or misleading as to fiber content; and
 2. does not indicate, directly or indirectly, that the covered product is composed wholly or in part of a particular fiber, when such is not the case, 16 C.F.R. §§ 303.17(d) and 303.41(d);
- F. Failing to ensure that any non-required information or representations used on the label of or in the advertising for any covered product:
1. do not interfere with, minimize, detract from, or conflict with required information;
 2. do not include any names, terms, or representations prohibited by the Textile Act or Rules; and
 3. are not false, deceptive, or misleading, 16 C.F.R. §§ 303.16(c) and 303.42(b);
- G. Where a covered product is advertised in such manner as to require disclosure of the information required by the Textile Act and Textile Rules, failing to include all parts of the required information in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence, 16 C.F.R. § 303.42(a);
- H. Where a fiber trademark is used in advertising a covered product, failing:
1. to include the generic name of the fiber contained in such covered product in immediate proximity to and in conjunction with such fiber trademark; and
 2. to include a full disclosure of the fiber content information required by the Textile Act and Textile

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Rules in at least one instance in any such advertisement, 16 C.F.R. § 303.41;

- I. Failing to ensure that any words, coined words, symbols or depictions used in the labeling or advertising of a covered product which:
 1. constitute or imply the name or designation of a fiber;
 2. are phonetically similar to the name or designation of a fiber; or
 3. are only a slight variation of spelling from the name or designation of a fiber are not used in such a manner as to represent or imply that such fiber is present in the covered product, unless such fiber is actually present in that product, 16 C.F.R. § 303.18; and
- J. Failing to maintain for at least three years proper records for any covered products manufactured by respondent, including records showing the fiber content, 15 U.S.C. § 70d(b); 16 C.F.R. § 303.39.

IV.

IT IS FURTHER ORDERED that respondent The M Group, Inc., also doing business as Bamboosa, and its successors and assigns, and respondents Mindy Johnson, Michael Moore, and Morris Saintsing 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, labeling, packaging and promotional materials containing the representation;

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- B. All materials that were relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
- D. All acknowledgments of receipt of this order obtained pursuant to Part V.

V.

IT IS FURTHER ORDERED that respondent The M Group, Inc., also doing business as Bamboosa, and its successors and assigns, and respondents Mindy Johnson, Michael Moore, and Morris Saintsing shall deliver a copy of this order to all current and future principals, members, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that respondent The M Group, Inc., also doing business as Bamboosa, and its successors and assigns, and respondents Mindy Johnson, Michael Moore, and Morris Saintsing shall notify the Commission at least thirty (30) days prior to any change with regard to The M Group, Inc., also d/b/a Bamboosa, or any business entity that any respondent directly

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or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including but not limited to formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. *Provided, however,* that, with respect to any proposed change 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.

VII.

IT IS FURTHER ORDERED that respondents Mindy Johnson, Michael Moore, and Morris Saintsing, for a period of five (5) years after the date of issuance of this order, each 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 the 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.

VIII.

IT IS FURTHER ORDERED that respondent The M Group, Inc., also doing business as Bamboosa, and its successors and assigns, and respondents Mindy Johnson, Michael Moore, and

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Morris Saintsing shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which they have complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondents each shall submit additional true and accurate written reports.

IX.

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

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a respondent 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.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by the Secretary and its

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official seal to be affixed hereto, at Washington, D.C., this seventh day of August, 2009.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from The M Group, Inc., also doing business as Bamboosa, a corporation, corporationand Mindy Johnson, Michael Moore, and Morris Saintsing, individually and as members of the corporation corporation (together, “respondents”).

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 involves respondents’ Pure Bamboo’s marketing and sale of textile fiber products purportedly ing to be made of bamboo fiber, including “Spa Wear,” “Active Wear,” and “Yoga Wear” lines of adult clothing. The FTC complaint alleges that respondents violated Section 5(a) of the FTC Act by making false claims that their textile fiber products are made ofbamboo fiber; retain the anti-microbial properties of the bamboo plantes; and will completely break down and return to the biodegrade into elements found in nature within a reasonably short period of time after customary disposal. The complaint alleges that respondents’ textile bamboo fiber products and naturally anti-microbial claims are false because the respondents’ products are actuallymade of rayon; do not retain the anti-microbial properties of the bamboo plant; . The complaint alleges that respondents’ environmentally-friendly claim is false because the rayon manufacturing processand that . Finally, the complaint alleges that respondents’ biodegradability claim is false because a substantial majority of household waste is disposed of by either in landfills, incinerators, or recycling facilities and these customary disposal methods that do not present conditions

Analysis to Aid Public Comment

that would allow for respondents' textile fiber products to decompose biodegrade into elements found in nature, within a reasonably short period of time. The complaint further alleges that the respondents failed to have substantiation for the foregoing claims.

The complaint also alleges that the respondents have violated the Textile Fiber Products Identification Act ("Textile Act") and the Rules and Regulations promulgated thereunder ("Textile Rules") by falsely and deceptively labeling and advertising their textile fiber products as bamboo to the product or packaging.

The proposed consent order contains provisions designed to prevent respondents from engaging in similar acts and practices in the future. Part I.A of the proposed order prohibits respondents from representing that any their textile fiber products (1) is are made of bamboo or bamboo fiber; (2) is are anti-microbial or retains the anti-microbial properties of any material from which it is they are made; or (3) is are degradable, biodegradable, or photodegradable, unless such representations are true, not misleading, and substantiated by competent and reliable scientific evidence. Part I.B prohibits respondents from making claims about the benefits, performance, or efficacy of any their textile fiber products, unless at the time the representation is made, it is truthful and not misleading, and is substantiated by competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence. Part II makes clear that, although Part I prohibits respondents from making false and unsubstantiated representations that their textile fiber products are made of bamboo or bamboo fiber as opposed to rayon, the respondents nonetheless may describe such products using the generic name of any manufactured fiber and identifying bamboo as the cellulose source for such fiber (*e.g.*, rayon made from bamboo), so long as such representation is true and substantiated. Part III of the proposed order prohibits respondents from failing to comply with the Textile Act and/or the Textile Rules.

Analysis to Aid Public Comment

Parts IV through VIII require respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; to notify the Commission of changes in the individual respondents' current business or employment; and to file compliance reports with the Commission and respond to other requests from FTC staff. Part IX 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. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way its terms.

Complaint

IN THE MATTER OF

**ROARING FORK VALLEY
PHYSICIANS I.P.A., INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4288; File No. 061 0172
Filed, April 5, 2010 — Decision, April 5, 2010*

This consent order addresses Roaring Fork Valley Physicians I.P.A., Inc.'s orchestrating and implementing price-related agreements and concerted refusals to deal among competing physician members of RFV to maintain and raise the price at which RFV's physician members contract with payers. Since at least 2003 RFV, although purporting to use a messenger model, negotiated price-related terms on behalf of its members for the purpose of increasing and maintaining the rates for services provided by RFV's otherwise competing physician members. Its members also engaged in concerted refusals to deal with payers except upon the collectively-agreed upon contract terms demanded during negotiations. Furthermore, RFV members did not engage in any efficiency-enhancing integration of their practices sufficient to justify the collectively negotiation or the concerted refusals to deal. The order prohibits RFV from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payers on any physician's behalf; (2) to deal, refuse to deal, or threaten to refuse to deal with payers; (3) on any terms on which a physician is willing to deal with any payer; or (4) not to deal individually with any payer, or not to deal with any payer other than through RFV. RFV is also prohibited from facilitating exchanges of information between physicians concerning any physician's willingness to deal with a payer or the terms or conditions, including price terms, on which the physician is willing to deal with a payer. RFV is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement," however, the arrangement must not restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payers outside of the arrangement.

Complaint

Participants

For the *Commission*: *Linda Blumenreich* and *Constance M. Salemi*.

For the *Respondents*: *Sharon E. Caulfield, Caplan and Earnest, LLC* and *Mark Horoschak, Womble Carlyle*.

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 Respondent Roaring Fork Valley Physicians I.P.A., hereinafter referred 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 action concerns horizontal agreements among approximately 85 competing independent physicians and physician practice groups (“physician members”) acting through Respondent to engage in concerted refusals to deal and to fix prices with payers offering coverage for health care services in the Garfield County, Colorado area. Respondent orchestrated and carried out these illegal agreements, and Respondent’s physician members participated in these illegal agreements, which have increased prices for consumers of physician services in the Garfield County area and have no legitimate justification.

Complaint

THE RESPONDENT

2. Respondent is a Colorado corporation with a principal place of business at 1906 Blake Avenue, Glenwood Springs, Colorado 81623.

JURISDICTION

3. Respondent is organized for the purpose, among others, of serving the interest of its members. Respondent exists, and operates, and at all times relevant to this Complaint has existed and operated, in substantial part for the pecuniary benefit of its physician members.

4. Respondent is a "corporation" within the meaning of Section 4 of the Federal Trade Commission Act.

5. At all times relevant to the Complaint, Respondent has been engaged in the business of contracting with payers, on behalf of its physician members, for the provision of physician services to persons for a fee.

6. Except to the extent that competition has been restrained as alleged herein, Respondent's physician members have been, and are now, in competition with one another for the provision of physician services in the Garfield County area.

7. The general business practices of Respondent and its physician members, including the acts and practices herein alleged, affect the interstate movement of patients, the interstate purchase of supplies and products, and the interstate flow of funds, and are in or affecting "commerce" as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Complaint

**OVERVIEW OF PHYSICIAN CONTRACTING WITH
PAYERS**

8. Respondent is a type of organization commonly referred to in the health care industry as an “independent practice association” because its members consist of independent physicians in solo and small group practices.

9. Physicians often contract with health plans and other third-party payers (“payers”) to establish the terms and conditions, including price and price-related terms, under which they render physician services to the payers’ enrollees. Physicians entering into such contracts often agree to lower compensation to obtain access to additional patients made available by the payers’ relationships with enrollees. These contracts may reduce payers’ costs and enable them to lower the price of insurance, and thereby result in lower medical-care costs for enrollees.

10. Absent agreements among competing physicians on the prices and terms at which they will provide services to payers’ enrollees, competing physicians decide unilaterally whether to participate in the payers’ provider networks based on the price and other terms and conditions offered by the payers.

11. To be marketable and competitive in the Garfield County area, a payer’s health plan must include in its physician network a large number of primary care and specialist physicians offering services to customers in a sufficient number of practice fields at convenient or accessible locations and at affordable prices. Because a substantial number of the primary care and specialist physicians who practice in the Garfield County area are members of Respondent, payers doing business in the Garfield County area have significant difficulty offering marketable and competitive health plans without having at least a substantial portion of Respondent’s physician members in their provider networks.

Complaint

ANTICOMPETITIVE CONDUCT

12. Respondent, acting as a combination and in conspiracy with its physician members, has acted to maintain and increase the rates at which Respondent's physician members contract with payers by (1) facilitating, coordinating, and implementing agreements to refuse to deal with payers except on collectively agreed-upon terms; and (2) facilitating, coordinating, negotiating, entering into, and implementing agreements on price-related terms.

RESPONDENT'S PHYSICIAN MEMBERS AGREE TO ABIDE BY THE CONTRACTING RULES AND POLICIES APPROVED BY RESPONDENT

13. Respondent was formed in 1994 for the purpose of entering into contracts with health maintenance organizations, insurance companies, and other entities to provide a panel of physicians to perform the physician services covered by the contracts. Under Respondent's by-laws, Respondent's Board of Directors manages its affairs. Board members are elected by the general membership at Respondent's annual meeting.

14. To join Respondent, physicians sign a "Physicians Professional Services Agreement" in which they agree to comply with the contracts that Respondent enters into and to which they opt in or accept; the bylaws, rules, and regulations of Respondent; and any policies and procedures established by Respondent. By signing the "Physicians Professional Services Agreement," Respondent's members agree to refuse and refused to enter into contracts except on Respondent's collectively agreed-upon terms. The collectively agreed-upon terms include, but are not limited to, terms in the "Bona Fide Offer Criteria" and the "Best Practices" formally adopted by Respondent's Board of Directors in mid-2003.

Complaint

15. The Bona Fide Offer Criteria states, among other things, that Respondent will not consider any Medicare-based proposal to be a bona fide offer. Respondent would not messenger offers with Medicare-based rates to its members because the offer did not meet the Bona Fide Offer Criteria. The Best Practices identify a cost of living increase (“COLA”) as a term that should be in Respondent’s payer contracts.

16. After a payer’s offer was found to comply with Respondent’s Bona Fide Offer Criteria, Respondent would hold lengthy bargaining sessions during which Respondent pressed payers to use a COLA, other Best Practice terms, and other terms in their contracts. Respondent messengered the negotiated contract to its members at the conclusion of those bargaining sessions.

17. Respondent represented itself to some prospective members as the “group which does the bargaining” with payers on the Best Practices that they should include in their proposed contracts.

**RESPONDENT, WITH ITS MEMBERS, ENGAGED IN
CONCERTED REFUSALS TO DEAL**

18. In order to collectively maintain and increase rates, Respondent’s members agreed to refuse and refused to enter into individual contracts with payers. The payers with whom Respondent’s members refused to deal, included, but were not limited to, United Healthcare, CIGNA, Government Employee Hospital Association Inc., Humana Inc., and Anthem Blue Cross and Blue Shield. When approached by payers asking them to sign individual contracts, members often referred the payers to Respondent for contracting. For example, one member told Respondent that the payer’s “contract agreements are filed in the local landfill. We will wait for them to go back to the IPA.”

19. By adopting the ban on Medicare-based rates, Respondent and its members agreed to refuse to deal and refused to deal with

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any payer using Medicare-based rates in a proposed contract. In a 2004 newsletter, Respondent told its members that it banned Medicare-based rates because any physician who has Medicare-based rates in a payer contract would face “declining reimbursements.”

20. Respondent formally adopted a restrictive network adequacy rule in 2004. The network adequacy rule states that Respondent would only sign and administer messengered contracts that at least 80 percent of all of its members and 50 percent of each specialty accepted.

21. By adopting its restrictive network adequacy rule, Respondent and its physician members again agreed to refuse to deal and refused to deal with any payer except on Respondent’s collectively agreed-upon contract terms. According to a member of the Board of Directors, the network adequacy rule was a mechanism to allow for “a consensus among the community” on the contract terms that should be accepted.

22. Respondent and its members used its restrictive network adequacy rule as a mechanism to facilitate a boycott of national payers. None of the national payers satisfied Respondent’s network adequacy rule. Only one of the national payers eventually satisfied the network adequacy rule after a second messengering attempt, and only after Respondent advised the payer to increase the offered reimbursement level to induce members to accept the contract.

23. Respondent and its members refused to provide payers who had failed to meet the network adequacy rule with the identities of the members who accepted their contracts. This further impeded the ability of the payers to contract individually with physicians and reinforced Respondent’s collective refusals to deal with national payers.

Complaint

24. Respondent also reinforced the concerted refusals to deal with payers except on its collectively agreed-upon terms by repeatedly reminding members in newsletters and other documents that Medicare-based rates banned by the Bona Fide Offer Criteria would lead to declining reimbursement, and that Respondent's role was to "keep [members] informed of best practices," and the extent to which payers used its Best Practices in their contracts.

**RESPONDENT COORDINATED AGREEMENT ON
PRICE-RELATED TERMS**

25. Respondent's formal adoption of a ban on Medicare-based rates was designed to maintain reimbursement levels in payer contracts.

26. Respondent's adoption of a COLA term in the "Best Practices," was designed to insure, among other things, that reimbursement in its payer contracts would increase.

27. Even before adopting the COLA term as an official "Best Practice," Respondent reported the benefits of an annual automatic COLA to the members in a 2002 newsletter. The newsletter stated: "Your IPA Board has been unusually inactive this year. The IPA has a Cost of Living Adjustment (COLA) built into all of our contracts so that we don't have to waste time renegotiating every year."

28. Respondent was highly effective in imposing the ban on Medicare-based rates and including the COLA term in payer contracts. None of Respondent's current contracts has rates based on Medicare and all of its contracts have a COLA.

Complaint

RESPONDENT'S CONDUCT IS NOT JUSTIFIED

29. Respondent and its physician members have not undertaken any programs or activities that create any integration among their members in the delivery of physician services sufficient to justify their acts or practices described in the foregoing paragraphs. Respondent's members do not share any financial risk in providing physician services, do not collaborate in a program to monitor and modify their clinical practice patterns to control costs or ensure quality, or otherwise integrate their delivery of care to patients.

RESPONDENT'S ACTIONS HAVE HAD SUBSTANTIAL ANTICOMPETITIVE EFFECTS

30. Respondent's actions have had, or tend to have had, the effect of unreasonably restraining trade and hindering competition in the provision of physician services in the Garfield County, Colorado area, in the following ways, among others:

- a. unreasonably restraining price and other forms of competition among physicians;
- b. increasing prices for physician services; and
- c. depriving health plans, employers, and individual consumers of the benefits of competition among physicians.

VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

31. 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

Complaint

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 fifth day of April, issues its Complaint against Respondent.

By the Commission, Commissioner Ramirez not participating.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Roaring Fork Valley Physicians I. P. A., Inc., hereinafter referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, 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 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 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 comments received from interested persons 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:

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1. Respondent is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Colorado, with its principal address at 1906 Blake Avenue, Glenwood Springs, CO 81601.
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. "Respondent" means Roaring Fork Valley Physicians I. P. A, Inc. ("RFVIPA"), its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, 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, or employees, or in which only one Physician practices medicine.
- C. "Non-exclusive Arrangement" means an arrangement that does not restrict the ability of, or facilitate the refusal of, Physicians who participate in it to deal with payors on an individual basis or through any other arrangement.

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- D. "Participate" in an entity or an arrangement means (1) to be a partner, shareholder, owner, member, or employee of such entity or arrangement, or (2) to provide services, agree to provide services, or offer to provide services to a Payor through such entity or arrangement. This definition applies to all tenses and forms of the word "participate," including, but not limited to, "participating," "participated," and "participation."
- E. "Payor" means any person that pays, or arranges for payment, for all or any part of any Physician services for itself or for any other person, as well as any person that develops, leases, or sells access to networks of Physicians.
- F. "Person" means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- G. "Physician" means a doctor of allopathic medicine ("M.D."), a doctor of osteopathic medicine ("D.O."), or a doctor of podiatric medicine ("D.P.M.).
- H. "Preexisting Contract" means a contract for the provision of Physician services 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 RFVIPA pursuant to Paragraphs VII.A.2 of this Order of such Payor's right to terminate such contract.
- I. "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.

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- J. “Qualified Clinically-Integrated Joint Arrangement” means an arrangement to provide Physician services in which:
1. all Physicians who 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 that result from such integration through the arrangement.
- K. “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 at a capitated rate,
 - b. the provision of Physician services for a predetermined percentage of premium or revenue from Payors,

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- 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, when 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 that result from such integration through the arrangement.
- L. "Qualified Arrangement" means a Qualified Clinically-Integrated Joint Arrangement or a Qualified Risk-Sharing 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,

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agreement, or understanding between or among any Physicians with respect to their provision of Physician services:

1. to negotiate on behalf of any Physician with any Payor;
 2. to refuse to deal, or threaten to refuse to deal with any Payor, in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order;
 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 other than through any 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 with a Payor;
- 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.

Decision and Order

Provided, however, that nothing in this Paragraph II shall prohibit any agreement or conduct involving Respondent that, subject to the requirements of Paragraphs V and VI of this Order, is reasonably necessary to form, Participate in, or take any action in furtherance of, a Qualified Arrangement, so long as such Qualified Arrangement is a Non-exclusive Arrangement.

III.

IT IS FURTHER ORDERED that, for three (3) years from the date this Order becomes final, for any arrangement under which Respondent would act as an agent or messenger, on behalf of any Physician or any Medical Group Practice with any Payor, Respondent shall notify the Commission in writing (“Paragraph III Notification”) at least sixty (60) days before acting as an agent or messenger for the first time under the arrangement. Respondent shall also provide Paragraph III Notification for any modifications to an arrangement previously reported to the Commission under this Paragraph. The Paragraph III Notification shall include:

- A. the number of proposed Physician Participants in the proposed arrangement;
- B. the proposed geographic area in which the proposed arrangement would operate;
- C. a copy of any proposed Physician Participation agreement;
- D. a description of the proposed arrangement’s purpose and function;
- E. a copy of any rules, best practices or guidance to providers or payers regarding contracting provisions or the contracting process;

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- F. a copy of any rule or requirement regarding participation levels;
- G. a description of any resulting efficiencies expected to be obtained through the proposed arrangement; and
- H. a description of procedures to be implemented to limit possible anticompetitive effects of the proposed arrangement, such as those prohibited by this Order.

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

- A. If, within sixty (60) days from the date of the Commission's receipt of the Paragraph III Notification, a representative of the Commission makes a written request to Respondent providing such notification for additional information, then Respondent shall not Participate in the proposed arrangement prior to the expiration of thirty (30) days after substantially complying with such request, or such shorter waiting period as may be granted in writing from the Bureau of Competition;
- B. 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 the proposed arrangement does or does not violate this Order or any law enforced by the Commission;
- C. The absence of notice that the proposed arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination

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by the Commission, or its staff, that the proposed arrangement has been approved;

- D. Receipt by the Commission of any Paragraph III Notification is not to be construed as a determination by the Commission, or its staff, that the proposed arrangement does or does not violate this Order or any law enforced by the Commission; and
- E. Paragraph III Notification shall not be required prior to Participating in any arrangement for which Paragraph III Notification has previously been given.

V.

IT IS FURTHER ORDERED that for three (3) years from the date this Order becomes final, pursuant to each Qualified Arrangement in which Respondent is a Participant, Respondent shall notify the Commission in writing ("Paragraph V Notification") at least sixty (60) days prior to:

- A. Participating in, organizing, or facilitating any discussion or understanding with or among any Physicians or Medical Group Practices in such Qualified Arrangement relating to price or other terms or conditions of dealing with any Payor; or
- B. Contacting a Payor, pursuant to a Qualified 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 or Medical Group Practice in such Qualified Arrangement.

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

- A. Paragraph V Notification shall include the following information regarding the Qualified Arrangement pursuant to which Respondent intends to engage in the above identified conduct:
1. the total number of Physicians and the number of Physicians in each specialty Participating in the Qualified Arrangement;
 2. a description of the Qualified Arrangement, including its purpose and geographic area of operation;
 3. a description of the nature and extent of the integration and the efficiencies resulting from the Qualified 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 Qualified Arrangement;
 5. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Qualified 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 any relevant market, including, but not limited to, the market share of Physician services in any relevant market.

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- B. If, within sixty (60) days from the Commission's receipt of the Paragraph V Notification, a representative of the Commission makes a written request to Respondent for additional information, then Respondent shall not Participate in any arrangement described in Paragraph V.A or Paragraph V.B 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;
- C. 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 the proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission;
- D. The absence of notice that the proposed Qualified Arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualified Arrangement has been approved;
- E. Receipt by the Commission of any Paragraph V Notification regarding Participation pursuant to a proposed Qualified Arrangement is not to be construed as a determination by the Commission that any such proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission; and
- F. Paragraph V Notification shall not be required prior to Participating in any Qualified Arrangement for which Paragraph V Notification has previously been given.

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VII.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days after the date on which this Order becomes final:
1. send a copy of this Order and the Complaint by first-class mail with delivery confirmation or electronic mail with return confirmation and a letter in Attachment B explaining the Order to:
 - a. every Physician who Participates, or has Participated, in Respondent at any time since January 1, 2001; and
 - b. each current officer, director, manager, and employee of Respondent;
 2. send by first-class mail, return receipt requested to the chief executive officer of each Payor with whom Respondent has record of being in contact since January 1, 2001, regarding contracting for the provision of Physician services:
 - a. a copy of this Order and the Complaint; and
 - b. the letter attached as Appendix A to this Order.
- B. Terminate, without penalty or charge, and in compliance with any applicable laws any Preexisting Contract or Contracts with any Payor who is sent the letter attached as Appendix A to this Order, at the earlier of: (1) receipt by Respondent of a written request to terminate such contract from any Payor that is a party to the contract, or (2) the earliest termination

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date, renewal date (including any automatic renewal date), or the anniversary date of such contract.

Provided, however, a Preexisting Contract with a Payor to be terminated pursuant to Paragraph VII.B 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 Paragraph VII.B. of this Order, to terminate the Preexisting Contract at any time.

- C. Within ten (10) days of receiving a written request to terminate from a Payor, pursuant to Paragraph VII.B of this Order, distribute, by first-class mail, return receipt requested, a copy of that request to each Physician Participating in such contract as of the date that Respondent receives such request to terminate; and
- D. For three (3) years from the date this Order becomes final:
 1. Distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:

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- 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 who contracts with Respondent for the provision of Physician services, 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 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 position;
2. Annually publish in any official report or newsletter sent to all Physicians who Participate in Respondent a copy of this Order and the Complaint with such prominence as is given to regularly featured articles.

VIII.

IT IS FURTHER ORDERED that Respondent shall file verified written reports within sixty (60) days from 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 report shall include, among other information that may be necessary:

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- A. The name, address, and telephone number of each Payor with which Respondent has had any contact during the one (1) year period preceding the date for filing such report;
- B. The identity of each Payor sent a copy of the letter attached as Appendix A, the response of each Payor to that letter, and the status of each contract to be terminated pursuant to that letter;
- C. Copies of the delivery confirmations or electronic mail with return confirmations required by Paragraph VII.A.1, and copies of the signed return receipts required by Paragraphs VII.A.2, VII.C, and VII.D; and
- D. A detailed description of the manner and form in which Respondent has complied and is complying with this Order.

IX.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

- A. Of any change in its Principal Address within twenty (20) days of such change in address; and
- B. At least thirty (30) days prior to any proposed: (a) dissolution of Respondent; (b) acquisition, merger, or consolidation of Respondent; or (c) any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

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X.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and
- B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on April 5, 2030.

By the Commission, Commissioner Ramirez not participating.

Decision and Order

APPENDIX A

[letterhead of RFVIPA]

[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 Roaring Fork Valley Physicians I.P.A., Inc. ("Roaring Fork").

Pursuant to Paragraph VII.B of the Order, Roaring Fork must allow you to terminate, upon your written request, without any penalty or charge, any contracts with Roaring Fork that are in effect as of the date you receive this letter.

If you do not make a written request to terminate the contract, Paragraph VII.B. further provides that the contract will terminate on the earlier of the contract's termination date, renewal date (including any automatic renewal date), or anniversary date, which is [date].

You may, however, ask Roaring Fork to extend the contract beyond [date], the termination, renewal, or anniversary date, to any date no later than [date], one (1) year after the date the Order becomes final.

If you choose to extend the term of the contract, you may later terminate the contract at any time.

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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,

[Roaring Fork to fill in information in brackets]

APPENDIX B

[Letterhead of Roaring Fork Valley Physicians I.P.A.]

Dear Member:

The Federal Trade Commission has ordered the Roaring Fork Valley Physicians I. P. A., Inc. ("Roaring Fork"), to cease and desist its collective contracting activities. A copy of the Commission's Complaint and Order is enclosed.

In order that you may readily understand the terms of the Order, we have set forth its essential provisions and describe its application to Roaring Fork's contracting activities, although you must realize that the Order itself is controlling, rather than the following explanation of its provisions.

(1) Roaring Fork, on behalf of its members, is prohibited from engaging in any collective contracting activities affecting rates in payer contracts. Roaring Fork is prohibited under the Order from:

(i) collectively refusing to accept proposed contracts for messengering with Medicare-based rates,

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- (ii) collectively asking payers to include a cost of living adjustment in the contract to be messengered, and
- (iii) directing payers seeking information on the rates acceptable to members to look at collectively-negotiated I. P. A. contracts;

The Order prohibits the adoption and enforcement of any new rule or guidance affecting the rates of its members in payer contracts.

(2) Roaring Fork, with and on behalf of its members, is further prohibited from adopting or implementing any rule or guideline or engaging in other conduct that promotes members' collective refusals to deal with payers that do not conform to Roaring Fork's bona fide offer criteria, best practices or other contracting guidance. Examples of the prohibited conduct include:

- (i) the network adequacy rule stating that 80 percent of the members and 50 percent of the specialists must accept a contract before Roaring Fork agrees to administer it; and
- (ii) the rule preventing Roaring Fork from providing payers with the identity of members who wish to contract with the payer.

(3) All Roaring Fork contracts currently in effect with payers must be canceled no later than one year after the Order becomes final.

Sincerely yours,

[appropriate RFV officer]

Analysis to Aid Public Comment

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 (“proposed order”) with Roaring Fork Valley Physicians I.P.A., Inc., (“RFV”). The agreement settles charges by the Federal Trade Commission that RFV violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by, among other things, orchestrating and implementing price-related agreements and concerted refusals to deal among competing physician members of RFV to maintain and raise the price at which RFV’s physician members contract with payers.

The proposed 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 order has been entered into for settlement purposes only and does not constitute an admission by the proposed respondent 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.

RFV is a type of organization commonly referred to in the health care industry as an “independent practice association” because its members consist of independent physicians in solo and small group practices. RFV is controlled by and organized in

Analysis to Aid Public Comment

substantial part for the pecuniary benefit of its approximately 85 physician members. RFV is located in Garfield County, Colorado.

The complaint alleges that since at least 2003 RFV, although purporting to use a messenger model, negotiated price-related terms on behalf of its members for the purpose of increasing and maintaining the rates for services provided by RFV's otherwise competing physician members. RFV increased rates by demanding that payers include automatic annual cost of living adjustments (COLAs) in their contracts. RFV held lengthy bargaining sessions with payers to pressure them into including COLAs and other terms in their contracts. To protect the automatic increases, RFV refused to messenger contracts with Medicare-based rates because of their potential to decline. RFV feared Medicare-based rates would decline over time.

The complaint also alleges that since at least 2003 RFV and its members engaged in concerted refusals to deal with payers except upon the collectively-agreed upon contract terms demanded during negotiations. RFV organized concerted refusals to deal by requiring payers contracting with RFV to persuade 80 percent of all RFV members and 50 percent of each RFV specialty ("80/50 rule") to accept their contracts. After a payer satisfied the 80/50 rule, RFV signed, administered and bound all the members to the payer's contract. RFV refused to messenger the contract of a payer who failed to satisfy the 80/50 rule. RFV reinforced the 80/50 rule by refusing to provide unsuccessful payers with the identity of the members willing to accept their contracts. RFV's refusal prevented the unsuccessful payers from contracting directly with individual physicians willing to accept the proposed contract terms. RFV also reinforced its concerted refusals to deal by encouraging members to only use the IPA for their contracting. RFV targeted its concerted refusals at national payers and warned members against contracting with them. Most national payers attempting to contract with RFV could not satisfy the 80/50 rule. RFV members did not engage in any efficiency-enhancing

Analysis to Aid Public Comment

integration of their practices sufficient to justify the collectively negotiation or the concerted refusals to deal. Accordingly, the complaint alleges that RFV violated Section 5 of the FTC Act.

The Proposed 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 RFV from entering into or facilitating any agreement between or among any physicians: (1) to negotiate with payers on any physician's behalf; (2) to deal, refuse to deal, or threaten to refuse to deal with payers; (3) on any terms on which a physician is willing to deal with any payer; or (4) not to deal individually with any payer, or not to deal with any payer other than through RFV.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits RFV from facilitating exchanges of information between physicians concerning any physician's willingness to deal with a payer or the terms or conditions, including price terms, on which the physician is willing to deal with a payer. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes RFV from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing providers' collective conduct with health-care purchasers, Paragraph II excludes certain kinds of agreements from its prohibitions. First, RFV is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing physicians, such as a "qualified

Analysis to Aid Public Comment

risk-sharing joint arrangement” or a “qualified clinically-integrated joint arrangement.” The arrangement, however, must not restrict the ability of, or facilitate the refusal of, physicians who participate in it to contract with payers outside of the arrangement.

As defined in the proposed order, a “qualified risk-sharing joint arrangement” possesses two characteristics. First, all physician participants must share substantial financial risks 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 RFV to notify the Commission before it enters into any arrangements to act as a messenger or an agent on behalf of any physicians, with payers regarding contracts. Paragraph IV sets out the information necessary to make the notification complete.

Paragraph V, for three years, requires RFV to notify the Commission before participating in contracting with health plans on behalf of either a qualified risk-sharing or a qualified

Analysis to Aid Public Comment

clinically-integrated joint arrangement. Paragraph VI sets out the information necessary to satisfy the notification requirement.

Paragraph VII imposes other notification obligations on RFV and requires the termination of certain contracts that were entered into illegally. Paragraph VII.A require RFV to distribute the complaint and order to (1) physicians who have participated in RFV since 2001; (2) to various past and current personnel of RFV; and (3) to payers with whom RFV has dealt since 2001. Paragraph VII.B requires RFV, at any payer's request and without penalty, to terminate its existing contracts with the payer for the provision of physician services. Paragraph VII.B allows certain contracts currently in effect to be extended at the written request of the payer no longer than one year from the date that the order becomes final. Paragraph VII.C requires RFV to distribute payer requests for contract termination to physicians who participate in the contract Paragraph VII.D requires RFV for three years, to provide new members, personnel, and payers not previously receiving a copy, a copy of the Order and the Complaint. Paragraph VII.D also requires RFV to publish annually a copy of the Order and the Complaint in its newsletter.

Paragraphs VIII, IX, and X impose various obligations on RFV to report or provide access to information to the Commission to facilitate the monitoring of compliance with the order. Finally, Paragraph XI provides that the order will expire in 20 years.

Complaint

IN THE MATTER OF

RICHARD J. STANTONCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4287; File No. 072 3165
Filed, April 5, 2010 — Decision, April 5, 2010*

This consent order addresses Richard J. Stanton's marketing and distribution of a variety of online seal certification marks ("website seals" or "seals") for companies to display on their websites. Mr. Stanton falsely represented to consumers that his company, Controlscan, had verified the privacy and security protections offered by a company displaying ControlScan's Business Background Reviewed, Registered Member, Privacy Protected, and Privacy Reviewed seals, and falsely represented how frequently ControlScan reviewed a company's fitness to display each of these seals, as well as an additional seal, the Verified Secure seal. The complaint describes, with specificity, the claims respondent made regarding its verification of a company displaying each of the challenged seals, as well as the verification that ControlScan in fact conducted in connection with each seal. The consent order prohibits respondent from misrepresenting: 1) the verification that is conducted concerning the protection that a company provides for the privacy and/or security of consumer information or the steps a company has taken to provide such protection; or 2) the frequency of such verification. Mr. Stanton was required to pay to the Commission \$102,000 in equitable monetary relief.

Participants

For the *Commission*: *Laura Berger, Katie Race Brin, and Kristin Krause Cohen.*

For the *Respondents*: *Steven D. Cooper, Stites & Harbison, PLLC.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Richard Stanton, through his direction, control, and ownership of

Complaint

ControlScan, Inc. (“ControlScan” or “the company”), has violated the provisions of the Federal Trade Commission Act (“FTC Act”), and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Richard Stanton (“respondent”) founded ControlScan, a privately-owned, Delaware corporation that, among other things, has offered a variety of online seal certification marks (“website seals” or “seals”) for companies to display on their websites. Respondent controlled the design of the company’s product offerings and was its CEO from its founding until approximately September 2007 and its sole owner from its founding until approximately February 2007. He retains an ownership interest in the company. Individually, or in concert with others, he has formulated, directed, controlled, or participated in the policies, acts, or practices of ControlScan, including the acts or practices alleged in this complaint.

2. The acts and practices of respondent as alleged in this complaint are in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act.

CONTROLSCAN’S SEAL PRODUCTS

3. In approximately October 2005, respondent, through his control and ownership of ControlScan, began to offer a variety of privacy and data security seals for online companies to post on their websites including, but not limited to, the Business Background Reviewed, Verified Secure (initially offered as Hacker Defended and/or Trusted Secure), and Privacy Protected seals. In approximately July 2007, respondent, through his control and ownership of ControlScan, began to provide the Registered Member (initially Security Reviewed) and Privacy Reviewed seals for display, as substitute seals, by a company that failed to qualify for ControlScan’s Verified Secure and Privacy Protected seals, respectively (Exhibits 1-10).

4. Each ControlScan seal has included:

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- a. a graphic icon next to the seal's trade name, including, but not limited to: for Business Background Reviewed, a check mark; for Verified Secure, a padlock; for Registered Member, a prize ribbon; and for Privacy Protected and Privacy Reviewed, a shield; and
- b. a stamp that displays the current date (a "date stamp"), which (except with regard to the Registered Member seal) appears beside the word "verified," *e.g.*,



5. During the relevant time period, respondent, in connection with his operation of ControlScan, also offered a "joint seal design" that a company could elect to use in order to display the Verified Secure or Registered Member seal in combination with

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the Business Background Reviewed seal (*see* Exhibit 6). In addition to the date stamp and applicable graphic icons, this joint seal design displayed the words “Internet Security by ControlScan,” *e.g.*,



6. During the relevant time period, each seal also has included a window that “pops up” onscreen when a consumer clicks on the seal and remains visible until the consumer clicks to close it (a “pop-up”). Each pop-up has contained the name of the website displaying the seal and has described ControlScan’s verification of that website’s privacy and/or security protections.

7. From ControlScan’s founding until approximately September 2007, respondent controlled the design, content, and format of ControlScan’s seals and pop-ups.

REPRESENTATIONS REGARDING THE SEALS

8. Beginning in approximately October 2005, ControlScan, under respondent’s direction and control, made statements to consumers regarding ControlScan’s verification of the privacy and/or security protections that companies displaying its seals provide for consumer information. At various times, such statements have included, but not been limited to:

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- a. for the Business Background Reviewed seal, a statement in the pop-up that “You can shop in confidence knowing your personal information is safe with [a website displaying the seal]”; and a pop-up heading that displayed the words “ControlScan Verified Site” beside a padlock icon (*see* Exhibit 2).
- b. for the Registered Member seal, a seal design that displayed a prize ribbon icon and the pop-up quoted below (*see* Exhibits 4-5):

The [website] is currently working towards meeting the Payment Card Industry Data Security Standards. They are employing ControlScan’s PCI Compliance tool to help meet the PCI DSS guidelines. The ControlScan PCI Compliance scanning tool actively searches this website for thousands of known vulnerabilities.

The ControlScan approved PCI compliance scanning tool includes:

- Comprehensive vulnerability assessment scans looking for thousands of vulnerabilities.
- Network mapping that rapidly detects and identifies servers, desktops, routers, wireless access points and other network devices.
- Automated daily updates to the ControlScan vulnerability Knowledge Base.
- Both scheduled and automated network discovery and vulnerability scan tasks that can be executed on a daily, weekly or monthly basis.

The [website’s] ControlScan Member seal has been validated and is authentic.

For more information please visit ControlScan.com.

>> [Verify Seal using ControlScan verification database](#)

- c. for both the Business Background Reviewed and

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Registered Member seals, the joint seal design, which displayed the words “Internet Security by ControlScan” on the seal’s face (*see* Exhibit 6).

- d. for the Privacy Protected seal, a seal design that displayed the trade name “Privacy Protected” with a shield icon on the seal’s face and the pop-up quoted below, which displayed the heading “ControlScan Verified Site” beside a padlock icon (*see* Exhibits 7-8):

PRIVACY PROTECTED CERTIFICATION:

ControlScan certifies [website] as Privacy Protected. The privacy statement and practices of [website] have been reviewed by ControlScan for compliance with our strict program requirements.

You can shop in confidence knowing your personal information is safe with [website]. The [website] ControlScan certification seals have been validated and are authentic. Visit ControlScan.com for more details.

About ControlScan

ControlScan is a market leader in e-commerce security, enabling businesses and consumers to have confidence in a connected world. ControlScan helps its customers protect their infrastructure, information, and interactions by delivering services that address risks to security compliance.

- e. for the Privacy Reviewed seal, a seal design that displayed the trade name “Privacy Reviewed” with a shield icon on the seal’s face and the pop-up quoted below, which displayed the heading “ControlScan Security Reviewed” beside a padlock icon (*see* Exhibits 9-10):

[Website] is enrolled in ControlScan’s Privacy Reviewed certification program. Companies that participate in this program have their privacy policy [*sic*] reviewed by ControlScan. [Website] is currently working towards meeting the strict ControlScan Privacy Protected program requirements.

In addition to the privacy review [website] has completed a

Complaint

detailed Business Background Verification which includes verifying [website] through business licenses and Secretary of State information.

About ControlScan.

ControlScan is a market leader in e-commerce security, enabling businesses and consumers to have confidence in a connected world. ControlScan helps its customers protect their infrastructure, information, and interactions by delivering services that address risks to security compliance.

- f. for the Business Background Reviewed, Verified Secure, Registered Member, Privacy Protected, and Privacy Reviewed seals, as described in paragraphs 4.b. and 5, a date stamp that displayed the current date, which was updated on a daily basis (*see* Exhibits 1, 3, 4, 6, 7, 9).

VERIFICATION PROCEDURES

9. Contrary to the statements described in paragraph 8, in many instances, ControlScan, under respondent's direction and control, conducted little or no verification of the privacy and/or security protections for consumer information provided by companies displaying ControlScan's seals. Instead, in many instances, the company, under respondent's direction and control:

- a. provided the Business Background Reviewed seal to a company after verifying certain information, unrelated to information security, regarding the company's business address, ownership, and domain registration;
- b. provided the Registered Member seal to a company that failed to qualify for the Verified Secure seal because an electronic scan of its website ("website scan") identified an actual or potential severe vulnerability on the website, and permitted the company to display the seal indefinitely while taking no action to assess whether the company was working

Complaint

to resolve any vulnerability identified by the website scan;

- c. provided the Privacy Protected seal to a company that posted a privacy policy on its website, with no review of the company's underlying privacy or information security practices; and
- d. provided the Privacy Reviewed seal to a company that failed to qualify for the Privacy Protected seal because it failed to post a privacy policy on its website.

10. Contrary to the current date displayed in each seal's date stamp, ControlScan, under respondent's direction and control, failed to review a company's practices on a daily basis. Instead, in many instances, the company, under respondent's direction and control:

- a. for a company displaying the Business Background Reviewed, Privacy Protected, and Privacy Reviewed seal, conducted no ongoing review of the company's fitness to display the seal;
- b. for a company displaying the Verified Secure seal, conducted only a weekly scan of the company's website; and
- c. for a company displaying the Registered Member seal, conducted a weekly website scan but imposed no requirement that the company take steps to resolve any actual or potential severe vulnerability identified by the scan.

VIOLATIONS OF THE FTC ACT

11. As described in paragraph 8, respondent, through his control and ownership of ControlScan, has represented, expressly or by implication, that ControlScan has taken reasonable steps to

Complaint

verify that a company displaying the Business Background Reviewed, Registered Member, Privacy Protected, or Privacy Reviewed seals provided appropriate protection for the privacy and/or security of consumer information.

12. In truth and in fact, as described in paragraph 9, in many instances, ControlScan has not taken reasonable steps to verify that a company displaying the Business Background Reviewed, Registered Member, Privacy Protected, or Privacy Reviewed seals has provided appropriate protection for the privacy and/or security of consumer information. Therefore, the representation set forth in paragraph 11 was, and is, false or misleading.

13. As described in paragraph 8.b., respondent, through his control and ownership of ControlScan, has represented, expressly or by implication, that ControlScan has taken reasonable steps to verify that a company that displays the Registered Member seal “is currently working towards meeting the Payment Card Industry Data Security Standards.”

14. In truth and in fact, as described in paragraph 9.b., in many instances ControlScan has not taken any steps to verify that a company that displays the Registered Member seal “is currently working towards meeting the Payment Card Industry Data Security Standards.” Therefore, the representation set forth in paragraph 13 was, and is, false or misleading.

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15. As described in paragraph 8.f., respondent, through his control and ownership of ControlScan, has represented, expressly or by implication, that ControlScan has taken reasonable steps to review a company's fitness to display the Business Background Reviewed, Verified Secure, Registered Member, Privacy Protected, or Privacy Reviewed seal on a daily basis.

16. In truth and in fact, as described in paragraph 10, in many instances ControlScan has not taken reasonable steps to review a company's fitness to display the Business Background Reviewed, Verified Secure, Registered Member, Privacy Protected, or Privacy Reviewed seal on a daily basis. Therefore, the representation set forth in paragraph 15 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this fifth day of April, 2010, has issued this complaint against respondent.

By the Commission, Commissioner Ramirez not participating.

Complaint

EXHIBIT 1

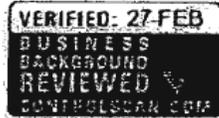


EXHIBIT 2

Complaint

Participant Verification

Page 1 of 1



SITE NAME: controlscan.com

THE SITE NAME MUST BE LISTED ABOVE TO BE A VALID CONTROLSCAN REGISTERED MEMBER.

BUSINESS BACKGROUND REVIEWED CERTIFICATION:
ControlScan has performed an in depth business background review on controlscan.com and has awarded them with the Business Background Reviewed Certification. The business background review is an in depth business background check that makes sure the company is a valid and legitimate business with ethical business standards.

ControlScan has Issued controlscan.com the Business Background Reviewed Certification through:

- Verification of Business Address and Location
- Verification of Business Registrations
- Internet Domain Names Registered to the Business
- Business registrations and location have been verified by using third party sources to confirm the information posted on the business website is correct and valid.

You can shop in confidence knowing your personal information is safe with **controlscan.com**.

The **controlscan.com** ControlScan Certification seals have been validated and are authentic.

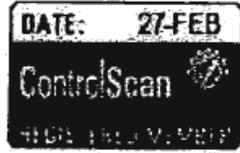
>> Verify Seal using ControlScan verification database

EXHIBIT 3



Complaint

EXHIBIT 4

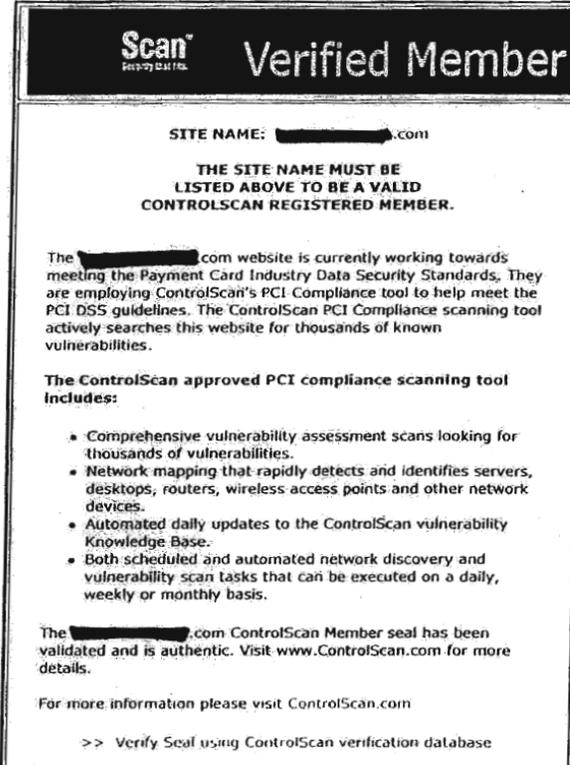


Complaint

EXHIBIT 5

Participant Verification

Page 1 of 1



Scan
EST. 2007
Verified Member

SITE NAME: ██████████.com

THE SITE NAME MUST BE LISTED ABOVE TO BE A VALID CONTROLSCAN REGISTERED MEMBER.

The ██████████.com website is currently working towards meeting the Payment Card Industry Data Security Standards. They are employing ControlScan's PCI Compliance tool to help meet the PCI DSS guidelines. The ControlScan PCI Compliance scanning tool actively searches this website for thousands of known vulnerabilities.

The ControlScan approved PCI compliance scanning tool includes:

- Comprehensive vulnerability assessment scans looking for thousands of vulnerabilities.
- Network mapping that rapidly detects and identifies servers, desktops, routers, wireless access points and other network devices.
- Automated daily updates to the ControlScan vulnerability Knowledge Base.
- Both scheduled and automated network discovery and vulnerability scan tasks that can be executed on a daily, weekly or monthly basis.

The ██████████.com ControlScan Member seal has been validated and is authentic. Visit www.ControlScan.com for more details.

For more information please visit ControlScan.com

>> Verify Seal using ControlScan verification database

Complaint

EXHIBIT 6



EXHIBIT 7



Complaint

EXHIBIT 8Certified Privacy Protected Pop-up

The following is a seal pop up box which is displayed once a company has met the Privacy Protected certification guidelines.



Complaint

EXHIBIT 9



EXHIBIT 10

Pending Privacy Protected Pop-up

The following is the seal pop-up which is displayed when a customer clicks on the Privacy Reviewed seal, i.e. the pending Privacy Protected seal.



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 which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 et seq.;

The respondent and counsel for the Commission having thereafter executed an agreement containing a 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 the agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, or that any of 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 Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Richard J. Stanton founded ControlScan, designed its product offerings, and was its chief executive officer from its founding until approximately September 2007 and its sole owner from its founding

Decision and Order

until approximately February 2007. He retains an ownership interest in the company. Individually, or in concert with others, he has formulated, directed, controlled, or participated in the policies, acts, or practices of ControlScan, including the acts or practices alleged in the complaint.

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. "Seal" shall mean any trademark, logo, seal of approval, emblem, shield, or other insignia offered for placement on a company's website.
2. Unless otherwise specified, "respondent" shall mean Stanton.
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, website, or other device, in connection with the advertising, marketing, promotion, offering for sale, or sale of any product or service, in or affecting commerce, shall not materially misrepresent, in any manner, expressly or by implication:

Decision and Order

- A. the verification that is conducted concerning the protection that a company provides for the privacy and/or security of consumer information or the steps a company has taken to provide such protection; or
- B. the frequency of such verification.

II.

IT IS FURTHER ORDERED that respondent shall pay \$102,000 to the Federal Trade Commission, as follows:

- A. Prior to or concurrently with the execution of this order, respondent shall transfer the amount specified in this Section to his undersigned counsel, who shall hold the sum in escrow for no purpose other than payment to the Commission.
- B. Within five (5) days of entry of this order, counsel for respondent shall transfer the sum to the Commission by electronic funds transfer in accordance with instructions previously provided by a representative of the Commission.
- C. In the event of any default in payment, interest shall accrue, computed pursuant to 28 U.S.C. § 1961, from the date of default to the date of payment.
- D. All funds paid to or received by the Commission pursuant to this Section shall be deposited into a fund administered by the Commission or its agent. In the event that direct restitution to consumers is wholly or partially impracticable or funds remain after restitution is completed, the Commission may apply any remaining funds for such other equitable relief (including consumer information remedies), as it determines to be reasonably related to respondent's practices as alleged in the complaint. Any funds not

Decision and Order

used for such equitable relief will be deposited with the United States Treasury as disgorgement. Respondent shall have no right to challenge the Commission's choice of remedies under this Section. Respondent shall have no right to contest the manner of distribution chosen by the Commission.

- E. Respondent relinquishes all dominion, control, and title to the funds paid to the fullest extent permitted by law. Respondent shall make no claim to or demand return of the funds, directly or indirectly, through counsel or otherwise.
- F. This order for equitable monetary relief is solely remedial in nature and is not a fine, penalty, punitive assessment, or forfeiture.

III.

IT IS FURTHER ORDERED that respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying, a print or electronic copy of, for a period of five (5) years from the date of preparation or dissemination, whichever is later, all documents, whether in written or electronic form, that relate to compliance with this order, including but not limited to:

- A. all advertisements and promotional materials containing any representations covered by this order, with all materials relied upon in disseminating the representation;
- B. consumer complaints (whether received directly, indirectly, or through any third party) that relate to respondent's activities as alleged in the draft complaint and respondent's compliance with the provisions of this order, and any responses to such complaints;

Decision and Order

- C. copies of all subpoenas and other communications with law enforcement entities or personnel, if such documents bear in any respect on respondent's activities as alleged in the draft complaint and respondent's compliance with the provisions of this order; and
- D. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

IV.

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

V.

IT IS FURTHER ORDERED that respondent, for a period of ten (10) years after the date of issuance of the order, shall notify the Commission of any changes to his employment or affiliation, or any new employment or affiliation, with any business that involves offering or providing seals or related products or services. The notice shall include any new business address and telephone number and a description of the nature of the business or employment, including the respondent's duties or responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement,

Decision and Order

Bureau of Consumer Protection, Federal Trade Commission,
Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

VII.

This order will terminate on April 5, 2030, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. any Part in this order that terminates in fewer than twenty (20) years;
- B. this order if such complaint is filed after the order has terminated pursuant to this Part.

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

Decision and Order

By the Commission, Commissioner Ramirez not participating.

Analysis to Aid Public Comment

**ANALYSIS OF PROPOSED CONSENT ORDER TO AID
PUBLIC COMMENT**

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Richard J. Stanton (“respondent”), the founder and former Chief Executive Officer of ControlScan, Inc. (“ControlScan”). The Commission has entered into a separate settlement with ControlScan to be filed in federal district court in the Northern District of Georgia.

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 again will review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement’s proposed order.

This matter involves respondent’s marketing and distribution of a variety of online seal certification marks (“website seals” or “seals”) for companies to display on their websites. The FTC complaint alleges that respondent violated Section 5(a) of the FTC Act by falsely representing to consumers that ControlScan had verified the privacy and data security practices of companies displaying its website seals, when in fact it had not. Specifically, the complaint alleges that respondent falsely represented to consumers that ControlScan had verified the privacy and security protections offered by a company displaying ControlScan’s Business Background Reviewed, Registered Member, Privacy Protected, and Privacy Reviewed seals, and falsely represented how frequently ControlScan reviewed such companies’ fitness to display each of these seals. In addition, the complaint alleges that respondent falsely represented to consumers how frequently ControlScan reviewed companies’ fitness to display the Verified Secure seal. The FTC complaint describes, with specificity, the claims respondent made regarding ControlScan’s verification of a

Analysis to Aid Public Comment

company displaying each of the challenged seals, as well as the verification that ControlScan in fact conducted in connection with each seal.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits respondent from misrepresenting: 1) the verification that is conducted concerning the protection that a company provides for the privacy and/or security of consumer information or the steps a company has taken to provide such protection; or 2) the frequency of such verification. Part II requires respondent to pay to the Commission \$102,000 in equitable monetary relief. Parts III through VI of the proposed order are reporting and compliance provisions. Part III requires respondent to keep copies of documents relevant to compliance with the order for a five-year period. Part IV requires respondent to provide copies of the order to certain personnel of companies he controls, and Part V requires him to notify the Commission of changes in his employment or affiliation with any business that involves offering or providing seals or related products or services. Part VI mandates that respondent file an initial compliance report with the Commission and respond to other requests from FTC staff. Part VII 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 agreement and proposed order or to modify in any way its terms.

Complaint

IN THE MATTER OF

TRANSITIONS OPTICAL, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4288; File No. 091 0062
Filed, April 22, 2010 — Decision, April 22, 2010

This consent order addresses Transitions Optical, Inc.'s exclusionary acts and practices used to maintain its monopoly power in the photochromic lens industry. Transitions has monopoly power in the relevant market for the development, manufacture and sale of photochromic treatments for corrective ophthalmic lenses in the United States. Since 1999, Transitions has maintained its dominance, in significant part, by implementing exclusive agreements and other exclusionary policies at nearly every level of the photochromic lens distribution chain. The order provides that any exclusive agreements between Transitions and Indirect Customers must: i) be terminable without cause, and without penalty, on 30 days written notice; ii) be available on a partially exclusive basis, if requested by the customer; and iii) not offer flat payments of monies in exchange for exclusivity Transitions from adopting or implementing any agreement or policy that results in "exclusivity" with lens casters, or its "Direct Customers." Also, Transitions may not limit its customers from communicating or discussing a competing photochromic lens with consumers and others. Furthermore, Transitions cannot offer market share discounts, *i.e.*, discounts based on the percentage of a customer's sales of Transitions' lenses as a percentage of all photochromic lens sales and Transitions cannot offer discounts that are applied retroactively once a customer reaches a specified threshold.

Participants

For the *Commission*: *Linda M. Holleran* and *Christopher G. Renner*.

For the *Respondents*: *Jeffrey Ayer*, *William Kolasky*, and *Jim Lowe*, *Wilmer Cutler Pickering Hale & Dorr LLP*.

Complaint

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 Transitions Optical, Inc. (“Transitions” or “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 as follows:

NATURE OF THE CASE

1. This action concerns Transitions’ exclusionary acts and practices in the photochromic lens industry. Transitions has improperly maintained its monopoly power by engaging in exclusionary acts and practices, which include entering into exclusive dealing arrangements that foreclose its rivals from key distribution channels. Transitions’ conduct has led to higher prices, lower output, reduced innovation and diminished consumer choice.

RESPONDENT

2. Respondent Transitions is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 9251 Belcher Road, Pinellas Park, Florida 33782. Transitions develops, manufactures and sells photochromic treatments for corrective ophthalmic lenses.

JURISDICTION

3. At all times relevant herein, Transitions has been, and is now, a corporation as “corporation” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

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4. The acts and practices of Transitions, including the acts and practices alleged herein, are in commerce or affect commerce in the United States, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

RELEVANT MARKET

5. The relevant product market is no broader than the development, manufacture and sale of photochromic treatments for corrective ophthalmic lenses. The relevant geographic market is the United States.

6. Consumers of corrective ophthalmic lenses (lenses used in eyeglasses to correct vision defects) may purchase those lenses with the option of an add-on photochromic treatment, which protects eyes from harmful ultraviolet (“UV”) light. A “photochromic lens,” or a corrective ophthalmic lens with a photochromic treatment, will darken when it is exposed to the UV light present in sunlight, and fade back to clear when it is removed from the UV light.

7. Each year, U.S. consumers purchase roughly 76 million pairs of corrective ophthalmic lenses. In 2008, photochromic lenses represented approximately 18-20% of all corrective ophthalmic lens sales in the United States, totaling approximately \$630 million in sales at the wholesale level.

8. There are no close substitutes for photochromic lenses, and no other product significantly constrains the prices of photochromic lenses. Photochromic lenses have characteristics and uses distinct from those of clear corrective ophthalmic lenses, polarized lenses (which are designed to remove glare), or fixed-tint lenses (*e.g.*, prescription sunglasses).

Complaint

**TRANSITIONS HOLDS MONOPOLY POWER IN THE
RELEVANT MARKET**

9. Transitions possesses monopoly power in the relevant market. Transitions' share of the relevant market has been at least 80 percent during each of the past five years. In 2008, Transitions' market share was over 85 percent.

10. Significant and lasting barriers make entry into the relevant market difficult. These barriers include, but are not limited to: (i) product development costs; (ii) capital requirements; (iii) intellectual property rights; (iv) regulatory requirements; and (v) Transitions' unfair methods of competition.

11. Transitions' monopoly power is also demonstrated directly by its ability to exclude competitors and to control prices. The indicia of Transitions' monopoly power include, but are not limited to, the ability of Transitions: (i) to coerce lens casters, which manufacture and distribute corrective ophthalmic lenses, to accept exclusive dealing arrangements; (ii) to price its product without regard to its competitors' prices; (iii) to impose significant price increases; and (iv) to withhold a desired product – a low-priced, private label photochromic lens – from consumers in the United States, even though Transitions supplies it in other markets.

**TRANSITIONS EMPLOYED UNFAIR METHODS OF
COMPETITION TO MAINTAIN ITS MONOPOLY IN
THE RELEVANT MARKET**

12. Beginning in 1999 and continuing through to today, Transitions has engaged in unfair methods of competition that foreclose key distribution channels for existing rivals and impede market entry by potential rivals. Transitions has engaged in acts and practices that, when considered individually and collectively, have the effect of improperly maintaining Transitions' monopoly power in the relevant market. Transitions' exclusionary actions have caused injury to competition and to consumers. Transitions'

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conduct is likely to continue to harm competition absent the relief requested herein, and violates Section 5 of the FTC Act.

A. The Photochromic Lens Industry

13. Transitions partners with lens casters to produce its photochromic lenses. Specifically, lens casters supply the corrective ophthalmic lenses to Transitions, and Transitions uses proprietary processes to apply patented photochromic dyes or other photochromic materials to the lens. Transitions then sells the lenses, now photochromic, back to the original lens casters. Lens casters are Transitions' only direct customers.

14. Nearly 100 percent of all photochromic lenses are first sold and/or produced by lens casters. Attempts to bypass lens casters by fabricating photochromic lenses at lower levels of the supply chain (*e.g.*, the wholesale optical laboratories or optical retailers) have largely been abandoned as uneconomical.

15. Lens casters sell and distribute these photochromic lenses alongside their clear corrective ophthalmic lenses. Lens casters sell these lenses through two distribution channels: wholesale optical laboratories ("wholesale labs") and optical retailers ("retailers"), each of which represent approximately one half of the downstream market.

16. Wholesale labs sell ophthalmic lenses, including photochromic lenses, to ophthalmologists, opticians and optometrists (collectively known as "eye care practitioners") who are not affiliated with retailers. The wholesale labs grind the lens according to a lens prescription, fit the lens into an eyeglass frame, and deliver the frame with the finished lens to the eye care practitioner. In addition to these laboratory functions, a wholesale lab will often employ a sales force to promote specific lenses to eye care practitioners. Photochromic lens suppliers, such as Transitions, use wholesale labs and their sales forces to market their lenses because wholesale labs are the most efficient means

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for a photochromic lens supplier to promote and sell its products to the tens of thousands of independent eye care practitioners prescribing photochromic lenses to consumers.

17. There has been considerable consolidation in the wholesale lab channel in recent years as lens casters have begun to acquire wholesale labs. Lens casters generally have used these wholesale labs to sell and promote primarily their own brand of lenses.

18. Retailers represent the other important distribution channel for photochromic lenses, and include national, regional and smaller retail chains. Retailers generally provide both eye care practitioner and laboratory services. They employ their own eye care practitioners who deal directly with consumers. In addition, retailers grind and fit lenses into eyeglass frames and deliver the frame with the finished lens to the consumer. Because retailers employ their own eye care practitioners, the retail channel is generally a more efficient means for promoting and selling photochromic lenses to consumers than comparable efforts through the wholesale lab channel. For example, a decision by the corporate headquarters of one retail chain to buy a specific photochromic lens can have an immediate impact on the prescribing behavior of all the practitioners who are employed by that retailer. The retail channel has also witnessed significant consolidation over time.

B. Transitions' Exclusive Dealing with Lens Casters

19. In 1999, Corning Inc. ("Corning") introduced a new plastic photochromic lens, SunSensors[®], which was a direct challenge to Transitions. Transitions responded to this competitive threat by terminating the first lens caster that began selling the new SunSensors[®] lens, Signet Armorlite, Inc. ("Signet"), and by adopting a general policy not to deal with any lens caster that sold or promoted a competing photochromic lens. Transitions continues to enforce this policy by, among other things, entering into agreements with certain lens casters that

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expressly require exclusivity and by publicizing its exclusive dealing policy. Accordingly, even lens casters that have not signed exclusive agreements with Transitions have a clear and well-founded understanding that Transitions will refuse to deal with them if they sell or promote a competing photochromic lens. This understanding is reinforced by Transitions' acts and practices, including but not limited to, the following:

- a. Transitions terminated Signet when it began selling a competing photochromic lens, SunSensors[®];
- b. Transitions announced its policy to deal only with exclusive lens casters;
- c. Transitions threatened to terminate other lens casters that did not initially agree to sell Transitions' photochromic lenses on an exclusive basis; and
- d. Transitions terminated another lens caster, Vision-Ease Lens ("Vision-Ease"), because Vision-Ease planned to sell a competing photochromic lens, LifeRx[®], that it had developed for use on its own ophthalmic lenses.

20. Given Transitions' dominant market position and practice of demanding exclusivity, lens casters face powerful economic incentives to deal with Transitions on an exclusive basis. Transitions' "all-or-nothing" exclusivity policy ensures that lens casters that want to sell a competing photochromic lens will be forced to forgo significant revenues from the sale of Transitions' products, which can represent up to 40 percent of a lens caster's overall profit. In addition, a lens caster's inability to offer Transitions' photochromic lenses is likely to jeopardize significant sales of its clear corrective ophthalmic lenses as well because many chain retailers and wholesale labs (and their eye care practitioner customers) prefer to buy both clear and photochromic

Complaint

versions of the same lens.

21. Transitions' exclusionary acts and practices exclude rival suppliers of photochromic treatments that need to partner with lens casters to bring their product to market, such as Corning. For example, no major lens caster has been willing to sell the SunSensors[®] plastic photochromic lens since Transitions terminated Signet. Without access to effective distribution, Corning has been unable to pose a competitive threat to Transitions' monopoly, and has had little incentive to invest in research and development to further innovate and improve its product.

22. Transitions' exclusionary acts and practices also erect significant barriers to entry by the lens casters themselves, which can supply their own ophthalmic lenses. Some lens casters would likely develop their own competing photochromic lens absent Transitions' exclusionary conduct. Only one lens caster, Vision-Ease, has been able to resist Transitions' coercion and introduce a new photochromic lens, LifeRx[®]. However, Vision-Ease was only able to do so after it entered into secret negotiations with one of the largest optical retailers in the United States. This large retailer's commitment to buy LifeRx[®] allowed Vision-Ease to secure enough business to replace its lost Transitions sales. Since Transitions terminated Vision-Ease for introducing LifeRx[®] in 2005, no other lens caster has introduced a new line of photochromic lenses in the United States.

23. Lens casters that are exclusive to Transitions collectively account for over 85% of photochromic lens sales in the United States.

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C. Transitions' Exclusive and Restrictive Dealing with Retailers and Wholesale Labs

24. Transitions also has entered into exclusive and other restrictive agreements with its indirect customers: retailers and wholesale labs. These agreements foreclose downstream outlets for photochromic lenses and create significant barriers to entry.

25. Transitions has entered into exclusive agreements with retailers with the purpose and effect of impeding entry into the relevant market. For example, after terminating Vision-Ease for developing and selling a competing photochromic lens, Transitions entered into exclusive contracts with over 50 retailers, including many of the largest retail chains. Most of these exclusive agreements were of long duration and could not be easily terminated. Transitions' conduct deprived Vision-Ease of access to many large retailers (one of the most efficient channels of distribution for photochromic lenses to consumers), which blunted the force of its entry into the market and diminished the ability of Vision-Ease to constrain Transitions' exercise of monopoly power. Potential entrants observed Transitions' exclusionary campaign and were deterred from entering the market.

26. Transitions' agreements with wholesale labs restrict the ability of rivals to promote and sell their photochromic lenses to independent eye care practitioners unaffiliated with a retail chain. For example, Transitions has entered into over 100 agreements with wholesale labs, including 23 of the top 30 independent wholesale labs, that require the wholesale lab to sell Transitions' lenses as its "preferred" photochromic lens and not to promote any competing photochromic lens. The anticompetitive impact of these wholesale lab agreements is augmented by Transitions' exclusive policies with lens casters – at least 50 percent of all wholesale labs are owned by lens casters that sell Transitions' photochromic lenses on an exclusive basis. As a result, rival suppliers of photochromic treatments have only limited access to

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these lens caster-owned wholesale labs as well.

27. Additionally, Transitions' agreements with retailers and wholesale labs generally provide a discount only if the customer purchases all or almost all of its photochromic lens needs from Transitions. Because no other supplier has a photochromic treatment that applies to a full line of ophthalmic lenses, Transitions' discount structure impairs the ability of rivals to compete for sales to these customers. It also erects a significant entry barrier by limiting the ability of a rival to enter the market with a new photochromic treatment that applies to less than a full line of ophthalmic lenses.

28. Transitions' exclusive and restrictive agreements with indirect customers deprive its rivals of access to outlets for the distribution and sale of competing photochromic lenses, and impair their ability to compete effectively with Transitions or to pose a significant threat to its monopoly. These agreements also deter incremental entry by a supplier with a photochromic treatment that applies to less than the full line of ophthalmic lenses, and reinforce and strengthen the barriers to entry erected by Transitions' policy of requiring that lens casters deal exclusively with Transitions. Transitions' exclusionary practices foreclose its rivals, in whole or in part, from a substantial share – as much as 40 percent or more – of the entire downstream photochromic lens market.

**ANTICOMPETITIVE EFFECTS OF
TRANSITIONS' CONDUCT**

29. The acts and practices of Transitions as alleged herein have the purpose, capacity, tendency, and effect of impairing the competitive effectiveness of Transitions' rivals in the relevant market, and of significantly raising barriers to entry for potential rivals. Transitions' conduct reasonably appears capable of making a significant contribution to the enhancement or maintenance of Transitions' monopoly power.

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30. Transitions' conduct also adversely affects competition and consumers by:

- a. increasing the prices and reducing the output of photochromic lenses;
- b. deterring, delaying and impeding the ability of Transitions' actual or potential competitors to enter or to expand their sales in the photochromic lens market;
- c. reducing innovation; and
- d. reducing consumer choice among competing photochromic lenses.

31. Additionally, by effectively stifling competition, Transitions has been able to refuse to supply its low-priced, private label photochromic lens in the U.S. market, notwithstanding considerable consumer demand for such a product. Transitions offers this product for sale outside the United States where it faces more competition. There are no legitimate procompetitive efficiencies that justify Transitions' conduct or outweigh its substantial anticompetitive effects.

VIOLATION ALLEGED

32. The acts and practices of Respondent, as alleged herein, constitute monopolization and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

Complaint

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-second day of April, 2010, issues its complaint against Respondent.

By the Commission, Commissioner Ramirez and Commissioner Brill not participating.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of Transitions Optical, Inc. (hereinafter “TOI” or Respondent), and Respondent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined 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 comments received from interested persons, 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 Decision and Order (“Order”):

1. Respondent TOI is a corporation organized, existing

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and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 9251 Belcher Road, Pinellas Park, Florida 33782.

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:

The Parties

- A. "Respondent" or "TOI" means Transitions Optical, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Transitions Optical, Inc.; and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. "Commission" means the Federal Trade Commission.

Other Definitions

- C. "Analysis to Aid Public Comment" means the public statement provided by the Commission that describes the allegations in the Complaint in FTC Dkt. No. 091-0062 and the terms of this Order.
- D. "Antitrust Compliance Program" means the program to ensure compliance with this Order and with the

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Antitrust Laws, as required by Paragraph III of this Order.

- E. “Antitrust Laws” means the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et. seq.*, the Sherman Act, 15 U.S.C. § 1 *et. seq.*, and the Clayton Act, 15 U.S.C. § 12 *et. seq.*
- F. “Bundled Discount” means any Discount that is conditioned, either formally or informally, directly or indirectly, upon a Direct Customer or Indirect Customer’s purchase, distribution, promotion, marketing, license, or sale of Photochromic Products in more than one Lens Material and/or more than one Refractive Index Range.
- G. “Competing Photochromic Product” means any Photochromic Product other than Respondent’s Photochromic Product.
- H. “Corrective Ophthalmic Lenses” means any lens, whether finished, semi-finished or unfinished, that is designed to be used for vision correction and to be worn in eyeglass frames, including but not limited to, any single vision, bifocal, trifocal, or progressive lens made of or containing glass, polycarbonate, plastic, Trivex[®] or other materials.
- I. “Development Partner” means any Direct Customer that, together with Respondent, invests substantial resources, in terms of time, money and/or technical know-how, in the research and development of a new and innovative Photochromic Product.
- J. “Direct Customer” means any Person who purchases, or otherwise takes delivery or receives directly, from Respondent any Photochromic Product; or who

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conveys, delivers, consigns, or sells Corrective Ophthalmic Lenses directly to Respondent for the application of Respondent's Photochromic Materials or Photochromic Treatments. A Direct Customer includes without limitation ophthalmic lens casters, but specifically excludes Shareholders.

- K. "Discount" means any price reduction, rebate, or other incentive that provides pecuniary value to a Direct Customer or Indirect Customer, including but not limited to, marketing funds, co-op funds, and business building funds.
- L. "Exclusivity" or "Exclusive" means any requirement, whether formal or informal, or direct or indirect, by the Respondent that a Direct Customer or Indirect Customer research, develop, manufacture, distribute, produce, market, purchase, sell, or license Respondent's Photochromic Products as its Preferred or as its only Photochromic Product, or any other requirement that a Direct Customer or Indirect Customer restrain, refrain from, or limit its research, development, manufacture, production, distribution, marketing, promotion, sales, purchases, or licensing of any Competing Photochromic Product.
- M. "Executive and Sales Staff" means all Directors on the Board of Directors, the President, all Vice-Presidents, the General Counsel, the General Manager, the Chief Financial and Administrative Officer, members of the Executive Committee, and the Directors of External Affairs and Managed Vision Care of Respondent (or their equivalent positions regardless of job title); and the officers, directors, employees, and contractors of Respondent whose duties primarily relate to the marketing, promotion, or sale of Photochromic Products.

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- N. “Independent Eye Care Professional” means any optician, optometrist or ophthalmologist not affiliated with a wholesale optical laboratory or optical retailer, and who works in a non-franchised operation with fewer than four establishments.
- O. “Indirect Customer” means any Person who sells, distributes, produces, markets, promotes, purchases, or licenses Respondent’s Photochromic Products but does not buy or sell Respondent’s Photochromic Products or Corrective Ophthalmic Lenses directly from or to Respondent. Indirect Customers include, but are not limited to, any retailer of Corrective Ophthalmic Lenses, any insurance company that provides vision care benefits, and any wholesale optical laboratory, regardless of whether or not the Indirect Customer: (i) is owned, in whole or in part, by a Direct Customer; or (ii) receives shipments of Respondent’s Photochromic Products directly from Respondent on behalf of a Direct Customer.
- P. “In-Kind Contribution” means: (i) any item of pecuniary value, other than money; (ii) the reimbursement by Respondent of the purchase price of any item of pecuniary value if purchased directly by an Indirect Customer; and/or (iii) a lump-sum advance of Discounts reasonably anticipated to be paid by Respondent to an Indirect Customer if necessary to provide joint marketing support at a third party’s special event (*e.g.*, golf tournament).
- Q. “In-Person Training” means any educational session, seminar, or other meeting whereby individuals participate on a face-to-face basis or through a live video-conference feed as part of the Antitrust Compliance Program required in Paragraph III of this Order.

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- R. "Lens Material" means any glass, plastic, polycarbonate, Trivex[®] or other material used in whole or in part to manufacture Corrective Ophthalmic Lenses.
- S. "Minimum Batch Size" means the minimum quantity of Corrective Ophthalmic Lenses that can be cost effectively produced by Respondent in a single operation, which shall not exceed 150 lenses.
- T. "Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or governmental entity, and any subsidiary, division, group or affiliate thereof.
- U. "Photochromic Corrective Ophthalmic Lenses" means any Corrective Ophthalmic Lenses to which Photochromic Materials have been applied.
- V. "Photochromic Material" means any dye, monomer, coating, film or other substance that darkens when exposed to ultraviolet radiation and lightens when removed from ultraviolet radiation.
- W. "Photochromic Products" means one or more of Photochromic Materials, Photochromic Treatments, or Photochromic Corrective Ophthalmic Lenses.
- X. "Photochromic Treatments" means the process or method of applying Photochromic Materials to Corrective Ophthalmic Lenses.
- Y. "Preferred" means any requirement, whether formal or informal, or direct or indirect, that a Direct Customer or Indirect Customer research, develop, manufacture, produce, distribute, promote, market, purchase, sell, or

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license Respondent's Photochromic Products on a more favorable basis than a Competing Photochromic Product.

- Z. "Price Term" means the retail or wholesale price, resale price, purchase price, price list, credit term, delivery term, service term, or any other monetary term defining, setting forth, or relating to the money, compensation, or service paid by a Direct Customer or Indirect Customer to Respondent or received by a Direct Customer or Indirect Customer in connection with the purchase or sale of any of Respondent's Photochromic Product.
- AA. "Product Development Service" means any service, assistance or other support related to the research, development or application of any improved, modified, or innovative Photochromic Product.
- BB. "Product Support" means any service, assistance or other support related to: (i) the qualification or validation process associated with applying Respondent's Photochromic Materials or Photochromic Treatments on Corrective Ophthalmic lenses; and (ii) examining, identifying, and developing solutions related to any problems associated with the application to or performance of Respondent's Photochromic Materials or Photochromic Treatments on Corrective Ophthalmic Lenses.
- CC. "Refractive Index" means the measure of the ability of a Corrective Ophthalmic Lens to bend light, which influences the center thickness of the lens.
- DD. "Refractive Index Range" means each of the following categories of Refractive Indices for Corrective

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Ophthalmic Lenses: (i) 1.5; (ii) 1.51 - 1.60; and (iii) 1.61 and higher.

- EE. “Respondent’s Other Photochromic Products” means any ophthalmic lenses, other than Corrective Ophthalmic Lenses, that are treated with Photochromic Materials and that are researched, developed, manufactured, produced, distributed, promoted, marketed, or sold by, under license by, or on behalf of Respondent, including but not limited to, by contract manufacturers.
- FF. “Respondent’s Photochromic Product” means any Photochromic Product researched, developed, manufactured, produced, distributed promoted, marketed, or sold by, under license by, or on behalf of Respondent, including but not limited to, by contract manufacturers.
- GG. “Shareholder” means any Person that holds at least a forty (40) percent ownership interest in Respondent, its successors and assigns, and any wholly-owned subsidiaries or affiliates of such Shareholder that otherwise would be considered a Direct Customer.
- HH. “Volume Discount” means any Discount that is based upon increasing quantities of purchases or sales, by Lens Material or by Refractive Index Range, of Respondent’s Photochromic Product, and specifically excludes any Discount that is based upon the amount of Respondent’s Photochromic Products that are purchased or sold as a percentage or proportion of a customer’s total purchases or sales of Photochromic Products.

II.

Decision and Order

IT IS FURTHER ORDERED that, acting directly or indirectly, or through any corporate or other device, in or affecting commerce, as “commerce” is defined by the Federal Trade Commission Act, in connection with the licensing, development, production, manufacture, marketing, promotion, purchase or sale of Photochromic Products:

- A. Respondent shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting thereto, any condition, policy, practice, agreement, or understanding that has the intent or effect of achieving Exclusivity with a Direct Customer, including but not limited to:
1. Conditioning the research, development, manufacture, promotion, distribution, marketing, sale, purchase, or licensing of any of Respondent’s Photochromic Products on Exclusivity;
 2. Requiring a Direct Customer to purchase minimum amounts (by units, revenue, or any other measure) of Respondent’s Photochromic Products in excess of the Minimum Batch Size;
 3. Requiring a Direct Customer to restrain or limit its sales, research, development, production, distribution, marketing, promotion, purchases, or licensing of any Competing Photochromic Product; and
 4. Conditioning the availability or applicability of Discounts, Price Terms, Product Support, or Product Development Services for Respondent’s Photochromic Products on Exclusivity.

provided, however, that Respondent may enter into a written agreement, contract, or other understanding

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with any Development Partner(s) that provides for Exclusivity by both the Respondent and the Development Partner(s) regarding the research, development, manufacture, promotion, purchase, or sale of any jointly developed Photochromic Product.

- B. Respondent shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting thereto, any condition, policy, practice, agreement, contract, understanding, or any other requirement with respect to an Indirect Customer that:
1. Contains a condition, term or other provision providing for Exclusivity unless:
 - a. the Indirect Customer, for any or no cause, and without payment or penalty of any kind, may terminate any condition, agreement, contract or understanding providing for Exclusivity upon thirty (30) days or less written notice;
 - b. the condition, term or other provision providing for Exclusivity can be applied to any subset of Lens Materials and/or any subset of Refractive Index Ranges, if requested in writing by the Indirect Customer; and
 - c. the Discount terms and rates offered or provided to an Indirect Customer by Respondent for Exclusivity on any Lens Material(s) and/or any Refractive Index Range(s) are the same irrespective of whether or not the Indirect Customer elects to be Exclusive on all Lens Materials and Refractive Index Ranges or only a subset thereof.
 2. Provides a flat or lump-sum payment of monies to an Indirect Customer in exchange for any

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condition, agreement, contract or understanding providing for Exclusivity; and

3. Provides an In-Kind Contribution to an Indirect Customer in exchange for any condition, agreement, contract or understanding providing for Exclusivity, unless:
 - a. Respondent cannot recover the In-Kind Contribution, or any part of the value of the In-Kind Contribution, in the event of termination; and
 - b. The provision of the In-Kind Contribution, or the manner in which the In-Kind Contribution is provided, does not infringe upon, limit, or otherwise make it impractical for an Indirect Customer to exercise its termination rights under Paragraph II.B.1 of this Order.
- C. Respondent shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting thereto, any condition, policy, practice, agreement, contract, understanding or any other requirement by the Respondent that:
1. Limits, restrains or prohibits any Direct Customer or Indirect Customer from communicating information about any Competing Photochromic Product to any Person, unless such information is false or deceptive; and
 2. Limits, restrains or prohibits any Direct Customer or Indirect Customer from selling a Competing Photochromic Product on the same brand(s) or product(s) in which the Direct Customer or Indirect Customer also sells Respondent's Photochromic

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Products, unless an Indirect Customer has a condition, agreement, contract or other understanding with Respondent providing for Exclusivity as permitted under Paragraph II.B. of this Order.

- D. Respondent, for ten (10) years from the date this Order becomes final, shall cease and desist from inviting, entering into, implementing, continuing, enforcing, or attempting thereto, any condition, policy, practice, agreement, contract, understanding or any other requirement that:
1. Conditions Price Terms or Discounts offered or provided to a Direct Customer or Indirect Customer based upon the amount of Respondent's Photochromic Products purchased or sold (in units, revenues, or any other measure) by that Direct Customer or Indirect Customer as a percentage or proportion of that customer's total purchases or sales of Photochromic Products; and
 2. Conditions Discounts offered or provided to a Direct Customer or Indirect Customer as a flat or lump-sum payment of monies or any other item(s) of pecuniary value based upon the Direct Customer or Indirect Customer's sales or purchases of Respondent's Photochromic Products reaching a specified threshold (in units, revenues, or any other measure), or otherwise reducing the price of one unit of Respondent's Photochromic Products because of the purchase or sale of an additional unit. By way of example, Respondent may offer or provide a discount of X% on all sales in excess of Y lenses, but it may not offer or provide a discount of X% on all lenses if sales exceed Y lenses.
- E. Respondent, for ten (10) years from the date this Order

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becomes final, shall not provide Bundled Discounts to any Direct Customer or Indirect Customer.

- F. Except to the extent permitted in Paragraph II.B of this Order, Respondent shall cease and desist from discriminating against, penalizing, or otherwise retaliating against any Direct Customer or Indirect Customer, for the reason, in whole or in part, that the Direct Customer or Indirect Customer engages in, or intends to engage in, the research, development, manufacture, production, distribution, purchase, marketing, promotion, sales, or licensing of a Competing Photochromic Product, or otherwise refuses to enter into or continue any condition, agreement, contract, understanding or other requirement of Exclusivity. Examples of prohibited discrimination or retaliation against a Direct Customer or Indirect Customer shall include, but not be limited to:
1. Terminating, suspending or delaying, or threatening or proposing thereto, sales of Respondent's Photochromic Products to the Direct Customer or Indirect Customer;
 2. Auditing the Direct Customer's or Indirect Customer's purchases or sales of Photochromic Products to determine the extent of purchases or sales of Competing Photochromic Products;
 3. Withdrawing or modifying, or threatening or proposing thereto, favorable Price Terms, Product Development Services, or Product Support to the Direct Customer;
 4. Providing, or threatening or proposing thereto, less favorable Price Terms, Product Development

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Services, or Product Support to the Direct Customer;

5. Withholding from the Direct Customer or Indirect Customer Photochromic Products newly developed or introduced by Respondent; and
6. Refusing to deal with the Direct Customer or Indirect Customer on terms and conditions generally available to other Direct Customers or Indirect Customers.

provided, however, that Respondent will not be considered to be in violation of this Paragraph by the mere fact that Respondent markets or competes against a Competing Photochromic Product that is owned or sold by a Direct Customer or Indirect Customer.

- G. Notwithstanding any provision of this Order, Respondent may provide or offer to provide the following without it constituting in and of itself a violation of this Order:
 1. Volume Discounts to Direct Customers or Indirect Customers that are calculated, based upon, or reflect actual differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which Respondent's Photochromic Products are sold or delivered;
 2. Discounts to Direct Customers or Indirect Customers that are sufficient to meet but not exceed the Discounts, Price Terms, Product Development Services, or Product Support actually provided or offered to be provided by any Person selling, distributing, promoting, marketing, or licensing Competing Photochromic Products; and

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3. Discounts that are offered or provided to Direct Customers or Indirect Customers with a condition or other requirement that the Discount be used solely in the sale, development, manufacture, distribution, promotion or marketing of Respondent's Photochromic Products, *provided* that Respondent does not preclude sales or promotional efforts of Competing Photochromic Products on any portion of sales or marketing materials or events that are not funded by Respondent.
- H. Respondent, within ninety (90) days after the date this Order becomes final, shall waive or modify any condition, requirement, policy, agreement, contract, or understanding with Direct Customers or Indirect Customers that is inconsistent with the terms of this Order.

III.

IT IS FURTHER ORDERED that Respondent shall design, maintain, and operate an Antitrust Compliance Program to comply with this Order and with the Antitrust Laws. This program shall include, but not be limited to:

- A. Respondent's designation of an officer or director to supervise personally the design, maintenance, and operation of this program;
- B. Distribution of a copy of this Order and Exhibit A to this Order to all Executive and Sales Staff:
 1. Within thirty (30) days of the date this Order becomes final; and,

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2. Annually within thirty (30) days of the anniversary of the date this Order becomes final until the Order terminates;
- C. In-Person Training on the requirements of this Order and the Antitrust Laws for Respondent's Executive and Sales Staff to occur within thirty (30) days after this Order becomes final, or for any subsequently hired Executive and Sales Staff, within thirty (30) days of their employment start date;
 - D. The retention of documents and records sufficient to record Respondent's compliance with its obligations under this Paragraph III of this Order;
 - E. Creation on Respondent's web site within thirty (30) days after this Order becomes final, and which shall be maintained until the termination of this Order, a link to this Order and the Analysis to Aid Public Comment on the Commission's web site, with such link to be located on Respondent's web site at a place reasonably calculated to be found by Independent Eye Care Professionals.
 - F. Distribution within thirty (30) days after this Order becomes final of a copy of this Order, the Analysis to Aid Public Comment, and Exhibit B to all Direct Customers who have purchased or sold Photochromic Products from or to Respondent within twelve (12) months prior to the date this Order becomes final; and
 - G. Distribution of a copy of this Order, the Analysis to Aid Public Comment, and Exhibit B to:
 1. All Indirect Customers with existing conditions, contracts, agreements or other understandings providing for Exclusivity within thirty (30) days

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after this Order becomes final and at the time of any contract renewal; and

2. All Indirect Customers, other than Independent Eye Care Professionals, that may enter into new conditions, contracts, agreements or other understandings providing for Exclusivity, or any other contracts, agreements or other understandings for the provision of Discounts to the Indirect Customer, at the beginning of any negotiations, or before any proposals or offers are made or accepted by Respondent.

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

- A. Within sixty (60) days after the date this Order becomes final, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which the Respondent has complied, is complying, and will comply with this Order. For the period covered by this report, the report shall include, but not be limited to:
 1. The name, title, business address, e-mail address, and business phone number of the officer or director designated by Respondent to design, maintain, and operate Respondent's Antitrust Compliance Program;
 2. The name, title, and business address of each Person to whom Respondent distributed a copy of Exhibit A to this Order, and the date and manner of distribution to each;

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3. The name, title, and business address of each Person who received In-Person Training on the requirements of this Order and the Antitrust Laws; the date and location at which each Person was trained; the name, title, and business address of the Person who conducted the training; and a description in reasonable detail of the In-Person Training;
 4. The name, address, and phone number of each Direct Customer to whom Respondent distributed a copy of this Order, the Analysis to Aid Public Comment, and Exhibit B to this Order; and,
 5. The name, address, and phone number of each Indirect Customer to whom Respondent distributed a copy of this Order, the Analysis to Aid Public Comment, and Exhibit B to this Order.
- B. One (1) year after the date this Order becomes final, and annually for the following six (6) years on the anniversary of the date this Order becomes final, as well as at any other such times as the Commission may require, Respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order. For the periods covered by these reports, these reports shall include, but not be limited to:
1. The name, title, business address, e-mail address, and business phone number of the officer or director designated by Respondent to design, maintain, and operate Respondent's Antitrust Compliance Program;
 2. The name, title, and business address of each Person to whom Respondent distributed a copy of

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Exhibit A to this Order, and the date and manner of distribution to each;

3. The name, title, business address, e-mail address, and business phone number of each Person within Respondent's Executive and Sales Staff who received Exhibit A to this Order and In-Person Training on the requirements of this Order and the Antitrust Laws during the reporting period, the date each Person received Exhibit A to this Order and In-Person Training, and a description in reasonable detail of the In-Person Training;
4. A description in reasonable detail of any policy, agreement, contract, understanding, or other requirement by Respondent that a Direct Customer or Indirect Customer deal Exclusively with Respondent with respect to any of Respondent's Other Photochromic Products, and with respect to each such product:
 - (a) Describe in reasonable detail the policy, agreement, contract, understanding, or requirement providing for Exclusivity; and,
 - (b) State the name, address, phone number, and e-mail address of each Person concerning which Respondent has enforced or attempted to enforce the policy, agreement, contract, understanding, or other requirement of Exclusivity; and
5. The name, address, phone number, and e-mail address of each Person who has complained or alleged, orally or in writing (including, but not limited to, pleadings filed in any state or federal court), that Respondent has violated this Order or

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the Antitrust Laws, a description in reasonable detail of the complaint or allegation, and a description of any action or conduct by Respondent taken or proposed in response to the complaint or allegation.

V.

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

- A. Any proposed dissolution of Respondent;
- B. Any proposed acquisition, merger or consolidation of Respondent; or
- C. Any other change in Respondent, including but not limited to, assignment, the creation or dissolution of subsidiaries, or if such change may affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that for the purpose of determining or securing compliance with this order, 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, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent; and

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- 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.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on April 22, 2030.

By the Commission, Commissioner Ramirez and Commissioner Brill not participating.

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EXHIBIT A

[INTERNAL NOTICE]

The Federal Trade Commission (“FTC”) has been investigating various practices used by Transitions Inc. (“TOI”) in the marketing and sale of photochromic materials and coatings used on corrective ophthalmic lenses. The purpose of the FTC’s investigation has been to determine if any of those practices violate federal antitrust laws.

TOI does not believe that its past or present practices violate any state or federal laws. However, to end the investigation quickly and to obtain clear guidelines about how TOI can market and sell its products, TOI has reached a settlement with the FTC. Under the settlement, TOI has signed a consent agreement with the FTC agreeing that the FTC can issue and TOI will be bound by a Decision and Order (“Order”) issued by the FTC.

It is very important to TOI that all of its executives, employees and contractors understand and comply with the Order. We are providing this notice as a first step to help you do that by telling you about the Order, describing a few of its most important terms, and telling you how you can learn more about the Order and get answers to any questions you may have about it.

Some of the Order’s terms apply to TOI’s transactions with its direct customers (e.g., lens casters), some terms apply to TOI’s relationships with its indirect customers (e.g., wholesale optical laboratories and optical retailers), and some Order terms apply to both. Generally, the Order prohibits TOI, directly or indirectly, formally or informally, from agreements or practices that require its direct customers to purchase photochromic materials, coatings, or products exclusively from TOI.

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The Order's terms regarding TOI's indirect customers are different. Under circumstances described in the Order, TOI can enter into agreements with indirect customers to sell TOI's photochromic products exclusively. However, TOI must allow these indirect customers the option to terminate these agreements without cause and without penalty on 30 days notice. TOI also must allow these indirect customers the option to sell exclusively only some of TOI's products (by lens material or by refractive index range). The terms of the Order affect how TOI can offer volume discounts, cooperative advertising, and other marketing support to its customers. The Order prohibits TOI from using its pricing and marketing policies and programs to retaliate against or punish direct or indirect customers who refuse to sell TOI's photochromic products exclusively.

TOI wants to help you better understand TOI's rights and obligations under the Order. Therefore, as required by the Order, TOI has appointed [name and title] to oversee a program to train TOI's executives and sales staff on the Order and the antitrust laws. You will be contacted soon to schedule your training, which must be conducted by [insert date 30 days from the date the Order becomes final by service]. In the meantime, if you have any questions at any time about the Order or your training, please contact [identify contact person] at [e-mail or phone].

EXHIBIT B

[Transitions letterhead]

Dear [name of customer]:

The Federal Trade Commission ("FTC") has been investigating various practices used by Transitions Inc. ("TOI") in

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the marketing and sale of photochromic materials and coatings used on corrective ophthalmic lenses. The purpose of the FTC's investigation has been to determine if any of those practices violate federal antitrust laws.

TOI does not believe that its past or present practices violate any state or federal laws. However, to end the investigation quickly and to obtain clear guidelines about how TOI can market and sell its products, TOI has reached a settlement with the FTC. Under the settlement, TOI has signed a consent agreement with the FTC agreeing that the FTC can issue and TOI will be bound by a Decision and Order ("Order") issued by the FTC.

The Order requires TOI to send the enclosed copies of the Order and the FTC's Analysis to Aid Public Comment to its customers. You also may read and download a copy of the Order from the FTC at its web site at [web link to Order] and a copy of the Analysis to Aid Public Comment at [web link to AAPC]. TOI's obligations under the Order are set out in Paragraph II of the Order, beginning on page 5. Capitalized terms used in the Order are defined in Paragraph I of the Order, which begins on page 2.

If you have concerns in the future about whether TOI is complying with its obligations under the Order, TOI invites you to raise them with us directly. You may contact any of our sales staff with whom you do business, or contact our corporate offices directly by phoning or e-mailing [name] at [phone number and e-mail address].

Alternatively or additionally, you may contact the FTC directly to express your concerns. You may reach the FTC by phone at [phone number] or by e-mail at [e-mail address].

Sincerely,

[name and title]

Analysis to Aid Public Comment

ANALYSIS TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order to Cease and Desist (“Agreement”) with Transitions Optical, Inc. (“Transitions”). The Agreement seeks to resolve charges that Transitions used exclusionary acts and practices to maintain its monopoly power in the photochromic lens industry in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Photochromic lenses are corrective ophthalmic lenses that darken when exposed to the ultraviolet light present in sunlight, and fade back to clear when removed from the ultraviolet light.

The proposed Complaint that accompanies the Agreement (“Complaint”) alleges that Transitions has used its monopoly power to impose an exclusive-dealing policy on its customers since 1999. As a result, Transitions 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.

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.

Analysis to Aid Public Comment

The Agreement is for settlement purposes only and does not constitute an admission by Transitions 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

This case involves the photochromic lens industry. Consumers of corrective ophthalmic lenses (lenses used for vision correction and worn in eyeglasses) have the option to purchase those lenses with a photochromic treatment, which protects eyes from harmful ultraviolet (“UV”) light. A “photochromic lens,” which is a corrective ophthalmic lens with a photochromic treatment, will darken when it is exposed to the UV light present in sunlight, and fade back to clear when it is removed from the UV light.

In 2008, approximately 18 to 20 percent of all corrective ophthalmic lenses purchased in the United States were photochromic, and photochromic lenses totaled approximately \$630 million in sales at the wholesale level. Photochromic lenses have characteristics and uses distinct from polarized lenses (which are designed to remove glare) and fixed-tint lenses (*e.g.*, prescription sunglasses).

Transitions produces its photochromic lenses in partnership with lens manufacturers known as “lens casters.” Lens casters supply the corrective ophthalmic lenses to Transitions, and Transitions uses proprietary methods to apply patented photochromic dyes or other photochromic materials to the lenses. Transitions then sells the lenses, now photochromic, back to the lens casters. These lens casters are Transitions’ only direct customers.

Analysis to Aid Public Comment

Lens casters, in turn, resell the photochromic lenses to wholesale optical laboratories (“wholesale labs”) and optical retailers (“retailers”). Wholesale labs generally sell corrective ophthalmic lenses, including photochromic lenses, to ophthalmologists, optometrists, and opticians (collectively known as “eye care practitioners”) who are not affiliated with retailers. Wholesale labs grind the lens according to the lens prescription, fit the lens into an eyeglass frame, and deliver the frame with the finished lens back to the eye care practitioner. In addition to these laboratory functions, a wholesale lab will often employ a sales force to promote specific lenses to eye care practitioners. Photochromic lens suppliers, such as Transitions, use wholesale labs and their sales forces to market their lenses because wholesale labs are the most efficient means for a photochromic lens supplier to promote and sell its products to the tens of thousands of independent eye care practitioners prescribing photochromic lenses to consumers.

Retailers, on the other hand, combine both eye care practitioner and laboratory services. They employ their own eye care practitioners who deal directly with consumers. In addition, retailers grind and fit lenses into eyeglass frames and deliver the frame with the finished lens to the consumer. The retail channel is generally a more efficient means for promoting and selling photochromic lenses to consumers than comparable efforts through the wholesale lab channel because a single sales effort to a large retailer can influence the prescribing behavior of hundreds of eye care practitioners. Retailers range from large national retail chains to smaller, regional ones.

This industry structure is reflected in the diagram below.

Analysis to Aid Public Comment

B. Transitions' Monopoly Power

Transitions has monopoly power in the relevant market for the development, manufacture and sale of photochromic treatments for corrective ophthalmic lenses in the United States. Transitions has garnered a persistently high share of at least 80 percent of this market over the past five years, and over 85 percent in 2008. The photochromic lens industry has high barriers to entry, which include significant product development costs and capital requirements, substantial intellectual property rights, regulatory requirements, and Transitions' anticompetitive and exclusionary conduct. Direct evidence of Transitions' ability to exclude competitors and to control prices confirms Transitions' monopoly power.

C. Transitions' Conduct

Transitions has maintained its dominance, in significant part, by implementing exclusive agreements and other exclusionary policies at nearly every level of the photochromic lens distribution chain.

1. Exclusionary Practices with Direct Customers (Lens Casters)

In 1999, Corning Inc. introduced a new plastic photochromic lens, SunSensors[®], which was a direct challenge to Transitions. Transitions responded to this competitive threat by terminating the first lens caster that began selling the new SunSensors[®] lens, Signet Armorlite, Inc. ("Signet"), and by adopting a general policy not to deal with lens casters that sold or promoted a competing photochromic lens. Transitions furthered its anticompetitive and exclusionary efforts by, among other things: (i) entering into exclusive agreements with certain lens casters; (ii) announcing to the industry its policy of dealing only with lens casters that sold its lenses on an exclusive basis; (iii) threatening to terminate lens casters that did not want to sell its lenses on an exclusive basis; and (iv) terminating a second lens caster, Vision-Ease Lens

Analysis to Aid Public Comment

("Vision-Ease"), that developed a photochromic treatment, LifeRx[®], to apply to its own ophthalmic lenses. Because of Transitions' course of conduct, even lens casters that have not signed exclusive agreements have a clear understanding that they cannot sell or promote a competing photochromic lens without being terminated by Transitions.

Transitions' exclusive policy is coercive to lens casters and acts as a powerful deterrent against selling a competing photochromic treatment because Transitions is such a large part of the photochromic lens market. Losing the sales generated by Transitions' photochromic lenses can jeopardize up to 40 percent of a lens caster's overall profit. Additionally, losing the ability to sell Transitions' photochromic lenses can endanger a lens caster's sales of clear lenses because many retailers and wholesale labs (and their eye care practitioner customers) prefer to buy both clear and photochromic versions of the same lens.

For all these reasons, Transitions has succeeded in foreclosing competitors from dealing with lens casters collectively accounting for over 85 percent of photochromic lens sales in the United States. These lens casters deal with Transitions on an exclusive basis and will not do business with any other suppliers of photochromic treatments.

2. Exclusionary Practices with Indirect Customers (Retailers and Wholesale Labs)

In an effort to shut out its rivals, Transitions also directed its exclusionary practices at its indirect customers: wholesale labs and retailers. In 2005, in order to mitigate the new competitive threat posed by Vision-Ease's introduction of LifeRx[®], Transitions began an exclusionary agreement campaign with major retailers. Transitions induced over 50 retailers, including many of the largest chains, with up-front payments and/or rebates to enter into long term exclusive agreements that were difficult to terminate.

Analysis to Aid Public Comment

Transitions also has entered into over 100 agreements with wholesale labs that require the wholesale labs to promote Transitions' lenses as their "preferred" photochromic lens and to withhold normal sales efforts for competing photochromic lenses in exchange for rebates or other items of pecuniary value. Further, at least 50 percent of all wholesale labs are owned by lens casters that sell only Transitions' lenses. Because these lens casters generally use their wholesale labs to promote and sell primarily their own brand of lenses, this further impairs competitors' access to wholesale labs.

Additionally, Transitions' agreements with retailers and wholesale labs generally provide a discount only if the customer purchases all or almost all of its photochromic lens needs from Transitions. Because no other supplier has a photochromic treatment that applies to a full line of ophthalmic lenses, Transitions' discount structure impairs the ability of rivals to compete for sales to these customers. It also erects a significant entry barrier by limiting the ability of a rival to enter the market with a new photochromic treatment that applies to less than a full line of ophthalmic lenses.

Transitions' exclusionary practices with retailers and wholesale labs foreclose rivals, in whole or in part, from a substantial share – as much as 40 percent or more – of the retailer and wholesale lab distribution channels.

D. Competitive Impact of Transitions' Conduct

Transitions' course of conduct harms competition by marginalizing existing competitors and by deterring new entry. Faced with the threat of termination by Transitions, no major lens caster operating in the United States has been willing to carry the plastic SunSensors[®] lens since Transitions terminated Signet. Without access to effective distribution, Corning has been unable to pose a competitive threat to Transitions' monopoly, and has had little incentive to invest in research and development to improve

Analysis to Aid Public Comment

its product. Further, some lens casters would likely develop and/or sell competing photochromic lenses, but Transitions' exclusive dealing – particularly its “all or nothing” ultimatum to lens casters – effectively deters new entrants.

Transitions' conduct at the wholesale lab and retailer levels also has harmed competition. For example, Transitions deprived Vision-Ease of access to many large retailers (one of the most efficient channels for distributing photochromic lenses to consumers), which blunted the force of its entry into the market and diminished its ability to constrain Transitions' exercise of monopoly power. Potential entrants observed Transitions' exclusionary campaign against Vision-Ease and have been deterred from entering the market.

Further, Transitions' exclusionary policies at all levels of the distribution chain deter potential competitors from entering the market on an incremental basis. Transitions' “all or nothing” policy with lens casters deters them from purchasing or developing a competing photochromic treatment that can be applied to less than a full line of ophthalmic lenses because the lens caster is unlikely to be able to recoup the substantial profits it would have made from the sale of the full line of Transitions' products. Similarly, the structure of Transitions' discounts to retailers and wholesale labs – which are generally conditioned on the customer's purchase of all or almost all of Transitions' products – places competitors with less than a full line of photochromic lenses at a disadvantage when competing for this business.

Transitions' exclusionary practices have likely increased prices and reduced output. For example, because it does not face effective competition, Transitions has been able to ignore consumer demand and refuse to supply its low-priced, private label photochromic lens in the U.S. market, even though Transitions offers this product in other markets.

Analysis to Aid Public Comment

Transitions' conduct has also harmed consumers by depriving rivals of the incentive to innovate and to develop competing photochromic lenses. If faced with more competition, Transitions would also likely have a greater incentive to invest additional resources in research and development.

There are no procompetitive efficiencies that justify Transitions' conduct or outweigh its substantial anticompetitive effects.

II. Legal Analysis

Exclusive dealing by a monopolist is condemned under Section 2 of the Sherman Act, 15 U.S.C. § 2, when the challenged conduct significantly impairs the ability of rivals to compete with the monopolist and thus to constrain its exercise of monopoly power.¹ Agreements that foreclose key distribution channels are often found to have this proscribed effect and are deemed illegal.²

¹ 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 Corp.*, 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 Int’l, Inc.*, 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).

² See, e.g., *Microsoft*, 253 F.3d at 64 (condemning exclusive agreements that foreclosed rivals from “cost-efficient” distribution channels); *LePage’s*, 324 F.3d at 159-60 (finding “exclusionary conduct cut LePage’s off from key retail pipelines”). See also Richard A. Posner, *ANTITRUST LAW* 229 (2d ed. 2002) (noting that exclusive dealing may “increase the scale necessary for new entry, and . . . increase the time required for entry and hence the opportunity for monopoly pricing”).

Analysis to Aid Public Comment

The factual allegations in the Complaint are consistent with a finding of monopoly power and competitive harm. Transitions' policy of requiring exclusivity from its lens caster customers has foreclosed its rivals from over 85 percent of available sales opportunities at this level of the distribution chain. This foreclosure is particularly significant because nearly all photochromic lenses are first sold by lens casters – attempts to fabricate photochromic lenses at the wholesale lab or retailer level have largely been abandoned as uneconomical. The competitive impact of this exclusive dealing with lens casters is amplified by Transitions' exclusionary practices with retailers and wholesale labs, which further foreclose rivals, in whole or in part, from as much as 40 percent or more of these downstream distribution channels. Transitions' exclusionary conduct has thus likely caused higher prices, lower output, and reduced innovation and consumer choice.

A monopolist may rebut a such a showing of competitive harm by demonstrating that the challenged conduct is reasonably necessary to achieve a procompetitive benefit.³ Any proffered justification, if proven, must be balanced against the harm caused by the challenged conduct.⁴

No procompetitive efficiencies justify Transitions' exclusionary and anticompetitive conduct. Transitions cannot show that the exclusive arrangements were reasonably necessary to achieve a procompetitive benefit, such as protecting Transitions' intellectual property or technical know-how, or preventing interbrand free-riding.⁵ Transitions does not transfer

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

Analysis to Aid Public Comment

substantial intellectual property or technical know-how to its customers, and even if it did, any such transfer would likely be protected by existing confidentiality agreements.

A concern about interbrand free-riding also does not justify the substantial anticompetitive effects found here. The vast majority of Transitions' promotional efforts are brand specific, reducing the significance of any free-riding concern.⁶ While Transitions' marketing efforts may generate some consumer interest in the product category as a whole – and not just in Transitions' 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.⁷

III. The Order

The proposed Order remedies Transitions' anticompetitive and exclusionary conduct and imposes certain fencing-in requirements that are designed to prevent *de facto* exclusive dealing.⁸ Paragraph II of the Order addresses the core of Transitions'

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.”).

⁷ *See In re Polygram*, 136 F.T.C. 310, 361-62 (2003), *aff'd*, 416 F.3d 29, 37-38 (D.C. Cir. 2005).

⁸ We use the term “*de facto* exclusive dealing” to refer to practices that significantly deter a customer from purchasing or selling a competing photochromic lens.

Analysis to Aid Public Comment

exclusionary conduct and seeks to lower entry barriers and to restore competition. Paragraph III requires Transitions to implement an antitrust compliance program, which includes providing notice of this Order to Transitions' customers. Paragraphs IV-VI impose reporting and other compliance requirements. The Order expires in 20 years unless otherwise indicated.

Paragraph II.A prohibits Transitions from adopting or implementing any agreement or policy that results in "exclusivity" with lens casters, or its "Direct Customers." "Exclusivity" is defined in the Order to include any requirement that a customer limit or refrain from dealing with a competing photochromic lens, as well as any requirement that a customer give Transitions' products more favorable treatment as compared to a competitor's products.

Paragraph II.B allows Transitions to enter into exclusive agreements with retailers and wholesale labs ("Indirect Customers"), provided certain safeguards are met. Specifically, any exclusive agreements with Indirect Customers must: i) be terminable without cause, and without penalty, on 30 days written notice; ii) be available on a partially exclusive basis, if requested by the customer; and iii) not offer flat payments of monies in exchange for exclusivity. These provisions, along with Paragraph II.E, which prohibits Transitions from bundling discounts, are designed to enable a competitor or entrant to compete for a customer's business, even if it does not offer a photochromic treatment that applies to a full line of ophthalmic lenses. Creating conditions conducive to effective entry on an incremental basis is likely to hasten new entry and to restore competition.

Under Paragraph II.C, Transitions may not limit its customers from communicating or discussing a competing photochromic lens with consumers and others. This Paragraph also requires Transitions to allow a lens caster or another customer that sells

Analysis to Aid Public Comment

Transitions' photochromic treatment on a particular brand of lens to sell a competitors' photochromic treatment on the same brand.

Paragraph II.D has two provisions designed to prevent *de facto* exclusive dealing through pricing policies. First, Transitions cannot offer market share discounts, *i.e.*, discounts based on the percentage of a customer's sales of Transitions' lenses as a percentage of all photochromic lens sales. Second, Transitions cannot offer discounts that are applied retroactively once a customer reaches a specified threshold. For example, Transitions may provide a discount on sales beyond 1000 units but it may not lower the price of the first 999 units if and when the customer buys the 1000th unit. The provisions in Paragraph II.D, along with Paragraph II.E, will be in effect for 10 years.

Notwithstanding any provision of the Order, Paragraph II.G explicitly allows Transitions to provide volume discounts that reflect certain cost differences, and to offer discounts to meet competition. It also allows Transitions to require that any monies it provides to customers be used solely for the manufacture, promotion or sale of Transitions lenses.

Finally, Paragraph II.F prohibits Transitions from retaliating against a customer that purchases or sells Transitions lenses on a non-exclusive basis.

Complaint

IN THE MATTER OF

**SERVICE CORPORATION INTERNATIONAL
AND
KEYSTONE NORTH AMERICA, INC.**

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

*Docket No. C-4284; File No. 101 0013
Filed, March 24, 2010 — Decision, April 30, 2010*

This consent order addresses the acquisition by Service Corporation International of Keystone North America Inc. The relevant funeral and cemetery services markets are highly concentrated, and the acquisition would significantly increase market concentration and eliminate substantial, direct competition between two significant funeral and cemetery services providers. The acquisition also will result in SCI controlling between 52 percent and 93 percent market share in each of the affected funeral services markets. With respect to the cemetery services markets, the acquisition will reduce the number of cemetery services providers from five to four in the Columbia, South Carolina and Macon, Georgia areas, and from three to two in Yuma, Arizona. The proposed Consent Agreement requires the divestiture of 22 funeral services facilities and four cemetery services facilities, as well as related equipment, customer and supply contracts, commercial trade names, and real property in the 19 funeral and cemetery services markets at issue in this transaction. Each funeral and cemetery services facility to be divested is a stand-alone business, and includes all of the assets necessary for a Commission-approved buyer to independently and effectively operate each facility.

Participants

For the *Commission*: *Susan Huber, Kaj Rozga, Andrea Ryan, Jennifer Stiefvater, and Michelle Yost.*

For the *Respondents*: *Brian McCalmon and James Weiss, K&L Gates LLP; and Howard Fogt, Jr. and Alan Rutenberg, Foley & Lardner LLP.*

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COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Service Corporation International (“SCI”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Respondent Keystone North America Inc. (“KNA”), 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 (“FTC Act”), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS AND JURISDICTION

1. Respondent SCI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1929 Allen Parkway, Houston, Texas 77019. SCI, among other things, is engaged in the sale and provision of: (a) funeral services and associated products, and (b) cemetery services and associated products and property.

2. SCI owns and operates 1,266 funeral service locations and 372 cemetery service locations worldwide, including 1,073 funeral service locations in 43 states and the District of Columbia, and 357 cemetery service locations in 31 states. SCI’s 2009 revenue from all operations totaled approximately \$2.05 billion.

c. SCI is, and at all relevant times has been, engaged in “commerce” as defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

4. Respondent KNA is a corporation organized, existing, and doing business under and by virtue of the laws of Canada, with its

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registered and head office at Suite 2400, 250 Yonge Street, Toronto, Ontario, M5B 2M6. KNA conducts business in the United States through its headquarters located at 400 North Ashley Drive, Suite 1900, Tampa, Florida 33602. KNA, among other things, is engaged in the sale and provision of: (a) funeral services and associated products, and (b) cemetery services and associated products and property.

5. KNA owns and operates 199 funeral service locations and 15 cemetery service locations in the United States and Canada, including 196 funeral service locations in 31 states, and 15 cemetery service locations in seven states. KNA's revenue for the 12 months ending June 30, 2009 totaled approximately \$124 million.

6. KNA is, and at all relevant times has been, engaged in "commerce" as defined in Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

II. THE ACQUISITION

7. On October 14, 2009, SCI and KNA executed a definitive support agreement pursuant to which SCI agreed to acquire all of the outstanding voting securities of KNA (the "Acquisition").

8. The Acquisition would combine the largest and fifth largest funeral and cemetery service providers in North America. SCI and KNA offer competing funeral and cemetery services in 19 local geographic markets, including 16 funeral services markets and three cemetery services markets where the Acquisition, if consummated, likely would substantially lessen competition.

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III. THE RELEVANT PRODUCT MARKETS**A. Funeral Services and Associated Products**

9. One relevant product market in which to analyze the competitive effects of the Acquisition is the provision and sale of funeral services and associated products (“funeral services”). Funeral services includes all activities relating to the promotion, marketing, sale, and provision of funeral services and goods, including, but not limited to, goods and services used to remove, care for, and prepare bodies for burial, cremation or other final disposition; and goods and services used to arrange, supervise, or conduct the funeral ceremony or final disposition of human remains.

10. There are no products or services that are reasonably interchangeable with or viable substitutes for funeral services.

B. Cemetery Services and Associated Products and Property

11. The provision and sale of cemetery services and associated products and property (“cemetery services”) constitutes a relevant product market in which to analyze the competitive effects of the Acquisition. Cemetery services includes all activities relating to the promotion, marketing, sale and provision of property, goods and services to provide for the final disposition of human remains in a cemetery, whether by burial, entombment in a mausoleum or crypt, disposition in a niche, or scattering of cremated remains on the cemetery grounds.

12. There are no products or services that are reasonably interchangeable with or viable substitutes for cemetery services.

13. In some local markets, certain funeral and cemetery service locations cater to specific populations by focusing on the customs and rituals associated with one or more religious, ethnic, or cultural heritage groups. In such situations, the provision of funeral services or cemetery services targeted to such populations

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may constitute distinct relevant product markets. Thus, in Denver, Colorado, the provision of funeral services to the Latino community constitutes a relevant product market in which to analyze the competitive effects of the acquisition.

IV. THE RELEVANT GEOGRAPHIC MARKETS

14. The 16 geographic markets in which to analyze the effects of the Acquisition with respect to funeral services are: Yuma, Arizona; Monterey Area, California; Denver, Colorado; Auburndale/Winter Haven, Florida; Vidalia, Georgia; Bossier City Area, Louisiana; Lansing, Michigan; East Aurora, New York; Northern Rockland County, New York; Charlotte Area, North Carolina; Greensboro Area, North Carolina; Columbia, South Carolina; West Columbia/Lexington, South Carolina; New Tazewell, Tennessee; Lynchburg Area, Virginia; and Yakima, Washington.

15. The three geographic markets in which to analyze the effects of the Acquisition with respect to cemetery services are: Yuma, Arizona; Macon Area, Georgia; and Columbia Area, South Carolina.

V. MARKET STRUCTURE AND MARKET CONCENTRATION

16. Under the 1992 Department of Justice and Federal Trade Commission Merger Guidelines (“Merger Guidelines”) and relevant case law, SCI’s acquisition of KNA is presumptively unlawful in the markets for funeral services and cemetery services in a total of 19 geographic markets. Under the Herfindahl-Hirschman Index (“HHI”), which is the standard measure of market concentration under the Merger Guidelines, an acquisition is presumed to create or enhance market power or facilitate its exercise if it increases the HHI by more than 100 points and results in a post-acquisition HHI that exceeds 1,800 points. The

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Acquisition creates market concentration levels well in excess of these thresholds.

A. Funeral Services

17. For funeral services, the post-acquisition HHIs range from 3730 to 8632, and HHI levels will increase by 295 to 4130 points over pre-acquisition levels. The Acquisition also will result in SCI controlling between 52 percent and 93 percent market share in each of the affected funeral services markets.

- a. Yuma, Arizona. Post-acquisition, SCI will have a market share of 69 percent. The Acquisition will increase the HHI by 2055 points, from 3277 to 5332. In addition, the Acquisition will reduce from four to three the number of funeral services providers in the relevant market.
- b. Monterey Area, California. Post-acquisition, SCI will have a market share of 93 percent. The Acquisition will increase the HHI by 4001 points, from 4631 to 8632, and eliminate one of only three funeral services providers in the relevant market.
- c. Denver, Colorado. Post-acquisition, SCI will have a market share of 71 percent of the market for funeral services targeted to the Latino community. The Acquisition will increase the HHI by 2445 points, from 3433 to 5878, and create a duopoly for such services in the Denver market.
- d. Auburndale/Winter Haven, Florida. Post-acquisition, SCI will have a market share of 59 percent. The Acquisition will increase the HHI by 1303 points, from 2737 to 4040.
- e. Vidalia, Georgia. Post-acquisition, SCI will have a market share of 81 percent. The Acquisition will

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increase the HHI by 3243 points, from 3647 to 6890, and eliminate one of only three competitors, creating a duopoly in the market.

- f. Bossier City Area, Louisiana. Post-acquisition, SCI will have a market share of 68 percent. The Acquisition will increase the HHI by 1726 points, from 3896 to 5622, and eliminate one of only three competitors, creating a duopoly in the market.
- g. Lansing, Michigan. Post-acquisition, SCI will have a market share of 52 percent. The Acquisition will increase the HHI by 1067 points, from 2470 to 3537. In addition, the Acquisition will reduce from five to four the number of funeral services providers in the relevant market.
- h. East Aurora, New York. SCI will have a post-acquisition market share of 91 percent. In addition, the Acquisition will increase the HHI by 4130 points, from 4288 to 8418, leave only two competitors, and eliminate the first or second choice of funeral services providers for a substantial number of consumers.
- i. Northern Rockland County, New York. Post-acquisition, SCI will have a market share of 69 percent. The Acquisition will increase the HHI by 2196 points, from 3019 to 5215, and reduce the number of competitors from five to four.
- j. Charlotte Area, North Carolina. SCI will have a post-acquisition market share of 63 percent. The Acquisition will increase the HHI by 1046 points, from 3156 to 4202.
- k. Greensboro Area, North Carolina. SCI will have a post-acquisition market share of 55 percent. The

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Acquisition will increase the HHI by 1201 points, from 3254 to 4455. In addition, the Acquisition will reduce from four to three the number of funeral services providers in the relevant market.

- l. Columbia, South Carolina. SCI will have a post-acquisition market share of 62 percent. The Acquisition will increase the HHI by 1716 points, from 3291 to 5007, and reduce the number of competitors from four to three.
- m. West Columbia/Lexington, South Carolina. SCI will have a post-acquisition market share of 56 percent. The Acquisition will increase the HHI by 295 points, from 3688 to 3983, and reduce the number of competitors from five to four.
- n. New Tazewell, Tennessee. Post-acquisition, SCI will have a market share of 83 percent. The Acquisition will increase the HHI by 3120 points, from 4062 to 7182, and create a duopoly in the market.
- o. Lynchburg Area, Virginia. SCI will have a post-acquisition market share of 61 percent. The Acquisition will increase the HHI by 1762 points, from 2870 to 4632, and reduce the number of competitors from four to three.
- p. Yakima, Washington. SCI will have a post-acquisition market share of 81 percent. The Acquisition will increase the HHI by 2341 points, from 4603 to 6944, eliminate the first or second choice of funeral services providers for a substantial number of consumers, and create a duopoly in the market.

B. Cemetery Services and Associated Products and Property

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18. The Acquisition will reduce the number of cemetery services providers from five to four in the Columbia, South Carolina and Macon, Georgia areas, and from three to two in Yuma, Arizona. Moreover, for a substantial number of customers in all three relevant markets, the Acquisition will eliminate one of two competitors that are their first and second choices.

- a. Columbia Area, South Carolina. The Acquisition will reduce the number of competing cemetery services providers from four to three, and eliminate the first or second choice of cemetery services providers for a substantial number of consumers.
- b. Macon Area, Georgia. Post-acquisition, SCI will have a market share of 59 percent. The Acquisition will increase the HHI by 1456 points, from 2590 to 4046, and reduce the number of competitors from five to four.
- c. Yuma, Arizona. The Acquisition will eliminate one of only three competing cemetery services providers, creating a duopoly in the market.

VI. ANTICOMPETITIVE EFFECTS

19. The Acquisition may substantially lessen competition in the relevant markets by, among other things:

- a. eliminating actual, direct, and substantial competition between SCI and KNA;
- b. increasing the likelihood that SCI will exercise market power unilaterally; and
- c. increasing the likelihood of collusion or coordinated interaction between SCI and other funeral or cemetery service providers.

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VII. ENTRY CONDITIONS

20. Entry into the relevant markets would not be timely, likely, or sufficient to prevent or defeat the likely anticompetitive effects of the Acquisition.

21. Among other entry barriers, both heritage (the consumer's tendency to use the same funeral services provider for multiple generations) and reputation pose substantial barriers to entrants attempting to establish new funeral service locations, and the availability of suitable land, and local zoning, health and environmental regulations impact significantly the ability of firms to enter with new cemetery service locations.

VII. VIOLATIONS

22. The allegations of Paragraphs 1 through 21 are repeated and realleged as though fully set forth here.

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

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

Decision and Order

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this twenty-fourth day of March 2010.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Respondent Service Corporation International ("ASCI") of the outstanding voting securities of Respondent Keystone North America Inc. ("AKNA"), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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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, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Service Corporation International is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its corporate head office and principal place of business located at 1929 Allen Parkway, Houston, Texas 77019.
2. Respondent Keystone North America Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its registered and head office at Suite 2400, 250 Yonge Street, Toronto, Ontario, M5B 2M6. Respondent KNA does business in the United States through its headquarters, which is located at 400 North Ashley Drive, Suite 1900, Tampa, Florida 33602.
3. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

Decision and Order

ORDER**I.**

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

- A. “SCI” means Service Corporation International, its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, groups, and affiliates controlled by Service Corporation International (including, after the Acquisition Effective Date, KNA) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “KNA” means Keystone North America Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, groups, and affiliates controlled by Keystone North America Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means, collectively, SCI and KNA, provided however, that, after the Acquisition Effective Date, Respondents shall mean SCI.
- D. “Commission” means the Federal Trade Commission.
- E. “Acquirer(s)” means any Person(s) that receives the prior approval of the Commission to acquire one or more Divestiture Businesses pursuant to this Order.
- F. “Acquisition” means the proposed acquisition described in and contemplated by the Acquisition Agreement.

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- G. “Acquisition Agreement” means the Support Agreement between and among Service Corporation International, SCI Alliance Acquisition Corporation, and Keystone North America Inc., dated October 14, 2009.
- H. “Acquisition Effective Date” means the date on which Respondent SCI, directly or indirectly, acquires a controlling interest in Respondent KNA.
- I. “Business Assets” means Respondents’ rights, title, and interest in all property and assets, tangible or intangible, of every kind and description, wherever located, and any improvements or additions thereto, including but not limited to:
1. All real property interests (including fee simple interests and real property lease-hold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
 2. All Tangible Personal Property, including without limitation, Tangible Personal Property removed (and not replaced) from a Facility at any time after October 14, 2009, if such Tangible Personal Property is necessary to operate a Facility as a going concern, unless such Tangible Personal Property was removed in the ordinary course of business and has a replacement cost of less than \$1,000;
 3. All commercial names, trade names, “doing business as” (d/b/a) names, registered and

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unregistered trademarks and service marks used in a Facility other than Corporate Trade Names;

4. All inventories;
5. All accounts receivable;
6. All consents, licenses, certificates, registrations, or permits issued, granted, given or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefore or renewals thereof, to the extent assignable;
7. All Business Intellectual Property;
8. Intangible rights and property other than Business Intellectual Property, including going concern value, goodwill, internet, telephone, telecopy, e-mail, telephone numbers, addresses, domain names, listings, and websites, provided that Business Assets need not include portions of website content or domain names that contain Corporate Trade Names;
9. All Business Records;
10. All agreements, contracts, and leases; including without limitation, all Pre-Need Arrangements;
11. All insurance benefits, rights, and proceeds, including those arising from any Pre-Need Arrangements; and
12. Rights to all bank, trust, or other accounts, and all deposits therein, related to Pre-Need Arrangements and endowment or perpetual care funds, and all

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claims for refunds, and rights to offset in respect thereof.

- J. “Business Intellectual Property” means intellectual property owned or licensed by Respondents (as licensor or licensee) or in which Respondents have a proprietary interest, including: (i) commercial names, trade names, “doing business as” (d/b/a) names, registered and unregistered trademarks, logos, service marks and applications; (ii) all patents, patent applications, inventions and discoveries that may be patentable; (iii) all registered and unregistered copyrights in both published works and unpublished works; (iv) all know-how, trade secrets, confidential or proprietary information, protocols, quality control information, customer lists, software, technical information, data, process technology, plans, drawings and blue prints; and (v) all rights in websites and internet domain names presently owned or used by Respondents.
- K. “Business Records” means all information, documents and records, including all electronic records wherever stored, that are related to or used by Respondents, including without limitation, client and customer lists, referral sources, research and development reports, service records, marketing and operational guides and manuals, financial and accounting documents, creative materials, advertising materials, promotional materials, studies, reports, correspondence, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses, customer lists, customer contracts, employee lists, salaries and benefits information, and, subject to legal requirements, copies of all personnel files.

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- L. “Cemetery Services” means all activities relating to the promotion, marketing, sale, and provision of property, goods and services, to provide for the final disposition of human remains in a cemetery, whether by burial, entombment in a mausoleum or crypt, disposition in a niche, or scattering of cremated remains on the cemetery grounds.
- M. “Confidential Divestiture Business Information” means all information not in the public domain related to any Divestiture Business, including without limitation, all Business Intellectual Property and Business Records, *provided, however,* that Confidential Divestiture Business Information shall not include: i) information exclusively regarding National programs, activities or assets unless specifically required to be divested pursuant to this Order; ii) information that was, or becomes, generally available to the public other than as a result of a disclosure by the Respondents; and iii) information that was available, or becomes available, to Respondents on a non-confidential basis if, to the knowledge of Respondents, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.
- N. “Corporate Trade Names” means the following commercial names, trade names, “doing business as” (d/b/a) names, registered and unregistered trademarks and service marks: “Alderwoods,” “Keystone,” “Key Memories,” “Service Corporation International,” “SCI,” “Dignity” (including “Dignidad,” “Dignite,” and other translations of Dignity into languages other than English), and “Dignity Memorial.”

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- O. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. “Direct Cost” to an Acquirer for the labor associated with any employee of Respondents shall not exceed the average hourly wage rate for such employee.
- P. “Divestiture Agreement” means an agreement approved by the Commission that divests and conveys one or more Divestiture Businesses to an Acquirer.
- Q. “Divestiture Business” means a Facility identified on Appendix A of the Order and the Business Assets used in the operation of such Facility,

provided, however, that a Divestiture Business need not include the following rights and assets:

1. assets located at facilities or offices other than those of the Facility if such assets are not exclusively or primarily used in the operation of the Facility;
2. motor vehicles used by the Divestiture Business if the Acquirer of such Business does not need the vehicles and the Commission approves the divestiture without them;
3. rights in any lease of Tangible Personal Property that pertains to generally available property such as office furniture, office equipment, or computers;
4. rights to any National license(s), National supply or service agreement(s), National proprietary or licensed advertising program(s), or other National proprietary product(s), including without limitation

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Respondent SCI's Dignity Memorial program and Respondent KNA's Key Memories program;

5. licenses to non-proprietary software available to the general public;
 6. records and documents (or portions thereof) exclusively discussing any National license(s), National supply or service agreement(s), National proprietary or licensed advertising program(s), or other National proprietary product(s), including without limitation Respondent SCI's Dignity Memorial program, unless such records or documents relate to the specific rights or benefits of customers whose Pre-Need Arrangements are being transferred to an Acquirer;
 7. rights to Corporate Trade Names, and records and documents (or portions thereof) exclusively concerning such Corporate Trade Names; or
 8. any other assets, rights, or agreements not needed by the Acquirer of the Divestiture Business if the Commission approves a Divestiture Agreement that does not divest, grant or transfer such assets, rights, or agreements.
- R. "Divestiture Business Employee(s)" means any and all full-time, part-time, or contract employees of Respondents whose duties, at any time on or after October 14, 2009, related primarily to one or more Divestiture Business(es).
- S. "Divestiture Closing Date" means the date on which Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer,

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deliver, or otherwise convey to an Acquirer one or more Divestiture Businesses.

- T. “Facility” means a location that provides Funeral Services and/or Cemetery Services.
- U. “Funeral Services” means all activities relating to the promotion, marketing, sale, and provision of funeral services and funeral goods, including, but not limited to, goods and services used to remove, care for and prepare bodies for burial, cremation, or other final disposition; and goods and services used to arrange, supervise, or conduct the funeral ceremony or final disposition of human remains.
- V. “National” in reference to an asset, license, program or activity means that such asset, license, program or activity is used by a Respondent in the operation of both (i) one or more Divestiture Businesses; and (ii) one or more other Facilities.
- W. “Orders” means the Decision and Order and Order to Hold Separate and Maintain Assets entered in this matter.
- X. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other business entity.
- Y. “Pre-Need Arrangement” means any type of contract or other agreement entered into by a person for the purchase of Funeral Services or Cemetery Services at a future time, regardless of whether such agreement is revocable or how payment for such services is arranged.

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- Z. “Support Services” means (i) human resources and administrative services such as payroll processing, labor relations support, pension administration, and procurement and administration of employee benefits, including health benefits; (ii) federal and state regulatory compliance and policy development services; (iii) environmental health and safety services; (iv) financial accounting services; (v) preparation of tax returns; (vi) audit services; (vii) information technology support services; (viii) processing of accounts payable and accounts receivable; (ix) technical support; (x) procurement of supplies; (xi) maintenance and repair of facilities; (xii) legal services or (xiii) other services (excluding pricing, marketing, strategic planning or other services related to engaging or responding to competition) that either Respondent, in the ordinary course of business, provides to one or more Divestiture Businesses through third party contracts or employees who provide such services generally to Facilities owned and operated by such Respondent.
- AA. “Support Services Employee” means an employee or contractor of either Respondent whose duties primarily relate to providing Support Services and do not involve assisting Facilities with pricing, marketing, strategic planning or other services related to engaging or responding to competition.
- BB. “Tangible Personal Property” means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, and other items of tangible personal property (other than inventories) of every kind owned or leased by a Respondent, together with any express or implied warranty by the manufacturers, sellers, or lessors of any item or component part thereof and all

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maintenance records and other documents relating thereto.

- CC. "Third Party" means any Person other than a Respondent or Acquirer.
- DD. "Transitional Services" means assistance with respect to providing Funeral Services or Cemetery Services, including assistance relating to administrative and support services.

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

- A. No later than ninety (90) days after the Acquisition Effective Date, Respondents shall, pursuant to one or more Divestiture Agreements divest all of the Divestiture Businesses identified on Appendix A of the Order, absolutely and in good faith, at no minimum price, as on-going businesses, to an Acquirer or Acquirers, and in a manner, that receives the prior approval of the Commission,

provided that, with respect to Business Intellectual Property and Business Records used by either Respondent in the operation of one or more Facilities other than those identified on the Appendices attached to this Decision and Order, Respondents may satisfy their divestiture obligations by conveying worldwide, royalty-free, paid-up, perpetual, irrevocable, transferable, sub-licensable, non-exclusive license(s) to such Business Intellectual Property and Business Records and exact duplicates of all tangible assets associated with such Business Intellectual Property and Business Records.

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- B. Each Divestiture Agreement shall be incorporated by reference into this Order and made a part hereof. Further, nothing in any Divestiture Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of an Acquirer or to reduce any obligations of Respondents under a Divestiture Agreement. Respondents shall comply with the terms of each Divestiture Agreement, and a breach by Respondents of any term of a Divestiture Agreement shall constitute a violation of this Order. To the extent that any term of a Divestiture Agreement conflicts with a term of this Order such that Respondents cannot fully comply with both, Respondents shall comply with the term of this Order. It shall be a violation of this Order to, without notification to the Commission; (i) modify a Divestiture Agreement prior to the Divestiture Closing Date applicable to such Agreement; or (ii) fail to meet any material condition precedent to closing (whether waived or not) in such Divestiture Agreement. Further, notwithstanding any paragraph, section, or other provision of a Divestiture Agreement, for a period of one (1) year after the last Divestiture Closing Date, it shall be a violation of this Order to make any material modification to a Divestiture Agreement without the approval of the Commission.
- C. Respondents shall take all actions necessary to maintain the full economic viability, marketability, and competitiveness of each Divestiture Business until such Business is fully and finally transferred to an Acquirer, and to prevent the destruction, removal, wasting, deterioration, or impairment of each such Business (except for ordinary wear and tear). Further, Respondents shall not sell, transfer, encumber, or

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otherwise impair a Divestiture Business other than in the manner prescribed in the Decision and Order.

- D. Prior to divesting a Divestiture Business, Respondents shall secure all consents and waivers from all Third Parties that are necessary to allow Respondents to divest such Divestiture Business and to permit the relevant Acquirer to operate such Divestiture Business, *provided, however,* Respondent may satisfy this requirement as to a particular Third Party by certifying that the relevant Acquirer has executed the necessary agreements directly with such Third Party.
- E. Prior to divesting a Divestiture Business, Respondent shall take all actions necessary to ensure that such Divestiture Business meets federal, state, local, and municipal requirements necessary to transfer such Business to the relevant Acquirer.
- F. Respondent shall not enforce any agreement against a Third Party or Acquirer to the extent that such agreement may limit or otherwise impair the ability of an Acquirer to acquire, operate, or use a Divestiture Business.
- G. Within ten (10) days of a request by the Commission or by an Acquirer or proposed Acquirer (as applicable), Respondents shall, to the extent permitted by law, provide to such Acquirer or proposed Acquirer, the following information regarding each Divestiture Business Employee whose duties relate to a Divestiture Business that Respondents propose to divest, or have divested, to such Acquirer:
1. name, job title or position, date of hire, and effective service date;

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2. a specific description of the employee's responsibilities;
 3. the base salary or current wages;
 4. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, and current target or guaranteed bonus, if any;
 5. employment status (i.e., active or on leave or disability; full-time or part-time);
 6. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
 7. at the option of the proposed Acquirer or Acquirer (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.
- H. Respondents shall not interfere with the employment by an Acquirer of any Divestiture Business Employee; shall not offer any incentive to such Employee to decline employment with an Acquirer or to accept other employment with Respondents; and shall eliminate any contractual impediments that may deter such Employee from accepting employment with an Acquirer including, but not limited to, removing any non-compete or confidentiality provisions of employment or other contracts that would affect the ability of such Employee to be employed by an Acquirer, and paying, or transferring to the account of

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the Employee, all current and accrued bonuses, pensions, and other current and accrued benefits.

- I. For a period of two (2) years after the last Divestiture Closing Date, Respondent SCI shall not, directly or indirectly, solicit, induce or attempt to solicit or induce any Divestiture Business Employee(s) who have accepted offers of employment with an Acquirer, or who are employed by an Acquirer, to terminate their employment relationship with such Acquirer,

provided, however, a violation of this provision will not occur if: (1) the Employee's employment has been terminated by an Acquirer; (2) Respondent SCI advertises for employees in newspapers, trade publications, or other media not targeted specifically at such Employees; or (3) Respondent SCI hires Employees who independently apply for employment with Respondent, so long as such Employees were not solicited by Respondent SCI in violation of this paragraph.

- J. At the request of an Acquirer, Respondent SCI shall use its best efforts to assist the Acquirer in the fulfillment of any Pre-Need Arrangement relating to the sale of a Dignity Memorial Funeral Plan or Key Memories Plan entered into by a Respondent prior to the date of divestiture of the applicable Divestiture Business; provided, however, that this Paragraph requires Respondent SCI to assist only with such goods and services that the Acquirer cannot reasonably provide on its own.
- K. For a period not to exceed six (6) months after the date all required assets and rights associated with a Divestiture Business have been fully and finally transferred to an Acquirer, Respondent SCI shall

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provide Transitional Services as needed to assist the Acquirer in using and operating such Divestiture Business as a viable and ongoing business(es) able to provide Funeral Services and Cemetery Services at least equivalent to those provided by Respondent SCI or Respondent KNA, as applicable, prior to the Acquisition Effective Date. In providing such Transitional Services, Respondent SCI shall not: (i) require an Acquirer to pay compensation that exceeds the Direct Cost of providing such goods and services; or (ii) terminate their obligation to provide Transitional Services because of a material breach by an Acquirer of any agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction.

- L. The purpose of this Order is to ensure that the Divestiture Businesses remain competitive and viable providers of Funeral Services and Cemetery Services independent of Respondents and to remedy in a timely manner the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. After the Acquisition Effective Date, Respondents shall not use or disclose Confidential Divestiture Business Information to any Person except as follows:
 - 1. Respondents may disclose Confidential Divestiture Business Information regarding a particular Divestiture Business to the Acquirer or proposed Acquirer (as the case may be) of such Business or other Persons specifically authorized by such

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Acquirer or proposed Acquirer to receive such information; and

2. Respondents may use and disclose Confidential Divestiture Business Information as necessary to comply with the requirements of the Orders, Respondents' obligations to an Acquirer under a Divestiture Agreement(s), or applicable laws; and
3. Respondents may use and disclose Confidential Divestiture Business Information as necessary to enforce the terms of any Divestiture Agreement or defend against any dispute or legal proceeding, so long as Confidential Divestiture Business Information is only disclosed to a Third Party as required by a court or pursuant to an appropriate confidentiality order, agreement, or arrangement with the Acquirer (if any) of the relevant Divestiture Business (but Respondent shall not be deemed to have violated this requirement if the relevant Acquirer withholds such agreement unreasonably); and Respondents use their best efforts to obtain a protective order to protect the confidentiality of such Confidential Divestiture Business Information during any adjudication or other court proceedings;

provided, that in no case shall KNA Confidential Business Information be disclosed to any employee or contractor of Respondents other than a KNA Hold Separate Employee or a Support Services Employee unless such disclosure is necessary to comply with applicable laws;

provided further, that in no case shall SCI Confidential Business Information be disclosed to any employee of Respondents other than a SCI Divestiture Employee or

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a Support Services Employee unless such disclosure is necessary to comply with applicable laws.

- B. Respondent SCI shall require, as a condition of continued employment, that each SCI Divestiture Employee agree not to disclose any SCI Confidential Business Information to any Person other than a SCI Divestiture Employee except as authorized to do so by Respondent SCI.
- C. During the Hold Separate Period, which period shall begin on the Acquisition Effective Date, Respondent SCI shall require, as a condition of continued employment, that each KNA Hold Separate Employee agree not to disclose any KNA Confidential Business Information to anyone other than a fellow KNA Hold Separate Employee, except as authorized to do so by the Interim Monitor, the Interim Manager or the Divestiture Trustee.
- D. Respondent SCI shall take such steps as are necessary to reasonably ensure that all employees and contractors, other than SCI Divestiture Employees and KNA Hold Separate Employees, who possess or obtain Confidential Divestiture Business Information,
 - 1. use and disclose such Confidential Divestiture Business Information only for purposes specifically authorized by the Orders, and
 - 2. do not disclose any Confidential Divestiture Business Information to any employee other than a Support Services Employee, a KNA Hold Separate Employee or a SCI Divestiture Employee, unless authorized to do so by Respondent SCI.

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- E. On or before the Acquisition Effective Date, Respondents shall provide written notification of the restrictions on the use of Confidential Divestiture Business Information that are contained in the Orders to all Divestiture Business Employees and other Respondent Employees who may otherwise have access to Confidential Divestiture Business Information and shall require that all such employees acknowledge their acceptance and understanding of such restrictions.

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

- A. For a period of ten (10) years from the date this Order becomes final, Respondents shall not, without providing advance written notification to the Commission, acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any concern, corporate or non-corporate, or in any assets engaged in Funeral Services or Cemetery Services as applicable to each area that is identified in Appendix A of this Order.
- B. The prior notification required by this Order shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of the Respondent and not

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of any other party to the transaction. Respondent shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), the Respondent shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this Order may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however,* that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

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

- A. The Commission appoints Shaun M. Martin as Interim Monitor and approves the Interim Monitor Agreement between Shaun M. Martin and Respondent SCI, attached as Confidential Appendix A to the Order to Hold Separate and Maintain Assets entered in this matter.
- B. Respondents shall facilitate the ability of the Interim Monitor to comply with the duties and obligations set forth in this Order, and shall take no action that interferes with or hinders the Interim Monitor's authority, rights, or responsibilities as set forth herein or in any agreement between the Interim Monitor and Respondent SCI.

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- C. The Interim Monitor's duties and responsibilities shall include the following:
1. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 2. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with this Order and shall exercise the power and authority needed to carry out his or her duties and responsibilities in a manner consistent with the purposes of this Order and in consultation with the Commission;
 3. the Interim Monitor may, in his or her sole discretion, consult with Acquirers, proposed Acquirers and Third Parties in the exercise of the Interim Monitor's duties under this Order or under any agreement between the Interim Monitor and Respondents;
 4. the Interim Monitor shall evaluate all reports submitted by Respondents pursuant to this Order during the term of the Interim Monitor's appointment. Further, within thirty (30) days from the date the Interim Monitor receives such report, he or she shall report in writing to the Commission concerning the performance by Respondents of their obligations under this Order.
- D. Respondent SCI shall, pursuant to the Interim Monitor Agreement, transfer to and confer upon the Interim Monitor all rights, powers, and authority necessary to permit the Interim Monitor to perform his duties and responsibilities pursuant to this Order and in consultation with Commission staff, and shall include

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in the Interim Monitor Agreement all provisions necessary to effectuate this requirement, including without limitation provisions that provide the following:

1. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
2. the Interim Monitor shall have the responsibility for monitoring Respondents' compliance with their obligations pursuant to this Order;
3. the Interim Monitor may, in his or her sole discretion, consult with Acquirers, proposed Acquirers and Third Party in the exercise of his or her duties under this Order, or under any agreement between Interim Monitor and Respondent;
4. Subject to all applicable laws, regulations, and any legally recognized privileges of Respondents, the Interim Monitor shall have full and complete access to all personnel, books, records, documents, and facilities of the Divestiture Businesses and to any other relevant information as the Interim 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 Divestiture Businesses. Respondents shall develop such financial or other information as the Interim Monitor may reasonably request and shall cooperate with the Interim Monitor;
5. the Interim Monitor shall have the authority to employ, at the cost and expense of Respondent SCI, such consultants, accountants, attorneys, and other representatives and assistants as are

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reasonably necessary to carry out the Interim Monitor's duties and responsibilities;

6. the Interim Monitor shall serve, without bond or other security, at the expense of Respondent SCI, on such reasonable and customary terms and conditions to which the Monitor and Respondent SCI agree and that the Commission approves;
 7. Respondent SCI shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, malfeasance, or bad faith by the Interim Monitor; and
 8. at the option of Respondent SCI, the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys, and other representatives and assistants may be required to sign an appropriate confidentiality agreement; provided, however, such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission

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materials and information received in connection with the performance of the Interim Monitor's duties.

- F. The Interim Monitor shall serve until Respondent SCI has fully and finally complied with its obligations in Paragraphs II.A and II.K of this Order.
- G. If the Commission determines that an Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor whose rights and duties shall be the same as those of the Interim Monitor. The following procedure shall be used to select a substitute Interim Monitor:
 - 1. The Commission shall select the substitute Interim Monitor, subject to the consent of Respondent SCI, whose consent shall not be unreasonably withheld. If Respondent SCI has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent SCI of the identity of the proposed Interim Monitor, Respondent SCI shall be deemed to have consented to the selection of the Interim Monitor.
 - 2. Not later than ten (10) days after the appointment of a substitute Interim Monitor, Respondent SCI shall execute an agreement that, subject to the prior approval of the Commission, confers on the substitute Interim Monitor all the rights and powers necessary to permit the substitute Interim Monitor to monitor Respondent SCI's compliance with the relevant requirements of this Order in a manner consistent with the purposes of the Order and pursuant to the procedures contained in this Paragraph.

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- H. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- I. The Interim Monitor appointed pursuant to this Order may be the same person appointed as an Interim Monitor under the Order to Hold Separate and Maintain Assets or the Divestiture Trustee(s) pursuant to this Order.

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

- A. If Respondents have not fully complied with the obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the Divestiture Businesses as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to assign, grant, license, divest, transfer, deliver, or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General of the United States brings an action pursuant to § 5(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(1), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver, or otherwise convey such assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General of the United States from seeking civil penalties or any other available relief, including a

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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 SCI, whose consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent SCI 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 SCI of the identity of any proposed Divestiture Trustee, Respondent SCI shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent SCI shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the divestiture required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondent SCI shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the assets that are required by this Order to be

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assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.

2. The Divestiture Trustee shall have twelve (12) months after the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; provided, however, that the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent SCI shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent SCI shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent SCI shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court appointed Divestiture Trustee, by the court.

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4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent SCI's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; provided, however, that if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondent SCI from among those approved by the Commission; provided further, however, that Respondent SCI shall select such Person within five (5) days after receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent SCI, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent SCI, 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

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direction of Respondent SCI, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets required to be divested by this Order.

6. Respondent SCI shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order; provided, however, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Interim Monitor pursuant to the relevant provisions of this Order and the Order to Hold Separate and Maintain Assets in this matter.
8. The Divestiture Trustee shall report in writing to Respondent SCI and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

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9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; provided, however, that such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
 - F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

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

- A. Within five (5) days of the Acquisition, Respondents shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order;
 1. Within thirty (30) days after this Order becomes final; and

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2. Every (90) days thereafter until the termination of Respondent SCI's obligations under Paragraph II.K. of this Order.
- C. One (1) year after this Order becomes final, annually for the next nine (9) years, on the anniversary of the date the Order becomes final, and at such other times as the Commission may require, Respondent SCI shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order.
- D. Respondents shall submit a copy of their reports concerning compliance with this Order to the Interim Monitor, unless the term of such Monitor has expired. Respondents shall include in their reports, among other things that are required from time to time, a full description of all efforts to comply with the Order, including: (i) the status of the divestiture and transfer of the Divestiture Businesses; (ii) a description of all Transitional Services provided to each Acquirer; (iii) a description of all substantive contacts with each Acquirer, the Interim Monitor (if one has been appointed), the Divestiture Trustee (if one has been appointed) and any other Persons related to compliance with the terms of this Order and/or the Divestiture Agreement(s), and any correspondence with proposed Acquirer, Acquirer, Interim Monitor, or other Third Party related to such contacts that is dated after the Divestiture Closing Date; and (iv) any other actions taken by Respondents relating to compliance with the terms of this Order and/or the Divestiture Agreements. The compliance report immediately following divestiture of the Divestiture Businesses shall include a statement that the divestitures required by the Order have been accomplished in the manner

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approved by the Commission and shall include the date the divestiture was accomplished.

VIII.

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

- A. any proposed dissolution of Respondents;
- B. any proposed acquisition, merger, or consolidation of Respondents; or
- C. any other change in Respondents, including without limitation, assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

IX.

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

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

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

X.

IT IS FURTHER ORDERED that this Order shall terminate on April 30, 2020.

By the Commission, Commissioner Ramirez and Commissioner Brill not participating.

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APPENDIX A

Appendix A

KNA Divestiture Businesses

Area	Facility	Owner prior to Acquisition Effective Date
Cemetery Services Facilities and Funeral Services Facilities located within a 20 mile radius of Johnson Mortuary & Desert Lawn Memorial Park, 1415 South First Avenue, Yuma, Arizona	Sunset Vista Cemetery, Sunset Vista Funeral Home and Crematory 11357 East 40th Street, Yuma AZ 85367	KNA
Cemetery Services Facilities located within a 20 mile radius of Saints Rest Cemetery, 826 Eisenhower Parkway, Macon, Georgia	Glen Haven Memorial Gardens 7070 Houston Road, Macon, GA 31216	KNA
Funeral Services Facilities located north of Route 60 in Polk County, Florida	Kersey Funeral Home 108 East Lake Stella Drive, Auburndale, FL 33823	KNA
Funeral Services Facilities located within a 15 mile radius of Murchison Funeral Home, 207 Second Street East, Vidalia, Georgia	Stewart Funeral Home 1722 Mount Vernon Road, Vidalia, GA 30474 Jones-Stewart Funeral Home 211 West Liberty Avenue, Lyons, GA 30436 Ronnie L. Stewart Funeral Home 200 South Second Street, Glenwood, GA 30428	KNA

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APPENDIX A (continued)

Area	Facility	Owner prior to Acquisition Effective Date
Funeral Services Facilities located within a 15 mile radius of Boone Funeral Home, 2156 Airline Drive, Bossier City, Louisiana	Boone Funeral Home 2156 Airline Drive, Bossier City, LA 71111	KNA
Funeral Services Facilities located within a 17 mile radius of Gorsline Runciman Funeral Home, 900 East Michigan Avenue, Lansing, Michigan	Tiffany Funeral Home 3232 West Saginaw Street, Lansing, MI 48917	KNA
Funeral Services Facilities located in Guilford County, North Carolina	Lambeth Troxler Funeral and Cremation Services 300 West Wendover Avenue, Greensboro, NC 27408	KNA
Funeral Services Facilities located in Mecklenburg County, North Carolina, or located north of Highway 75 (Waxhaw Highway) and west of Highway 601 (Concord Highway) in Union County, North Carolina	Hankins and Whittington Funeral Service 1111 East Boulevard, Charlotte, NC 28203	KNA
Funeral Services Facilities that are located in Rockland County, New York and are within a 10 mile radius of Michael J. Higgins Funeral Service, 73 North Liberty Drive, Stony Point, New York	T.J. McGowan Sons Funeral Home 71 North Central Highway, Garnerville, NY 10923 T.J. McGowan Sons Funeral Home 133 Broadway, Haverstraw, NY 10927	KNA
Funeral Services Facilities located in Claiborne County, Tennessee	Claiborne Funeral Home 1106 Highway 33 South, New Tazewell, TN 37825	KNA

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APPENDIX A (continued)

Area	Facility	Owner prior to Acquisition Effective Date
Funeral Services Facilities located within a 15 mile radius of Whitten Funeral Home/Park Avenue, 1336 Park Avenue, Lynchburg, Virginia	Diuguid Funeral Service and Crematory 811 Wigginton Road, Lynchburg, VA 24502 Diuguid Funeral Service and Crematory – Waterlick Chapel 21914 Timberlake Road, Lynchburg, VA 24502	KNA
Funeral Services Facilities located within a 12 mile radius of Langevin-Musser Funeral Home, 1010 West Yakima Avenue, Yakima, Washington	Shaw and Sons Funeral Directors 201 North Second Street, Yakima, WA 98901	KNA
Funeral Services Facilities located within a 12 mile radius of Bayside Community Mortuary, 1610 Noche Buena Street, Seaside, California	Mission Memorial Park and Seaside Funeral Home 1915 Ord Grove Avenue, Seaside, CA 93955 Mission Mortuary 450 Camino El Estero, Monterey, CA 93940	SCI
Funeral Services Facilities catering primarily to Latino communities located within a 20 mile radius of Trevino Mortuary, 300 South Logan Street, Denver, Colorado	Funeraria Latina-East 6601 East Colfax Avenue, Denver, CO 80220	SCI
Funeral Services Facilities in Erie County, New York that are located south Interstate 90 and east of Interstate 90 or U.S. Route 219 (whichever is the most easterly road at the latitude of the relevant Funeral Services Facility).	Kenneth Howe Funeral Home 64 Maple Street, East Aurora, New York, 14052 Froehley-Dengler Funeral Home 64 Maple Street, East Aurora, New York, 14052	SCI

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APPENDIX A (continued)

Area	Facility	Owner prior to Acquisition Effective Date
Funeral Services Facilities located within a 20 mile radius of Shives Funeral Home, 5202 Colonial Drive, Columbia, South Carolina	Greenlawn Memorial Park and Funeral Home 845 Leesburg Road, Columbia SC 29209	SCI
Cemetery Services Facilities located within a 25 mile radius of Elmwood Cemetery, 501 Elmwood Avenue, Columbia, South Carolina	Woodridge Memorial Park and Funeral Home 138 Corley Mill Road, Lexington, SC 29072	SCI
Funeral Services Facilities located within a 15 mile radius of Woodridge Memorial Park and Funeral Home, 138 Corley Mill Road, Lexington, South Carolina		SCI

Order to Maintain Assets

**ORDER TO HOLD SEPARATE
AND MAINTAIN ASSETS**

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Service Corporation International (“SCI”) of Respondent Keystone North America Inc. (“KNA”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, hereby issues its Complaint, makes the following jurisdictional findings, and issues this Order to Hold Separate and Maintain Assets (“Hold Separate Order”):

Order to Maintain Assets

1. Respondent Service Corporation International (“SCI”) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its corporate head office and principal place of business located at 1929 Allen Parkway, Houston, Texas 77019.
2. Respondent Keystone North America Inc. is a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its registered and head office at Suite 2400, 250 Yonge Street, Toronto, Ontario, M5B 2M6. Respondent KNA does business in the United States through its headquarters, which is located at 400 North Ashley Drive, Suite 1900, Tampa, Florida 33602.
3. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that in addition to definitions in the Consent Agreement and the Decision and Order, which are incorporated herein by reference and made a part hereof, the following definitions shall apply:

- A. “SCI” means Service Corporation International, its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, groups, and affiliates controlled by Service Corporation International (including, after the Acquisition Effective Date, KNA) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

Order to Maintain Assets

- B. “KNA” means Keystone North America Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, groups, and affiliates controlled by Keystone North America Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means, collectively, SCI and KNA, provided however, that, after the Acquisition Effective Date, Respondents shall mean SCI.
- D. “Commission” means the Federal Trade Commission.
- E. “Consent Agreement” means the Agreement Containing Consent Orders in this matter.
- F. “Decision and Order” means the:
1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission, and
 2. Final Decision and Order issued by the Commission in this matter.
- G. “Hold Separate Business” means a business that includes each KNA Divestiture Business until the day after such KNA Divestiture Business is fully and finally divested to an Acquirer.
- H. “Hold Separate Manager” means any Hold Separate Manager appointed pursuant to this Order.
- I. “Hold Separate Order” means this Order to Hold Separate and Maintain Assets.

Order to Maintain Assets

- J. “Hold Separate Period” means the time period starting on the Acquisition Effective Date and continuing so long as the Hold Separate Business includes at least one Divestiture Business.
- K. “Interim Monitor” means any monitor appointed pursuant to this Hold Separate Order or the Decision and Order.
- L. “KNA Confidential Business Information” means Confidential Divestiture Business Information that relates to one or more KNA Divestiture Businesses.
- M. “KNA Divestiture Business” means a Divestiture Business that was owned or operated by KNA prior to the Acquisition Effective Date.
- N. “KNA Hold Separate Employees” means any and all full-time, part-time, or contract employees of Respondent KNA whose duties relate primarily to operation of one or more KNA Divestiture Businesses included in the Hold Separate Business and such other employees of Respondent KNA, other than Support Service Employees, as are necessary to maintain the economic viability, marketability, and competitiveness of the Hold Separate Business and operate the Hold Separate Business, and each KNA Divestiture Business included in the Hold Separate Business, in the regular and ordinary course and in accordance with past practice.
- O. “Orders” means the Decision and Order and Hold Separate Order.
- P. “SCI Confidential Business Information” means Confidential Divestiture Business Information that relates to one or more SCI Divestiture Businesses.

Order to Maintain Assets

- Q. “SCI Divestiture Business” means a Divestiture Business that was owned or operated by Respondent SCI prior to Acquisition Effective Date.
- R. “SCI Divestiture Employees” means any and all full-time, part-time, or contract employees of Respondent SCI whose duties relate primarily to operations of one or more SCI Divestiture Business(es) and such other SCI employees, other than Support Service Employees, as are necessary to maintain the economic viability, marketability, and competitiveness of the SCI Divestiture Businesses, and operate them in the regular and ordinary course and in accordance with past practice.
- S. “Support Services” means (i) human resources and administrative services such as payroll processing, labor relations support, pension administration, and procurement and administration of employee benefits, including health benefits; (ii) federal and state regulatory compliance and policy development services; (iii) environmental health and safety services; (iv) financial accounting services; (v) preparation of tax returns; (vi) audit services; (vii) information technology support services; (viii) processing of accounts payable and accounts receivable; (ix) technical support; (x) procurement of supplies; (xi) maintenance and repair of facilities; (xii) legal services or (xiii) other services (excluding pricing, marketing, strategic planning or other services related to engaging or responding to competition) that either Respondent, in the ordinary course of business, provides to one or more Divestiture Businesses through third party contracts, or employees who provide such services generally to Facilities owned and operated by such Respondent.

Order to Maintain Assets

- T. “Support Services Employee” means an employee or contractor of either Respondent whose duties primarily relate to providing Support Services and do not involve assisting Facilities with pricing, marketing, strategic planning or other services related to engaging or responding to competition.

II.**IT IS FURTHER ORDERED** that

- A. From the date Respondents execute the Consent Agreement until the date the Hold Separate Order terminates, Respondents shall take all actions necessary to maintain the full economic viability, marketability, and competitiveness of each Divestiture Business until and unless such Business is fully and finally transferred to an Acquirer, and to prevent the destruction, removal, wasting, deterioration, or impairment of each such Business (except for ordinary wear and tear). Further, Respondents shall not sell, transfer, encumber, or otherwise impair a Divestiture Business other than in the manner prescribed in the Decision and Order.
- B. Respondent SCI shall maintain the operations of each SCI Divestiture Business in the regular and ordinary course of the Business and in accordance with past practice (including regular repair and maintenance of the assets of such business) from the date Respondent SCI executes the Consent Agreement until the day after full and final transfer of the Business to an Acquirer.
- C. In operating and maintaining each SCI Divestiture Business, Respondent SCI shall:

Order to Maintain Assets

1. provide each SCI Divestiture Business with sufficient working capital to operate at least at current rates of operation and to carry on, at least at their scheduled pace, all planned capital projects, business plans, and promotional activities;
2. continue, at least at their scheduled pace, any additional expenditures for each SCI Divestiture Business that were authorized prior to the date the Consent Agreement was signed by Respondent SCI, including, but not limited to, promotional, marketing, and sales expenditures;
3. use best efforts, consistent with past practice, to maintain and increase sales of each SCI Divestiture Business and provide such resources as may be necessary to respond to competition against each SCI Divestiture Business;
4. provide such Support Services to each SCI Divestiture Business as were being provided as of the date the Consent Agreement was signed by Respondent SCI;
5. use best efforts to preserve and maintain existing relationships with the customers, suppliers, vendors, private and governmental entities, and others having business relations with each SCI Divestiture Business;
6. provide the SCI Divestiture Employees with the authority and resources necessary to maintain and operate the SCI Divestiture Business(es) in a manner consistent with past practice and this Hold Separate Order;

Order to Maintain Assets

7. ensure that no SCI Divestiture Employee has responsibilities or duties related to the operation or management of a SCI Divestiture Business and a Facility acquired through the Acquisition if the SCI Divestiture Business and the Facility are located in the same geographic or product market, as such markets are alleged in the Complaint;
 8. continue all financial and other benefits of the SCI Divestiture Employees and provide financial incentives to such employees to continue in their positions and to operate and maintain the SCI Divestiture Business(es) in a manner consistent with past practice and this Hold Separate Order; and
 9. replace any SCI Divestiture Employee who leaves the employ of Respondent with an employee of similar skill, training and expertise, and treat such employee as a SCI Divestiture Employee under the terms of this Hold Separate Order.
- D. From the date Respondent KNA executes the Consent Agreement until the Acquisition Effective Date, Respondent KNA shall maintain the operations of each KNA Divestiture Business in the regular and ordinary course of the Business and in accordance with past practice (including regular repair and maintenance of the assets of such business). In operating and maintaining each KNA Divestiture Business, Respondent KNA shall:
1. provide each KNA Divestiture Business with sufficient working capital to operate at least at current rates of operation and to carry on, at least at their scheduled pace, all planned capital projects, business plans, and promotional activities;

Order to Maintain Assets

2. continue, at least at their scheduled pace, any additional expenditures for each KNA Divestiture Business that were authorized prior to the date the Consent Agreement was signed by Respondent KNA, including, but not limited to, promotional, marketing, and sales expenditures;
3. use best efforts, consistent with past practice, to maintain and increase sales of each KNA Divestiture Business and provide such resources as may be necessary to respond to competition against each KNA Divestiture Business;
4. provide such Support Services to each KNA Divestiture Business as were being provided as of the date the Consent Agreement was signed by Respondent KNA;
5. use best efforts to preserve and maintain existing relationships with the customers, suppliers, vendors, private and governmental entities, and others having business relations with each KNA Divestiture Business;
6. continue all financial and other benefits of the KNA Hold Separate Employees and provide financial incentives to such employees to continue in their positions and to operate and maintain the KNA Divestiture Business(es) in a manner consistent with past practice and this Hold Separate Order; and
7. replace any KNA Hold Separate Employee who leaves the employ of Respondent with an employee of similar skill, training and expertise, and treat such employee as a KNA Hold Separate Employee under the terms of this Hold Separate Order.

Order to Maintain Assets

- E. During the Hold Separate Period, Respondent SCI shall
1. maintain the Hold Separate Business separate, apart, and independent from Respondent's other businesses and assets as required by this Hold Separate Order; vest the Interim Monitor and the Hold Separate Manager with all rights, powers, and authority necessary to conduct the business of the Hold Separate Business;
 2. not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business or any of its operations, except to the extent necessary to fulfill Respondents' obligations under the Orders and applicable laws; and
 3. provide Support Services to the Hold Separate Businesses as may be requested by the Interim Monitor and/or Hold Separate Manager.
- F. Within ten (10) days of a request by the Commission or by an Acquirer or proposed Acquirer (as applicable), Respondents shall, to the extent permitted by law, provide to such Acquirer or proposed Acquirer, the following information regarding each Divestiture Business Employee whose duties relate to a Divestiture Business that Respondents propose to or have divested to such Acquirer:
1. name, job title or position, date of hire, and effective service date;
 2. a specific description of the employee's responsibilities;
 3. the base salary or current wages;

Order to Maintain Assets

4. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year, and current target or guaranteed bonus, if any;
 5. employment status (i.e., active or on leave or disability; full-time or part-time);
 6. any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
 7. at the option of the proposed Acquirer or Acquirer (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.
- G. Respondents shall not interfere with the employment by an Acquirer of any Divestiture Business Employee; shall not offer any incentive to such Employee to decline employment with an Acquirer or to accept other employment with Respondents; and shall eliminate any contractual impediments that may deter such Employee from accepting employment with an Acquirer including, but not limited to, removing any non-compete or confidentiality provisions of employment or other contracts that would affect the ability of such Employee to be employed by an Acquirer, and paying, or transferring to the account of the Employee, all current and accrued bonuses, pensions and other current and accrued benefits.
- H. For a period of two (2) years after the last Divestiture Closing Date, Respondent SCI shall not, directly or indirectly, solicit, induce, or attempt to solicit or

Order to Maintain Assets

induce any Divestiture Business Employee(s) who have accepted offers of employment with an Acquirer, or who are employed by an Acquirer, to terminate their employment relationship with such Acquirer;

provided, however, a violation of this provision will not occur if: (1) the Employee's employment has been terminated by an Acquirer; (2) Respondent SCI advertises for employees in newspapers, trade publications, or other media not targeted specifically at such Employees; or (3) Respondent SCI hires Employees who independently apply for employment with Respondent, so long as such Employees were not solicited by Respondent SCI in violation of this paragraph.

III.**IT IS FURTHER ORDERED** that

- A. After the Acquisition Effective Date, Respondents shall not use or disclose Confidential Divestiture Business Information to any Person except as follows:
1. Respondents may disclose Confidential Divestiture Business Information regarding a particular Divestiture Business to the Acquirer or proposed Acquirer (as the case may be) of such Business or other Persons specifically authorized by such Acquirer or proposed Acquirer to receive such information;
 2. Respondents may use and disclose Confidential Divestiture Business Information as necessary to comply with the requirements of the Orders, Respondents' obligations to an Acquirer under a Divestiture Agreement(s), or applicable laws; and

Order to Maintain Assets

3. Respondents may use and disclose Confidential Divestiture Business Information as necessary to enforce the terms of any Divestiture Agreement or defend against any dispute or legal proceeding, so long as Confidential Divestiture Business Information is only disclosed to a Third Party as required by a court or pursuant to an appropriate confidentiality order, agreement, or arrangement with the Acquirer (if any) of the relevant Divestiture Business (but Respondent shall not be deemed to have violated this requirement if the relevant Acquirer withholds such agreement unreasonably); and Respondents use their best efforts to obtain a protective order to protect the confidentiality of such Confidential Divestiture Business Information during any adjudication or other court proceedings;

provided, that in no case shall KNA Confidential Business Information be disclosed to any employee or contractor of Respondents other than a KNA Hold Separate Employee or a Support Services Employee unless such disclosure is necessary to comply with applicable laws;

provided further, that in no case shall SCI Confidential Business Information be disclosed to any employee of Respondents other than a SCI Divestiture Employee or a Support Services Employee unless such disclosure is necessary to comply with applicable laws.

- B. Respondent SCI shall require, as a condition of continued employment, that each SCI Divestiture Employee agree not to disclose any SCI Confidential Business Information to any Person other than a SCI Divestiture Employee except as authorized to do so by Respondent SCI.

Order to Maintain Assets

- C. During the Hold Separate Period, Respondent SCI shall require, as a condition of continued employment, that each KNA Hold Separate Employee agree not to disclose any KNA Confidential Business Information to anyone other than a fellow KNA Hold Separate Employee, except as authorized to do so by the Interim Monitor, the Interim Manager or the Divestiture Trustee.
- D. Respondent SCI shall take such steps as are necessary to reasonably ensure that all employees and contractors, other than SCI Divestiture Employees and KNA Hold Separate Employees, who possess or obtain Confidential Divestiture Business Information,
1. use and disclose such Confidential Divestiture Business Information only for purposes specifically authorized by the Orders, and
 2. do not disclose any Confidential Divestiture Business Information to any employee other than a Support Services Employee, a KNA Hold Separate Employee, or a SCI Divestiture Employee unless authorized to do so by Respondent SCI.
- E. On or before the Acquisition Effective Date, Respondents shall provide written notification of the restrictions on the use of Confidential Divestiture Business Information that are contained in the Orders to all Divestiture Business Employees and other Respondent Employees who may otherwise have access to Confidential Divestiture Business Information and shall require that all such employees acknowledge their acceptance and understanding of such restrictions.

IV.

Order to Maintain Assets

IT IS FURTHER ORDERED that

- A. The Commission appoints Shaun M. Martin as Interim Monitor and approves the Interim Monitor Agreement between Shaun M. Martin and Respondents, attached as Confidential Appendix A to the Hold Separate Order entered in this matter.
- B. The Interim Monitor's duties and responsibilities shall include the following:
 - 1. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 - 2. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with this Hold Separate Order and shall exercise such power and authority and carry out his or her duties and responsibilities in a manner consistent with the purposes this Hold Separate Order and in consultation with the Commission; and
 - 3. the Interim Monitor may, in his or her sole discretion, consult with third parties in the exercise of his or her duties under this Hold Separate Order, or under any agreement between the Interim Monitor and Respondent;
 - 4. thirty (30) days after the Acquisition Effective Date, and every thirty (30) days thereafter until this Hold Separate Order terminates, the Interim Monitor shall report in writing to the Commission concerning efforts to accomplish the purposes of this Hold Separate Order. Included within that report shall be the Interim Monitor's assessment of the extent to which the Divestiture Businesses are,

Order to Maintain Assets

or prior to divestiture were, meeting (or exceeding) their projected goals and budgets as reflected in operating plans, budgets, projections, or any other regularly prepared financial statements; and

5. the Interim Monitor shall be permitted, in consultation with the Commission staff, to remove the Hold Separate Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondent SCI shall appoint a replacement Manager, subject to the approval of the Commission, on the same terms and conditions as provided in this Hold Separate Order.
- C. Respondent SCI shall, pursuant to the Interim Monitor Agreement, transfer to and confer upon the Interim Monitor all rights, powers, and authority necessary to permit the Interim Monitor to perform his duties and responsibilities pursuant to this Hold Separate Order, in a manner consistent with the purposes of the Decision and Order and in consultation with Commission staff, and shall include in the Interim Monitor Agreement all provisions necessary to effectuate this requirement, including without limitation provisions that provide the following:
1. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 2. the Interim Monitor shall have the responsibility for monitoring Respondents' compliance with their obligations pursuant to the Orders, including without limitation, maintaining the viability, marketability, and competitiveness of each Divestiture Business prior to its divestiture;
 3. the Interim Monitor shall have responsibility for supervising the Hold Separate Business, including

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without limitation, monitoring its organization and independence from Respondents and its management by the Hold Separate Manager appointed pursuant to this Hold Separate Order;

4. Subject to all applicable laws, regulations and legally recognized privileges of Respondents, the Interim Monitor shall have full and complete access to all personnel, books, records, documents, and facilities of the Divestiture Businesses and to any other relevant information as the Interim 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 Divestiture Businesses. Respondents shall develop such financial or other information as the Interim Monitor may reasonably request and shall cooperate with the Interim Monitor;
5. the Interim Monitor shall have the authority to employ, at the cost and expense of Respondent SCI, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities;
6. the Interim Monitor shall serve, without bond or other security, at the expense of Respondent SCI, on such reasonable and customary terms and conditions to which the Monitor and Respondent SCI agree and that the Commission approves;
7. Respondent SCI shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties,

Order to Maintain Assets

including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor; and

8. at the option of Respondent SCI, the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys, and other representatives and assistants will be required to sign an appropriate confidentiality agreement; provided, however, such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- D. No later than one (1) day after the Acquisition Effective Date, Respondent SCI shall transfer all rights, powers, and authority necessary to manage and maintain the Hold Separate Business, to James R. Stark, who shall serve as Hold Separate Manager pursuant to the Hold Separate Manager Agreement attached hereto as Confidential Exhibit B.
- E. Respondent SCI shall ensure that the management agreement between Respondent SCI and the Hold Separate Manager provides the following:
1. Respondent SCI shall provide reasonable financial incentives to the Hold Separate Manager for performing his or her duties under this Hold Separate Order and the management agreement. Such incentives shall include a continuation of all employee benefits the Manager currently receives from Respondents, including regularly scheduled raises, bonuses, vesting of pension benefits (as

Order to Maintain Assets

permitted by law), and additional incentives as may be necessary to incentivize an individual acceptable to the Commission to accept the position of Hold Separate Manager.

2. The Hold Separate Manager shall report directly and exclusively to the Interim Monitor and shall manage the Hold Separate Business independently of the management of Respondents. The Manager shall not be involved, in any way, in the operations of the other businesses of Respondents during the term of this Hold Separate Order.
3. The Hold Separate Manager shall make no material changes in the ongoing operations of the Hold Separate Business except with the approval of the Interim Monitor, in consultation with the Commission staff.
4. The Hold Separate Manager shall have the authority, with the approval of the Interim Monitor, to remove Hold 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 Order, the Manager, in consultation with the Interim Monitor, may request Respondent SCI to, and Respondent SCI shall, appoint a substitute Person, which Person the Manager shall have the right to approve.
5. In addition to KNA Hold Separate Employees, the Manager may, with the approval of the Interim Monitor, employ such Persons as are reasonably necessary to assist the Manager in managing the Hold Separate Business.

Order to Maintain Assets

6. Respondents shall facilitate the ability of the Interim Monitor and the Hold Separate Manager to comply with the duties and obligations set forth in this Hold Separate Order, and shall take no action that interferes with or hinders the authority, rights, or responsibilities of either as set forth herein or any agreement between the Interim Monitor and Respondents or the Hold Separate Manager and Respondents.
 7. The Commission may require the Hold Separate Manager, the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to materials and information received from the Commission in connection with performance of the Interim Monitor's duties.
- F. If the Interim Monitor ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate Order, the Commission may appoint a substitute Interim Monitor consistent with the terms of this Hold Separate Order, subject to the consent of Respondent SCI, whose consent shall not be unreasonably withheld. If Respondent SCI has not opposed, in writing, including the reasons for opposing, the selection of the substitute Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent SCI of the identity of any substitute Interim Monitor, Respondent SCI shall be deemed to have consented to the selection of the proposed substitute Interim Monitor. Respondent SCI and the substitute Interim Monitor shall execute an Interim Monitor Agreement, subject to the approval of the Commission, consistent with this Order.

Order to Maintain Assets

- G. The Interim Monitor and the Hold Separate Manager shall serve until termination of this Hold Separate Order.
- H. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- I. The Interim Monitor appointed pursuant to this Hold Separate Order may be the same person appointed as an Interim Monitor or Divestiture Trustee(s) pursuant to the relevant provisions of the Decision and Order.

V.

IT IS FURTHER ORDERED that within thirty (30) days after the date this Hold Separate Order becomes final, and every thirty (30) days thereafter until Respondent has fully complied with its obligations to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets as required by the Decision and 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 Hold Separate Order.

VI.

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

- A. any proposed dissolution of Respondents;
- B. any proposed acquisition, merger, or consolidation of Respondents; or

Order to Maintain Assets

- C. any other change in Respondents, including without limitation, assignment and the creation or dissolution of subsidiaries, if such change may affect compliance obligations arising out of this Order.

VII.

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

- A. Access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of such Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. To interview officers, directors, or employees of the Respondent, who may have counsel present, regarding such matters.

VIII.

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

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

Analysis to Aid Public Comment

- B. The later of:
1. The day after all Divestiture Businesses have been divested as required by and described in the Decision and Order, or
 2. The day the Decision and Order becomes final.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS TO AID PUBLIC COMMENT

I. INTRODUCTION

The Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Service Corporation International (“SCI”) and Keystone North America Inc. (“KNA”). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would otherwise result from SCI’s acquisition of KNA. Under the terms of the proposed Consent Agreement, SCI and KNA are required to divest 22 funeral homes in 16 local funeral services markets and four cemeteries in three local cemetery services markets to acquirers who receive the approval of the Commission. The proposed Consent Agreement also requires SCI and KNA to divest all related assets and real property necessary to ensure the buyer(s) of the divested facilities will be able to quickly and fully replicate the competition that would have been eliminated by the acquisition. Finally, the Commission, SCI, and KNA have agreed to an Order to Hold Separate and Maintain Assets (“Hold Separate Order”) that requires SCI and KNA to maintain and hold separate the facilities to be divested pending their final divestiture pursuant to the Consent Agreement.

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

On October 14, 2009, SCI and KNA executed a definitive support agreement pursuant to which SCI agreed to acquire all of the outstanding voting securities of KNA. The Commission’s complaint alleges that the proposed acquisition, if consummated,

Analysis to Aid Public Comment

would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by removing an actual, direct, and substantial competitor from 16 funeral services markets, and three cemetery services markets. The proposed Consent Agreement would remedy the alleged violations by requiring divestitures that will replace the competition that otherwise would be lost in these markets as a result of the acquisition.

II. THE PARTIES

SCI is the largest funeral and cemetery services provider in North America. SCI owns and operates 1,266 funeral homes and 372 cemetery locations worldwide, including 1,073 funeral homes in 43 states and the District of Columbia, and 357 cemeteries in 31 states. SCI's 2009 revenue from all operations totaled approximately \$2.05 billion.

KNA is the fifth largest funeral and cemetery services provider in North America. KNA owns and operates 199 funeral homes and 15 cemeteries in the United States and Canada, including 196 funeral homes in 31 states, and 15 cemeteries in seven states. KNA's revenue for the 12 months ending June 30, 2009 totaled approximately \$124 million.

III. FUNERAL AND CEMETERY SERVICES

SCI's proposed acquisition of KNA presents substantial antitrust concerns in two relevant product markets: funeral services and cemetery services. Funeral services include all activities relating to the promotion, marketing, sale, and provision of funeral services and goods, including, but not limited to, goods and services used to remove, care for, and prepare bodies for burial, cremation or other final disposition; and goods and services used to arrange, supervise, or conduct funeral ceremonies or final disposition of human remains. Cemetery services include all activities relating to the promotion, marketing, sale, and

Analysis to Aid Public Comment

provision of property, goods and services to provide for the final disposition of human remains in a cemetery, whether by burial, entombment in a mausoleum or crypt, disposition in a niche, or scattering of cremated remains on the cemetery grounds.

The 16 funeral services markets and three cemetery services markets at issue in this transaction are relatively local in nature. Indeed, data analysis and evidence gathered from market participants indicate that pre-need purchasers of funeral services and cemetery plots, and families making at-need purchases, typically choose a local funeral home or cemetery to make the memorial service, burial, and subsequent visitation more convenient. The 16 funeral services markets are: Yuma, Arizona; Monterey, California; Denver, Colorado; Auburndale/Winter Haven, Florida; Vidalia, Georgia; Bossier City, Louisiana; Lansing, Michigan; East Aurora, New York; Northern Rockland County, New York; Charlotte, North Carolina; Greensboro, North Carolina; Columbia, South Carolina; West Columbia/Lexington, South Carolina; New Tazewell, Tennessee; Lynchburg, Virginia; and Yakima, Washington. The three cemetery services markets are: Yuma, Arizona; Macon, Georgia; and Columbia, South Carolina.

Each of the relevant funeral and cemetery services markets is highly concentrated, and the proposed acquisition would significantly increase market concentration and eliminate substantial, direct competition between two significant funeral and cemetery services providers. Under the Herfindahl-Hirschman Index ("HHI"), which is the standard measure of market concentration under the 1992 Department of Justice and Federal Trade Commission Merger Guidelines, an acquisition is presumed to create or enhance market power or facilitate its exercise if it increases the HHI by more than 100 points and results in a post-acquisition HHI that exceeds 1,800 points. SCI's proposed acquisition of KNA creates market concentration levels well in excess of these thresholds. For funeral services, the post-acquisition HHIs range from 3730 to 8632, and HHI levels will increase by 295 to 4130 points above

Analysis to Aid Public Comment

pre-acquisition levels. The proposed acquisition also will result in SCI controlling between 52 percent and 93 percent market share in each of the affected funeral services markets. With respect to the cemetery services markets, the proposed acquisition will reduce the number of cemetery services providers from five to four in the Columbia, South Carolina and Macon, Georgia areas, and from three to two in Yuma, Arizona.

The anticompetitive implications of such dramatic increases in concentration are buttressed by evidence of intense head-to-head competition that would be eliminated by the proposed acquisition. Consumers have benefitted from the rivalry between SCI and KNA in the form of lower prices, improved products, and better service. Left unremedied, the proposed acquisition likely would cause anticompetitive harm by enabling SCI to profit by unilaterally raising the prices of funeral and cemetery services, as well as reducing its incentive to improve quality and provide better service.

The high levels of concentration also increase the likelihood of competitive harm through coordinated interaction. Transparency in the pricing of funeral services and consumers' selection of funeral homes and cemeteries facilitate the ability of providers to reach and monitor terms of coordination, or alternatively promote tacit forms of collusion. In several funeral and cemetery services markets, coordinated interaction or tacit collusion is likely due to the transparency of important competitive information, high concentration, and few market participants.

New entry is unlikely to deter or counteract the anticompetitive effects of the proposed acquisition. Among other entry barriers, both heritage (the consumer's tendency to use the same funeral services provider for multiple generations) and reputation pose substantial barriers to entrants attempting to establish new funeral service locations, and the availability of suitable land, and local zoning, health, and environmental

Analysis to Aid Public Comment

regulations impact significantly the ability of firms to enter with new cemetery service locations. As a result, new entry sufficient to achieve a significant market impact is unlikely to occur in a timely manner.

IV. THE PROPOSED CONSENT AGREEMENT

The proposed Consent Agreement remedies completely the anticompetitive effects of the acquisition by requiring the divestiture of all of the SCI or KNA assets in each relevant geographic market to a Commission-approved buyer (or buyers) within 90 days of SCI acquiring KNA. Specifically, the proposed Consent Agreement requires the divestiture of 22 funeral services facilities and four cemetery services facilities, as well as related equipment, customer and supply contracts, commercial trade names, and real property in the 19 funeral and cemetery services markets at issue in this transaction. *See* Appendix A for a complete list of the divestiture assets. Each funeral and cemetery services facility to be divested is a stand-alone business, and includes all of the assets necessary for a Commission-approved buyer to independently and effectively operate each facility.

The proposed Consent Agreement contains several provisions designed to ensure that the divestitures are successful. First, the Commission will evaluate the suitability of possible purchasers of the divested assets to ensure that the competitive environment that would have existed but for the transaction is replicated by the required divestitures. If SCI fails to divest the assets within the 90-day time period to a Commission-approved buyer, the Consent Agreement permits the Commission to appoint a trustee to divest the assets. Second, SCI is required to provide transitional services to the Commission-approved buyer. These transitional services will facilitate a smooth transition of the assets to the acquirer, and ensure continued and uninterrupted operation of the assets during the transition. Third, the Consent Agreement requires SCI to remove any contractual impediments that may deter the current managers of the facilities to be divested from accepting offers of employment from any Commission-approved acquirer and to

Analysis to Aid Public Comment

obtain all consents necessary to transfer the required assets. The Agreement also appoints an Interim Monitor, Shaun Martin, to monitor SCI's compliance with the terms of the Agreement. Mr. Martin is well-qualified for this role, having extensive experience managing businesses on a short-term basis. Finally, to ensure that the Commission will have an opportunity to review any attempt by SCI to acquire any funeral or cemetery services asset in any of the 19 geographic markets at issue, the proposed Consent Agreement contains a ten-year prior notice provision.

The Hold Separate Order requires the parties to maintain the viability of the divestiture assets as competitive operations until each facility is transferred to a Commission-approved buyer. Specifically, the parties must maintain the confidentiality of sensitive business information, and take all actions required to prevent the destruction or wasting of the divestiture assets. After SCI acquires KNA, the Hold Separate Order requires that SCI separately hold and maintain the KNA divestiture assets and appoints a Hold Separate Manager to operate these assets pending their divestiture. SCI is also required to separately operate the SCI divestiture assets and the KNA assets that SCI acquires in the same geographic market. Finally, the Hold Separate Order appoints an Interim Monitor to monitor the operation of the separately-held KNA assets and the parties' compliance with the terms of the Hold Separate Order and the Consent Agreement.

The sole purpose of this analysis is to facilitate public comment on the Consent Agreement. This analysis does not constitute an official interpretation of the Consent Agreement or modify its terms in any way.

Complaint

IN THE MATTER OF

INDOOR TANNING ASSOCIATIONCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4290; File No. 082 3159
Filed, May 13, 2010 — Decision, May 13, 2010*

This consent order addresses Indoor Tanning Association's advertising and promotion of indoor tanning products and facilities. Indoor Tanning Association falsely represented that: tanning, including indoor tanning, poses no danger; does not increase the risk of skin cancer; indoor tanning is approved by the government; and indoor tanning is safer than tanning outdoors because, in indoor tanning facilities, the amount of ultraviolet light is monitored and controlled. Additionally, Indoor Tanning Association falsely represented that research shows that vitamin D supplements may harm the body's ability to fight disease; and that a recent study in the prestigious Proceedings of the National Academy of Sciences determined that the risks of not getting enough ultraviolet light far outweigh the hypothetical risk of skin cancer, that getting a healthy tan produces vitamin D, and that increased vitamin D has been linked to significantly decreasing your risk of contracting internal cancers, such as lung, kidney, or liver cancer. ITA also represented that tanning causes the skin to generate vitamin D and has health benefits, but failed to disclose that consumers can increase their vitamin D levels through ultraviolet levels lower than the amount needed to get a tan, and that ultraviolet radiation can injure the eyes and increases the risk of skin cancer. The order prohibits Indoor Tanning Association from representing that tanning, including indoor tanning, does not increase the risk of skin cancer; is safe or poses no danger; indoor tanning is approved by the government; and indoor tanning is safer than tanning outdoors because in indoor tanning facilities, the amount of ultraviolet light is monitored and controlled. Furthermore, Indoor Tanning Association is prohibited from misrepresenting (1) that research shows that vitamin D supplements may harm the body's ability to fight disease and (2) that a study in the Proceedings of the National Academy of Sciences determined: (a) that sun exposure does not cause skin cancer or melanoma, or that the risk of such cancer is only hypothetical; (b) that getting a tan is healthy; (c) that the risks of not getting enough ultraviolet light far outweigh the risk of skin cancer; or (d) that vitamin D has been linked to significantly decreasing the risk of contracting lung, kidney, or liver cancer.

Complaint

Participants

For the *Commission*: *Janet M. Evans.*

For the *Respondents*: *Daniel F. McInnis and Andrea Vavonese, Akin Gump Strauss Hauer & Feld LLP; Bridget Calhoun and David Osei, Crowell & Moring.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Indoor Tanning Association, a corporation (“respondent”), has violated the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Indoor Tanning Association (“ITA”) is a Massachusetts corporation with its principal place of business at 2025 M St., N.W., Washington, D.C. 20036. ITA is registered as a nonprofit entity under Section 501(c)(6) of the Internal Revenue Code. Its members include indoor tanning manufacturers, distributors, facility owners, and representatives of other supporting industries. ITA’s purpose is to “advance the business growth and image of the indoor tanning industry, and the welfare of its membership.”

2. Respondent has advertised and promoted to the public the use of ultraviolet lamps and sunlamp products, as defined in 21 C.F.R. § 1040.20, and commercial indoor tanning facilities where consumers may use ultraviolet lamps or sunlamp products. Ultraviolet lamps and sunlamp products are “devices” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

3. The acts and practices of respondent, as alleged herein, have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

Complaint

4. As part of a coordinated campaign to promote ultraviolet lamps and sunlamp products and indoor tanning, respondent created, prepared, disseminated, or caused to be disseminated advertisements, including the attached Exhibits A through G. These advertisements contain the following representations or statements, among others:

a. **TANNING CAUSES MELANOMA HYPE**

Recent research indicates that the benefits of moderate exposure to sunlight outweigh the hypothetical risks. Surprisingly, there is no compelling scientific evidence that tanning causes melanoma. Scientists have proven, however, that exposure to all forms of ultraviolet light – both indoors and out – stimulates the natural production of vitamin D. And research has proven that vitamin D protects against heart disease and many types of cancer, in addition to other important health benefits.

It's time to rethink sunbathing.

Find out more at **www.SunlightScam.com**.

A message brought to you by the Indoor Tanning Association

-Exhibit A, newspaper advertisement and point-of-sale poster art provided to ITA members

b. * * *

There are a lot of misconceptions about sunlight. After hearing relentless campaigns telling us to lather on the sunscreen, many Americans have been led to believe that ultra violet [sic] (UV) light – whether it comes from the sun or from a tanning salon – is something to be feared, rather than cherished.

...

Complaint

The reality is that UV light provides us with countless health benefits – both physiological and psychological. And the rewards of “soaking up the sun” even outweigh the risks of overexposure. Though there are various ways of getting the recommended amount, such as mowing the lawn or lying by the pool, safe, moderate tanning is the best way to maximize these benefits while minimizing any risks.

* * *

Melanoma Misinformation.

* * *

Getting a regular amount of sunlight is healthy, whether it's outdoors or in a sun bed. Moderate exposure to UV light benefits people with vitamin D deficiency and makes people feel good. However, a great deal of misinformation has been spread about the link between Melanoma and *any* amount [sic] UV exposure.

The truth may surprise you:

- Sunburns, not sun tans are linked to melanoma
- Melanoma is most common among those who work indoors, not outside
- Melanoma appears most commonly on body parts not regularly exposed to sun

Safe, moderate exposure does not increase risk of melanoma skin cancer. And tanning indoors is even safer because, unlike exposure to the sun, the environment is controlled. In fact, the anti-cancer benefits of UV exposure highlighted by [sic] recent studies far outweigh the risks associated with over-exposure.

-Exhibit B, website, <http://www.trusttanning.com>

Complaint

c. **Get the Facts About Tanning**

* * *

SCAM: Getting a tan is dangerous

TRUTH: There is nothing dangerous about getting a tan. In fact, your body needs ultraviolet light to live. And now, new research is unlocking the secrets of vitamin D, which is naturally produced by skin when it is exposed to sunlight or indoor tanning lights. Earlier this year the London *Telegraph* reported:

Last week, a report in the prestigious US journal *Proceedings of the National Academy of Sciences* revealed that people with higher levels [of vitamin D] were more likely to survive colon, breast and lung cancer

. . .

The *Proceedings of the National Academy of Sciences* study determined that the risks associated with not getting enough sun far outweighed any hypothetical damage that might occur.

While a healthy tan poses no significant risks of damaging your skin, burning your skin can be dangerous. For that reason, indoor tanning – where the amount of UV light you receive is monitored – is considered by many to be a safer alternative to tanning outdoors.

* * *

SCAM: Every ray of UV light from a tanning bed increases your risk of contracting melanoma skin cancer

TRUTH:

* * *

A recent study in the prestigious *Proceedings of the National Academy of Sciences* determined that the risks of not getting enough UV light far outweighed

Complaint

the hypothetically minute risk of skin cancer. That's because getting a healthy tan naturally produces vitamin D, which has been linked to significantly decreasing your risk of contracting internal cancers like lung, kidney, or liver cancer.

While getting too much sun has been linked to some forms of cancer, indoor tanning is a government-approved, controlled environment designed to give you a tan without ever burning – which is the likely culprit in contracting cancer from sun exposure.

* * *

SCAM: Indoor tanning is more dangerous than tanning in the sun

TRUTH: Just the opposite is true. Unlike tanning outdoors, indoor tanning is designed to match your skin type and desired tan in a well-regulated, controlled environment. Consequently, the vast bulk of scientific research indicates that indoor tanning is a safer alternative to tanning outdoors.

-Exhibit C, website, www.sunlightscam.com.

- d. The fear of getting a tan has gone too far. Dermatologists with the sunscreen and cosmetic industries are trying to scare us away from the sun. But tanning produces vitamin D, and research shows vitamin D may fight heart disease, breast cancer, stroke, and osteoporosis. So go get a tan, your body will thank you.

[on screen: Vitamin D Fights Heart Disease Breast Cancer Stroke Osteoporosis]

Bought to you by The Indoor Tanning Association.

Complaint

-Exhibit D1, Transcript, television and website advertisement and Exhibit E, DVD containing video of same

[on screen: www.SunLightScam.com]

The fear of getting a tan has gone too far. Dermatologists with the sunscreen and cosmetic industries are trying to scare us away from the sun. But tanning produces vitamin D, and research shows vitamin D may fight heart disease, breast cancer, stroke, and osteoporosis. So go get a tan, your body will thank you.

[on screen: www.SunLightScam.com]

[on screen: Vitamin D Fights Heart Disease Breast Cancer Stroke Osteoporosis]

Bought to you by The Indoor Tanning Association.

-Exhibit D2, Transcript, television and website advertisement and Exhibit E, DVD containing video of same

e. * * *

By practicing what you find in this book, you will more effectively communicate your message, build your image, and motivate desired behavior.

* * *

ARGUMENT 1 – VITAMIN D IS GOOD (VITAMIN D IS THE “SUNSHINE VITAMIN”):

* * *

- It is impossible to get the requisite amount of vitamin D in cities north of 37 degrees for as many as 6 months out of the year. . .
- Vitamin D isn't like other vitamins that you can easily ingest as part of your diet. It is best absorbed through

Complaint

the skin from exposure to UV light. New research indicates that supplement-based vitamin D, as opposed to vitamin D naturally produced through exposure to UV light, may actually harm the body's ability to fight disease.

* * *

ARGUMENT 3 – TANNING IN MODERATION IS BENEFICIAL:

* * *

- Indoor tanning in moderation is safer than exposure to the sun, because the environment is controlled.
- Unlike the sun, tanning is well regulated and approved by the government. When used moderately and responsibly, tanning sessions are designed to prevent burning.

-Exhibit F, ITA "Communications: the basics" guide provided to ITA members

f. Enjoy the sun on doctor's orders

Solar rays can help protect against some cancers and heart disease, say scientists

-The Guardian, January 8, 2008

As Vitamins Go, D, You Are My Sunshine

Just 20 minutes of sun exposure without sunscreen enables the skin to produce 20,000 IU of vitamin D

- The Washington Post, September 18, 2007

Sunshine prevents more deaths than it causes;

Sunshine has a protective effect overall because it helps to create vitamin D

- New Scientist, January 12, 2008

* * *

Time to rethink sun tanning?

Complaint

For more information visit www.TrustTanning.com

Dermatologists and the sunscreen industry have spent millions on a deceptive campaign to scare Americans away from the sun. Now the tide of research is turning the other direction. The positive effects of getting vitamin D from sunlight are clear. So soak up a little sunlight – indoors or out – a couple of times each week, and get your recommended dose of the “sunshine vitamin.”

Paid for by the Indoor Tanning Association

–Exhibit G, newspaper advertisement and point-of-sale poster art provided to ITA members

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

- a. Tanning, including indoor tanning, does not increase the risk of skin cancer;
- b. Tanning, including indoor tanning, poses no danger;
- c. Indoor tanning is approved by the government; and
- d. Indoor tanning is safer than tanning outdoors because, in indoor tanning facilities, the amount of ultraviolet light is monitored and controlled.

6. In truth and in fact:

- a. Tanning, including indoor tanning, increases the risk of skin cancer, including squamous cell and melanoma skin cancers;
- b. Tanning, including indoor tanning, poses danger;

Complaint

- c. Indoor tanning is not approved by the government; and
- d. Indoor tanning is not safer than tanning outdoors because the amount of ultraviolet light received when tanning indoors is neither monitored nor controlled sufficiently to prevent the health risks associated with ultraviolet exposure.

Therefore, the representations set forth in paragraph 5 were, and are, false and misleading.

7. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it relied on a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made.

8. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made. Therefore, the representation set forth in paragraph 7 was, and is, false and misleading.

9. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

- a. Research shows that vitamin D supplements may harm the body's ability to fight disease; and
- b. A recent study in the prestigious Proceedings of the National Academy of Sciences determined that the risks of not getting enough ultraviolet light far outweigh the hypothetical risk of skin cancer, that getting a healthy tan produces vitamin D, and that increased vitamin D has been linked to significantly decreasing your risk of contracting internal cancers, such as lung, kidney, or liver cancer.

Complaint

10. In truth and in fact:

- a. Research has not shown that vitamin D supplements may harm the body's ability to fight disease; and
- b. The study in the Proceedings of the National Academy of Sciences referenced by respondent did not determine that the risk of getting skin cancer from ultraviolet light is only hypothetical, that the risks of not getting enough ultraviolet light far outweigh the risk of skin cancer, that getting a tan is healthy, or that increased vitamin D has been linked to significantly decreasing the risk of contracting internal cancers, such as lung, kidney, or liver cancer.

Therefore, the representations set forth in paragraph 9 were, and are, false and misleading.

11. Through the means described in paragraph 4, respondent has represented that tanning causes the skin to generate vitamin D and has health benefits. Respondent has failed to disclose that consumers can increase their vitamin D levels through ultraviolet exposure levels lower than the amount needed to get a tan, and that ultraviolet radiation can injure the eyes and increases the risk of skin cancer. These facts would be material to consumers in their purchase or use of indoor tanning services. The failure to disclose these facts, in light of the representation made, was, and is, a deceptive practice.

12. Through the means described in Paragraph 4, respondent has provided to others the means and instrumentalities to engage in deceptive acts or practices.

13. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Section 5(a) and 12 of the Federal Trade Commission Act.

Complaint

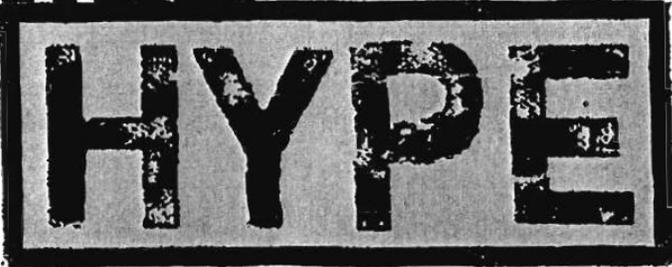
THEREFORE, the Federal Trade Commission this thirteenth day of May, 2010, has issued this complaint against respondent.

By the Commission, Commissioner Ramirez not participating.

Complaint

EXHIBIT A

**TANNING
CAUSES
MELANOMA**



HYPE

Recent research indicates that the benefits of moderate exposure to sunlight outweigh the hypothetical risks. Surprisingly, there is no compelling scientific evidence that tanning causes melanoma. Scientists have proven, however, that exposure to all forms of ultraviolet light—both indoors and out—stimulates the natural production of vitamin D. And research has proven that vitamin D protects against heart disease and many types of cancer, in addition to other important health benefits.

It's time to rethink sun bathing.

Find out more at
www.SunlightScam.com

Exhibit A

A message brought to you by the Indoor Tanning Association

EXHIBIT B

Complaint

Page 1 of 1

Life on our planet needs sunlight to survive. And humans are no exception. Unlike plants and animals that daily struggle to stay in the light, we actively work to *avoid* the sun.

There are a lot of misconceptions about sunlight. After hearing relentless campaigns telling us to lather on the sunscreen, many Americans have been led to believe that ultra violet (UV) light—whether it comes from the sun or from a tanning salon—is something to be feared, rather than cherished. Until now, hope for a balanced message in the public debate on this issue seemed to be lost.

The reality is that UV light provides us with countless health benefits—both physiological and psychological. And the rewards of “soaking up the sun” even outweigh the risks of overexposure. Though there are various methods of getting the recommend amount, such as mowing the lawn or lying by the pool, safe, moderate tanning is the best way to maximize these benefits while minimizing any risks.

TrustTanning.com is devoted to answering the most frequently asked questions about tanning and debunking some of the most pervasive myths.

© 2008 TrustTanning.com

Exhibit B, p. 1

<http://www.trusttanning.com/>

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Complaint

EXHIBIT B (continued)

Page 1 of 1

Melanoma Misinformation

"These data, together with those for internal cancers and the beneficial effects of an optimal vitamin D status, indicate that increased sun exposure may lead to improved cancer prognosis and, possibly, give more positive than adverse health effects."

—*Proceedings from the National Academies of Science*
2008

Getting a regular amount of sunlight is healthy, whether it's outdoors or in a sun bed. Moderate exposure to UV light benefits people with vitamin D deficiency and makes people feel good. However, a great deal of misinformation has been spread about the link between Melanoma and any amount UV exposure.

The truth may surprise you:

- Sunburns, not sun tans are linked to melanoma
- Melanoma is most common among those who work indoors, not outside
- Melanoma appears most commonly on body parts not regularly exposed to sun

Safe, moderate exposure does not increase risk of melanoma skin cancer. And tanning indoors is even safer, because unlike exposure to the sun, the environment is controlled. In fact, the anti-cancer benefits of UV exposure highlighted by recent studies far outweigh the risks associated with over-exposure.

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Exhibit B, p. 2

<http://www.trusttanning.com/skinCancerMisinformation.htm>

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EXHIBIT C

Complaint

06/13/09, Getting a tan is dangerous - SunLightScam.com

Page 1 of 2



- [Forside](#)
- [Sunscare](#)
- [Scams About Tanning](#)
- [Blowback](#)
- [About Us](#)

Get the Facts about Tanning

The Sunscam Industry has spent millions of dollars scaring Americans out of the sun in an effort to sell more sunscreen. But before you believe the sunscreen companies, get the facts about UV light and tanning.

- **Getting a tan is dangerous**
- **Tanning has caused an epidemic of skin cancer**
- **Every ray of UV light from a tanning bed increases your risk of contracting melanoma skin cancer**
- **Tanning beds are 15 times stronger than the sun**
- **There is no such thing as a responsible tan**
- **You can get enough Vitamin D through supplements or drinking milk**
- **Tanning doesn't protect you from getting a burn on vacation**
- **Indoor tanning is more dangerous than tanning in the sun**

SCAM:

Getting a tan is dangerous

TRUTH:

There is nothing dangerous about getting a tan. In fact, your body needs ultraviolet light to live. And now, new research is unlocking the secrets of vitamin D, which is naturally produced by skin when it is exposed to sunlight or indoor tanning lights. Earlier this year the London *Telegraph* reported:

Last week, a report in the prestigious US journal Proceedings of the National Academy of Sciences revealed that people with higher levels [of vitamin D] were more likely to survive colon, breast and lung cancer. This follows last year's University of San Diego review of 40 years of research, which revealed that a daily dose could halve the risk of breast and bowel cancer.

Other claims are that it reduces the risk of heart disease (a study of 10,000 women in California found that those who took supplements had a 31 per cent lower risk of dying

Exhibit C, p. 1

<http://www.sunlightscam.com/scam1.html>

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EXHIBIT C (continued)

Complaint

...from: www.sunlightscam.com is dangerous - www.lightscam.com

Page 2 of 2

from it), diabetes (in a Finnish study of 12,000 children, it cut their chance of developing Type A diabetes by 80 per cent), even colds and flu (New Yorkers who took vitamin D had flu 70 per cent less often).

The Proceedings of the National Academy of Sciences study determined that the risks associated with not getting enough sun far outweighed any hypothetical damage that might occur.

While a healthy tan poses no significant risks of damaging your skin, burning your skin can be dangerous. For that reason, indoor tanning—where the amount of UV light you receive is monitored—is considered by many to be a safer alternative to tanning outdoors.

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Exhibit C, p. 2

Complaint

EXHIBIT C (continued)

Every ray of UV light from a tanning bed increases your risk of contracting melanoma... Page 1 of 2

x]

- Forside
- Sunscare
- Scams About Tanning
- Blowback
- About Us
- Getting a tan is dangerous
- Tanning has caused an epidemic of skin cancer
- **Every ray of UV light from a tanning bed increases your risk of contracting melanoma skin cancer**
- Tanning beds are 15 times stronger than the sun
- There is no such thing as a responsible tan
- You can get enough Vitamin D through supplements or drinking milk
- Tanning doesn't protect you from getting a burn on vacation
- Indoor tanning is more dangerous than tanning in the sun

SCAM:

Every ray of UV light from a tanning bed increases your risk of contracting melanoma skin cancer

TRUTH:

So careful sunbathing, with measured exposure to the sun, may actually reduce rather than increase the risk of melanoma, reduce the overall risk of death from skin cancer, and improve survival for those who develop melanoma.

- Dr. Oliver Gillie in the British Journal of Dermatology

The "C" word is scary. Nobody knows that more than the billion-dollar sunscreen industry, which has systematically attempted to link sun exposure to cancer in an effort to deceptively scare people into buying their products. But despite their best efforts to link tanning to melanoma, no clear link exists. In fact, more than 18 separate peer-reviewed scientific studies indicate that there is no link between tanning indoors and melanoma.

That should put the debate about tanning and cancer to rest, but the sunscreen industry knows that the fear of cancer is the driving force selling their product. As a result, they have taken to quietly funding front groups with deceptive names like the Skin Cancer Foundation and the Sun Safety Alliance to keep the myth of tanning and cancer planted in the minds of the media and, ultimately, their consumers.

Ironically, emerging research (may require login) indicates that sunscreen does nothing to protect against contracting melanoma. The industry is effectively selling a problem in search of a solution that

Exhibit C, p. 3

<http://www.sunlightscam.com/scam3.html>

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Complaint

EXHIBIT C (continued)

...contracting melanoma from a tanning bed increases your risk of contracting melanoma... Page 2 of 2

they don't even have.

In the meantime, the law of unintended consequences reveals that the sunscreen industry's message of UV abstinence may have backfired when it comes to preventing cancer.

A recent study in the prestigious Proceedings of the National Academy of Sciences determined that the risks of not getting enough UV light far outweighed the hypothetically minute risk of skin cancer. That's because getting a healthy tan naturally produces vitamin D, which has been linked to significantly decreasing your risk of contracting internal cancers like lung, kidney, or liver cancer.

While getting too much sun has been linked to some forms of cancer, indoor tanning is a government-approved, controlled environment designed to give you a tan without ever burning—which is the likely culprit in contracting cancer from sun exposure.

The bottom line is clear: the risks of not getting enough vitamin D outweighs the hypothetical risks of UV light exposure.

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Exhibit C, p. 4

<http://www.sunlightscam.com/scam3.html>

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EXHIBIT C (continued)

Complaint

SCAM: indoor tanning is more dangerous than tanning in the sun - SunLightScam.com

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- Forside
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 - Scams About Tanning
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 - About Us
-
- Getting a tan is dangerous
 - Tanning has caused an epidemic of skin cancer
 - Every ray of UV light from a tanning bed increases your risk of contracting melanoma skin cancer
 - Tanning beds are 15 times stronger than the sun
 - There is no such thing as a responsible tan
 - You can get enough Vitamin D through supplements or drinking milk
 - Tanning doesn't protect you from getting a burn on vacation
 - **Indoor tanning is more dangerous than tanning in the sun**

SCAM:

Indoor tanning is more dangerous than tanning in the sun

TRUTH:

Just the opposite is true. Unlike tanning outdoors, indoor tanning is designed to match your skin type and desired tan in a well-regulated, controlled environment. Consequently, the vast bulk of scientific research indicates that indoor tanning is a safer alternative to tanning outdoors.

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Exhibit C, p. 5

<http://www.sunlightscam.com/scam8.html>

1/13/2009

Complaint

EXHIBIT D

The fear of getting a tan has gone too far. Dermatologists with the sunscreen and cosmetic industries are trying to scare us away from the sun. But tanning produces vitamin D, and research shows vitamin D may fight heart disease, breast cancer, stroke, and osteoporosis. So go get a tan, your body will thank you.

[on screen: Vitamin D Fights Heart Disease Breast Cancer Stroke Osteoporosis]

Bought to you by The Indoor Tanning Association.

–Exhibit D1, Transcript, television and website advertisement

[on screen: www.SunLightScam.com]

The fear of getting a tan has gone too far. Dermatologists with the sunscreen and cosmetic industries are trying to scare us away from the sun. But tanning produces vitamin D, and research shows vitamin D may fight heart disease, breast cancer, stroke, and osteoporosis. So go get a tan, your body will thank you.

[on screen: www.SunLightScam.com]

[on screen: Vitamin D Fights Heart Disease Breast Cancer Stroke Osteoporosis]

Bought to you by The Indoor Tanning Association.

–Exhibit D2, Transcript, television and website advertisement

Complaint

EXHIBIT E



Exhibit E

Complaint

EXHIBIT F



Complaint

EXHIBIT F (continued)

of an **effective**
communications
STRATEGY

AN EFFECTIVE COMMUNICATIONS STRATEGY IS ESSENTIAL FOR ANY BUSINESS OR NON-PROFIT ADVOCACY GROUP. In a world where there is an infinite amount of information competing for the limited attention of consumers, it is increasingly important to employ a messaging campaign that can cut through the clutter and reach your intended target.

It is frequently assumed that to do this you need a multi-million dollar advertising budget. However, with solid research, new or underreported facts, a creative or controversial advertising campaign, and a coordinated media strategy, there are inexpensive ways to ensure that the public hears and is influenced by your message.

By practicing what you find in this book, you will be able to more effectively communicate your message, build your image, and motivate desired behavior.

7
3
2

Complaint

EXHIBIT F (continued)

WORKING

ARGUMENT 1--**VITAMIN D IS GOOD (VITAMIN D IS THE "SUNSHINE VITAMIN"):**

- According to a Harvard University study published in the *New England Journal of Medicine*, 60% of Americans are vitamin D deficient.
- Vitamin D deficiency is associated with an increased risk of colon, prostate, and breast cancer and is shown to ward off heart disease, MS, and other chronic health problems.
- Recent research shows that the benefits associated with vitamin D outweigh any potential risks associated with exposure to UV light.
- Doctors estimate that there are over one billion people worldwide at risk of vitamin D deficiency, with 30-50% of children and adults in the United States at high risk for this dangerous condition.
- Vitamin D is also linked to many common wintertime complaints such as fatigue, depression, and aches and pains.
- It is impossible to get the requisite amount of vitamin D in cities north of 37 degrees for as many as 6 months out of the year. That includes cities like Richmond, VA, St. Louis, MO, Sacramento, CA, and those further north.
- Vitamin D isn't like other vitamins that you can easily ingest as part of your diet. It is best absorbed through the skin from exposure to UV light. New research indicates that supplement-based vitamin D, as opposed to vitamin D naturally produced through exposure to UV light, may actually harm the body's ability to fight disease.
- African Americans are particularly susceptible to vitamin D deficiency because increased levels of skin pigment inhibit the body's natural ability to produce vitamin D.

Complaint

EXHIBIT F (continued)

WORKING

**ARGUMENT 3-
TANNING IN MODERATION IS BENEFICIAL:**

- Tanning in moderation makes people look and feel better.
- Moderate exposure to UV light benefits people concerned about vitamin D deficiency and has proven to boost immunity to certain diseases.
- Indoor tanning in moderation is safer than exposure to the sun, because the environment is controlled.
- Unlike the sun, tanning indoors is well regulated and approved by the government. When used moderately and responsibly, tanning sessions are designed to prevent burning.

Complaint

EXHIBIT G**Enjoy the sun on doctor's orders**

Solar rays can help protect against some cancers and heart disease, say scientists

—The Guardian, January 8, 2008

As Vitamins Go, D, You Are My Sunshine

Just 20 minutes of sun exposure without sunscreen enables the skin to produce 20,000 IU of vitamin D.

—The Washington Post, September 18, 2007

Sunshine prevents more deaths than it causes; Sunshine has a protective effect overall because it helps to create vitamin D

—New Scientist, January 12, 2008

The so-called sunshine vitamin is poised to become the nutrient of the decade...

—The New York Times, February 19, 2008

Studies shed light on 'sunshine vitamin'

Americans typically get more than 90 percent of their vitamin D from the source that nature intended—the sun...

—The Oakland Tribune, January 22, 2008

Time to rethink sun tanning?

For more information visit www.TrustTanning.com

Dermatologists and the sunscreen industry have spent millions on a deceptive campaign to scare Americans away from the sun. Now the tide of research is turning the other direction. The positive effects of getting vitamin D from sunlight are clear. So soak up a little sunlight—indoors or out—a couple of times each week, and get your recommended dose of the "sunshine vitamin."

Exhibit G

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 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; 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 complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the respondent that the law has been violated as alleged in such complaint, or that any of 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 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 for the receipt and consideration of public comments, and having duly considered the comments received from interested persons, 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 Indoor Tanning Association (“ITA”) is a Massachusetts corporation with its principal office or

Decision and Order

place of business at 2025 M Street, N.W., Washington, D.C. 20036.

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

ORDER**DEFINITIONS**

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

1. Unless otherwise specified, “respondent” shall mean Indoor Tanning Association, its successors and assigns, its officers when acting in active concert or participation with Indoor Tanning Association, and its executive director.
2. “Covered product or service” shall mean any ultraviolet lamp or sunlamp product, as defined in 21 C.F.R. § 1040.20; and any commercial facility where consumers may use ultraviolet lamps or sunlamp products.
3. “Clearly and conspicuously” means:
 - a. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;
 - b. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online

Decision and Order

services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read and comprehend it; and

- c. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.
4. “Close proximity” means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.
 5. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

Decision and Order

IT IS HEREBY ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that:

- A. Tanning, including indoor tanning, does not increase the risk of skin cancer;
- B. Tanning, including indoor tanning, is safe or poses no danger;
- C. Indoor tanning is approved by the government; and
- D. Indoor tanning is safer than tanning outdoors because in indoor tanning facilities, the amount of ultraviolet light is monitored and controlled.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that:

- A. Research shows that vitamin D supplements may harm the body's ability to fight disease; and
- B. A study in the Proceedings of the National Academy of Sciences determined: (a) that sun exposure does not

Decision and Order

cause skin cancer or melanoma, or that the risk of such cancer is only hypothetical; (b) that getting a tan is healthy; (c) that the risks of not getting enough ultraviolet light far outweigh the risk of skin cancer; or (d) that vitamin D has been linked to significantly decreasing the risk of contracting lung, kidney, or liver cancer.

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting commerce, shall not make any representation, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the safety, health-related efficacy or performance, or health-related risks or benefits, of any covered product or service; or about the sources, performance, efficacy, or health-related risks or benefits of vitamin D; unless the representation is non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields to substantiate that the representation is true. For the purposes of this order, competent and reliable scientific evidence shall consist of tests, analyses, research, studies, or other evidence that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and whose results are consistent with the body of reliable scientific evidence relevant to the representation.

Decision and Order

IV.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, the existence, contents, validity, results, conclusions, or interpretations of any test, study, survey, or research.

V.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the safety or health benefits of any covered product or service unless it discloses, clearly and conspicuously, and within close proximity to that representation:

NOTICE: Exposure to ultraviolet radiation may increase the likelihood of developing skin cancer and can cause serious eye injury.

Provided that, in lieu of the above, in the event that advertising for any covered product or service makes any representation, expressly or by implication, including through the use of a product name, endorsement, depiction, or illustration, that exposure to ultraviolet radiation produces vitamin D in the body, or otherwise about the effectiveness or usefulness of such product

Decision and Order

for generation of vitamin D, the required disclosure shall be as follows:

NOTICE: You do not need to become tan for your skin to make vitamin D. Exposure to ultraviolet radiation may increase the likelihood of developing skin cancer and can cause serious eye injury.

VI.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product or service, in or affecting commerce, shall not provide to any other person or entity any means or instrumentalities that contain any representation or omission prohibited by this order. For the purposes of this Part, “means or instrumentalities” shall mean any information, including but not necessarily limited to any advertising, labeling, communications guides, or other promotional material.

VII.

IT IS FURTHER ORDERED that respondent Indoor Tanning Association and its successors and assigns shall send as soon as practicable, but in no event later than thirty (30) days after entry of this order, by first-class mail, postage prepaid and return receipt requested, an exact copy of the notice attached hereto as Attachment A, showing the date of mailing, to all Indoor Tanning Association members and all other entities to which Indoor Tanning Association provided point-of-sale advertising on or after January 1, 2008. The notice required by this paragraph shall not include any other document or enclosures and may be sent to the principal place of business of each entity.

Decision and Order

VIII.

IT IS FURTHER ORDERED that, for a period of five (5) years after the last date of dissemination of any representation covered by this order, respondent Indoor Tanning Association and its successors and assigns shall 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, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

IX.

IT IS FURTHER ORDERED that respondent Indoor Tanning Association and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, and other employees with managerial authority having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

Decision and Order

X.

IT IS FURTHER ORDERED that respondent Indoor Tanning Association 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, 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.

XI.

IT IS FURTHER ORDERED that respondent Indoor Tanning Association and its successors and assigns shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

XII.

This order will terminate on May 13, 2030, 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

Decision and Order

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 Paragraph in this order that terminates in less than twenty (20) years; and
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Paragraph.

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

By the Commission, Commissioner Ramirez not participating.

Decision and Order

ATTACHMENT A

[ON INDOOR TANNING ASSOCIATION LETTERHEAD]

**IMPORTANT NOTICE ABOUT GOVERNMENT
ACTION**

[insert addressee name]
[insert addressee address]

Dear ITA Member or Affiliate:

In a recent lawsuit, the Federal Trade Commission (FTC) charged the Indoor Tanning Association (ITA) with making misleading representations in its advertising and marketing for indoor tanning. Among other things, the FTC alleged that ITA falsely claimed that indoor tanning poses no risk to health, including no risk of skin cancer. In addition, the FTC alleged that when ITA represented that indoor tanning caused the skin to generate vitamin D, ITA failed to disclose material facts about the risks of indoor tanning. ITA has agreed to send this notification to you as part of its settlement with the FTC.

ITA hereby requests that you immediately stop using all advertising and marketing materials previously provided by to you by ITA. Among the materials you should no longer use are all of the materials contained on the CD-ROM issued in 2008, including the following:

- A. The “Melanoma Hype” print ad
- B. The “Overdose of Hysteria” video
- C. The “Communications: The Basics” guide and
- D. The print ad with the tag line, “Time to rethink sun tanning?”

Analysis to Aid Public Comment

The FTC complaint alleges that these ads contain representations that are false and/or misleading.

For further information about the FTC's complaint and order, go to www.ftc.gov and search "Indoor Tanning Association."

Very truly yours,

John Overstreet
Executive Director

**ANALYSIS OF PROPOSED CONSENT ORDER
TO AID PUBLIC COMMENT**

The Federal Trade Commission ("FTC" or "Commission") has accepted, subject to final approval, an agreement containing a consent order from the Indoor Tanning Association ("respondent"). The proposed consent order has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter involves the advertising and promotion of indoor tanning products and facilities. According to the FTC complaint, respondent represented, in various advertisements, that tanning, including indoor tanning, does not increase the risk of skin cancer. The complaint alleges that this claim is false and unsubstantiated

Analysis to Aid Public Comment

because tanning, including indoor tanning, increases the risk of skin cancer, including squamous cell and melanoma skin cancers. Also, according to the complaint, respondent represented that: tanning, including indoor tanning, poses no danger; indoor tanning is approved by the government; and indoor tanning is safer than tanning outdoors because, in indoor tanning facilities, the amount of ultraviolet light is monitored and controlled. The FTC complaint alleges that these claims are false and unsubstantiated.

The FTC complaint further charges that respondent represented that research shows that vitamin D supplements may harm the body's ability to fight disease; and that a recent study in the prestigious Proceedings of the National Academy of Sciences determined that the risks of not getting enough ultraviolet light far outweigh the hypothetical risk of skin cancer, that getting a healthy tan produces vitamin D, and that increased vitamin D has been linked to significantly decreasing your risk of contracting internal cancers, such as lung, kidney, or liver cancer. The complaint alleges that these claims are false and misleading. The FTC complaint also alleges that respondent represented that tanning causes the skin to generate vitamin D and has health benefits, but that respondent failed to disclose facts that would be material to consumers in their purchase and use of indoor tanning services, specifically, that consumers can increase their vitamin D levels through ultraviolet levels lower than the amount needed to get a tan, and that ultraviolet radiation can injure the eyes and increases the risk of skin cancer. The complaint alleges that respondent's failure to disclose these facts, in light of the representation made, is a deceptive practice. Finally, the complaint alleges that respondent provided to others the means and instrumentalities to engage in deceptive acts or practices.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in the future. The order covers representations made in connection with the manufacturing, labeling, advertising, promotion, offering

Analysis to Aid Public Comment

for sale, sale, or distribution of any covered product or service, in or affecting commerce. It does not cover representations made in non-commercial settings or contexts, such as communications to legislative or executive bodies. The order defines a covered product or service as any ultraviolet lamp or sunlamp product, as defined in federal regulation 21 C.F.R. § 1040.20, or any commercial facility where consumers may use ultraviolet lamps or sunlamp products.

Part I of the order prohibits respondent from making the following representations: tanning, including indoor tanning, does not increase the risk of skin cancer; tanning, including indoor tanning, is safe or poses no danger; indoor tanning is approved by the government; and indoor tanning is safer than tanning outdoors because in indoor tanning facilities, the amount of ultraviolet light is monitored and controlled. The ban on representations that tanning, including indoor tanning, is safe, is fencing-in relief. Part II of the order prohibits respondent from misrepresenting (1) that research shows that vitamin D supplements may harm the body's ability to fight disease and (2) that a study in the Proceedings of the National Academy of Sciences determined: (a) that sun exposure does not cause skin cancer or melanoma, or that the risk of such cancer is only hypothetical; (b) that getting a tan is healthy; (c) that the risks of not getting enough ultraviolet light far outweigh the risk of skin cancer; or (d) that vitamin D has been linked to significantly decreasing the risk of contracting lung, kidney, or liver cancer.

Part III prohibits respondent from making any representation about the safety, health-related efficacy or performance, or health-related risks or benefits, of any covered product or service; or about the sources, performance, efficacy, or health-related risks or benefits of vitamin D; unless the representation is non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields to substantiate that the representation is true. For the purposes of the order, competent and reliable

Analysis to Aid Public Comment

scientific evidence is defined as tests, analyses, research, studies, or other evidence that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and whose results are consistent with the body of reliable scientific evidence relevant to the representation. Part IV of the order prohibits respondent from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, survey, or research.

Part V of the order is a disclosure provision. It prohibits respondent from making any representation about the safety or health benefits of any covered product or service unless it makes the following disclosure, clearly and conspicuously, and in close proximity to the representation: **“NOTICE:** Exposure to ultraviolet radiation may increase the likelihood of developing skin cancer and can cause serious eye injury.” In the event, however, that respondent represents that exposure to ultraviolet radiation produces vitamin D in the body, or otherwise about the effectiveness or usefulness of such product for generation of vitamin D, the required disclosure shall be as follows: **“NOTICE:** You do not need to become tan for your skin to make vitamin D. Exposure to ultraviolet radiation may increase the likelihood of developing skin cancer and can cause serious eye injury.”

Part VI of the order prohibits respondent from providing to any other person or entity any means or instrumentalities that contain any representation prohibited by the order. Part VII requires respondent to send a notice about the FTC's law enforcement action to all of its members, and all other entities to which it provided point-of-sale advertising on or after January 1, 2008; the required notice is attached to the order as Attachment A.

Parts VIII, IX, X, and XI of the consent order require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to

Analysis to Aid Public Comment

provide copies of the order to its personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part XII provides that the order will terminate after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

DAVE & BUSTER'S, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5(A) OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4291; File No. 082 3153
Filed, May 20, 2010 — Decision, May 20, 2010

This consent order addresses Dave & Buster's, Inc.'s practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computer networks. Dave & Buster's: (a) failed to employ sufficient measures to detect and prevent unauthorized access to computer networks or to conduct security investigations, such as by employing an intrusion detection system and monitoring system logs; (b) failed to adequately restrict third-party access to its networks, such as by restricting connections to specific IP addresses or granting temporary, limited access; (c) failed to monitor and filter outbound traffic from its networks to identify and block export of sensitive personal information without authorization; (d) failed to use readily available security measures to limit access between in-store networks, such as by using firewalls or isolating the payment card system from the rest of the corporate network; and (e) failed to use readily available security measures to limit access to its computer networks through wireless access points on the networks. Between April 30, 2007, and August 28, 2007, an intruder, exploiting some of these vulnerabilities, connected to Dave & Buster's networks numerous times without authorization, installed unauthorized software, and intercepted personal information in transit from in-store networks to its credit card processing company. The breach compromised approximately 130,000 unique payment cards used by consumers in the United States. The order requires Dave & Buster's 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 Dave & Buster's size and complexity, the nature and scope of its activities, and the sensitivity of the personal information collected from or about consumers.

Participants

For the *Commission*: *Katrina Blodgett* and *Kate White*.

Complaint

For the *Respondents: Benita Kahn, Vorys, Sater, Seymour and Pease LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Dave and Buster's, 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 Dave & Buster's, Inc. is a Missouri corporation with its principal office or place of business at 2481 Manana Drive, Dallas, Texas 75220.
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 owns and operates 53 restaurant/entertainment complexes in the United States under the names Dave & Buster's, Dave & Buster's Grand Sports Café, and Jillian's. Consumers pay for purchases at these stores with credit and debit cards (collectively, "payment cards"), or cash.
4. Respondent operates networks in each store ("in-store networks") as well as a corporate computer network (collectively, "networks"). These networks link corporate headquarters in the United States with each store, and, among other things, are used to process sales transactions.
5. In conducting its business, respondent routinely collects information from consumers to obtain authorization for payment card purchases. Among other things, it collects: the credit card account number, expiration date, and an electronic security code for payment card authorization (collectively, "personal information"). This information is particularly sensitive because it can be used to facilitate payment card fraud and other consumer harm.

Complaint

6. To obtain payment card authorization, respondent collects personal information at its various in-store terminals, transfers the data to its in-store servers, and then transmits the data to a third-party credit card processing company.

7. In collecting and processing sensitive personal information, respondent engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its networks. In particular, respondent:

- a. failed to employ sufficient measures to detect and prevent unauthorized access to computer networks or to conduct security investigations, such as by employing an intrusion detection system and monitoring system logs;
- b. failed to adequately restrict third-party access to its networks, such as by restricting connections to specified IP addresses or granting temporary, limited access;
- c. failed to monitor and filter outbound traffic from its networks to identify and block export of sensitive personal information without authorization;
- d. failed to use readily available security measures to limit access between in-store networks, such as by employing firewalls or isolating the payment card system from the rest of the corporate network; and
- e. failed to use readily available security measures to limit access to its computer networks through wireless access points on the networks.

Complaint

8. Between April 30, 2007, and August 28, 2007, an intruder, exploiting some of the vulnerabilities set forth in Paragraph 7, connected to respondent's networks numerous times without authorization, installed unauthorized software, and intercepted personal information in transit from in-store networks to respondent's credit card processing company. After learning of the breach, respondent took steps to prevent further unauthorized access and to notify law enforcement and the credit card companies of affected consumers.

9. The breach compromised approximately 130,000 unique payment cards used by consumers in the United States. To date, issuing banks have collectively claimed several hundred thousand dollars in fraudulent charges on some of these implicated accounts.

10. As described in Paragraphs 7 through 9, respondent's failure to employ reasonable and appropriate security measures to protect personal information caused or is likely to cause substantial injury to consumers that is not offset by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers. This practice was and is an unfair act or practice.

11. 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).

THEREFORE, the Federal Trade Commission this twentieth day of May, 2010, has issued this complaint against respondent.

By the Commission, Commissioner Ramirez not participating.

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 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:

1. Respondent is a Missouri corporation with its principal office or place of business at 2481 Manana Drive, Dallas, Texas 75220.

Decision and Order

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

ORDER**DEFINITIONS**

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

- A. "Personal information" shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name; (d) a telephone number; (e) a Social Security number; (f) a driver's license number; (g) a credit card or debit card account number; (h) a persistent identifier, such as a customer number held in "cookie" or processor serial number, that is combined with other available data that identifies an individual consumer; or (i) any information that is combined with any of (a) through (h) above.
- B. Unless otherwise specified, "respondent" shall mean Dave & Buster's, Inc., and its subsidiaries, divisions, and affiliates owned or controlled by Dave & Buster's, Inc. and the successors and assigns of Dave & Buster's, Inc.
- C. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

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I.

IT IS ORDERED that respondent, in connection with the 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; and (3) prevention, detection, and response to attacks, intrusions, or other systems failures;

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- C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;
- D. the development and use of reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from respondent, and requiring service providers by contract to implement and maintain appropriate safeguards; and
- E. the evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by sub-Part 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.

II.

IT IS FURTHER ORDERED that, in connection with its compliance with Part I of this order, respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for ten (10) years after service of the order for the biennial Assessments. Each Assessment shall:

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

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- B. explain how such safeguards are appropriate to respondent's size and complexity, the nature and scope of respondent's activities, and the sensitivity of the personal information collected from or about consumers;
- C. explain how the safeguards that have been implemented meet or exceed the protections required by the Part I of this order; and
- D. certify that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies 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 similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.

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III.

IT IS FURTHER ORDERED that respondent shall maintain, and upon request make available to the Federal Trade Commission for inspection and copying:

- A. for a period of five (5) years, a print or electronic copy of each document relating to compliance, including but not limited to documents, 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 Assessment required under Part II of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of the respondent, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials relating to respondent's compliance with Parts I and II of this order, for the compliance period covered by such Assessment.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, directors, and managers at corporate headquarters, regional offices, and at each store having responsibilities relating to the subject matter of this order. Respondent shall deliver this order to such current personnel within thirty (30) days after service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

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V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor 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.

VI.

IT IS FURTHER ORDERED that respondent shall, within ninety (90) 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.

VII.

This order will terminate on May 20, 2030, 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:

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- A. any Part in this order that terminates in less than twenty (20) years;
- B. this order's application to any respondent that is not named as a defendant in such complaint; and
- C. this order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission, Commissioner Ramirez not participating.

**ANALYSIS OF PROPOSED CONSENT ORDER
TO AID PUBLIC COMMENT**

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from Dave & Buster's, Inc. ("Dave & Buster's").

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

Analysis to Aid Public Comment

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.

Dave & Buster's owns and operates 53 restaurant and entertainment complexes in the United States. Consumers may pay for purchases at these locations with credit and debit cards (collectively, "payment cards") or cash. In conducting its business, Dave & Buster's routinely collects information from consumers to obtain authorization for payment card purchases, including the credit card account number, expiration date, and an electronic security code for payment authorization. This information is particularly sensitive because it can be used to facilitate payment card fraud and other consumer fraud.

The Commission's complaint alleges that since at least April 2007, Dave & Buster's engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information on its computer networks. Among other things, Dave & Buster's: (a) failed to employ sufficient measures to detect and prevent unauthorized access to computer networks or to conduct security investigations, such as by employing an intrusion detection system and monitoring system logs; (b) failed to adequately restrict third-party access to its networks, such as by restricting connections to specific IP addresses or granting temporary, limited access; (c) failed to monitor and filter outbound traffic from its networks to identify and block export of sensitive personal information without authorization; (d) failed to use readily available security measures to limit access between in-store networks, such as by using firewalls or isolating the payment card system from the rest of the corporate network; and (e) failed to use readily available security measures to limit access to its computer networks through wireless access points on the networks.

Analysis to Aid Public Comment

The complaint further alleges that between April 30, 2007 and August 28, 2007, an intruder, exploiting some of these vulnerabilities, connected to Dave & Buster's networks numerous times without authorization, installed unauthorized software, and intercepted personal information in transit from in-store networks to its credit card processing company. The breach compromised approximately 130,000 unique payment cards used by consumers in the United States.

The proposed order applies to personal information Dave & Buster's collects from or about consumers. It contains provisions designed to prevent Dave & Buster's from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order requires Dave & Buster's 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 Dave & Buster'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 Dave & Buster's to:

- Designate an employee or employees to coordinate and be accountable for the information security program.
- Identify material internal and external risks to the security, confidentiality, and integrity of personal information that could result in the unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks.
- Design and implement reasonable safeguards to control the risks identified through risk assessment, and regularly

Analysis to Aid Public Comment

test or monitor the effectiveness of the safeguards' key controls, systems, and procedures.

- Develop and use reasonable steps to select and retain service providers capable of appropriately safeguarding personal information they receive from respondents, and require service providers by contract to implement and maintain appropriate safeguards.
- Evaluate and adjust its information security program in light of the results of the testing and monitoring, any material changes to its operations or business arrangements, or any other circumstances that it knows or has reason to know may have a material impact on the effectiveness of its information security program.

Part II of the proposed order requires that Dave & Buster's obtain within 180 days, and on a biennial basis thereafter for ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that it has in place a security program that provides protections that meet or exceed the protections required by Part I of the proposed order; and its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information is protected.

Parts III through VII of the proposed order are reporting and compliance provisions. Part III requires Dave & Buster's to retain documents relating to its compliance with the order. For most records, the order requires that the documents be retained for a five-year period. For the third-party assessments and supporting documents, Dave & Buster's must retain the documents for a period of three years after the date that each assessment is prepared. Part IV requires dissemination of the order now and in the future to principals, officers, directors, and managers at corporate headquarters, regional offices, and at each store having

Analysis to Aid Public Comment

responsibilities relating to the subject matter of the order. Part V ensures notification to the FTC of changes in corporate status. Part VI mandates that Dave & Buster's submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

AGILENT TECHNOLOGIES, INC.

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

Docket No. C-4292; File No. 091 0135
Filed, June 25, 2010 — Decision, June 25, 2010

This consent order addresses the \$1.5 billion acquisition by Agilent Technologies, Inc., of Varian, Inc. Agilent and Varian are the only two competitors in the market for Micro Gas Chromatography instruments. With only four suppliers, the markets for Triple Quadrupole Gas Chromatography-Mass Spectrometry and Inductively Coupled Plasma-Mass Spectrometry instruments are highly concentrated. Agilent's acquisition of Varian would leave only three suppliers, which would lessen competition in the markets for Micro GC, 3Q GC-MS and ICP-MS instruments. The order requires Agilent to: (1) divest the assets of its Micro Gas Chromatography instruments business to Inficon Group, a subsidiary of Inficon Holding AG; and (2) divest the assets of Varian's Triple Quadrupole Gas Chromatography-Mass Spectrometry and Inductively Coupled Plasma-Mass Spectrometry instruments businesses to Bruker Corp.

Participants

For the *Commission*: *Richard H. Cunningham, Lisa D. DeMarchi Sleigh, Aylin Skroejer, and James R. Weiss.*

For the *Respondents*: *Joanne C. Lewers and Robert A. Skitol, Drinker Biddle & Reath LLP.*

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Agilent Technologies, Inc. ("Agilent"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Varian,

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Inc. ("Varian"), 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 the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT

1. Respondent Agilent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 5301 Stevens Creek Blvd., Santa Clara, California 95051.

2. Respondent is engaged in, among other things, the production and sale of micro gas chromatography instruments, triple quadrupole gas chromatography-mass spectrometry instruments, and inductively coupled plasma-mass spectrometry instruments.

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. Varian is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 3120 Hansen Way, Palo Alto, California 94304.

5. Varian is engaged in, among other things, the production and sale of micro gas chromatography instruments, triple quadrupole gas chromatography-mass spectrometry instruments,

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and inductively coupled plasma-mass spectrometry instruments.

III. PROPOSED ACQUISITION

6. Pursuant to an Agreement and Plan of Merger (the "Agreement") dated July 26, 2009, Agilent announced its intention to acquire the stock of Varian for \$1.5 billion (the "Acquisition").

IV. RELEVANT MARKETS

7. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the manufacture and sale of the following products: (a) micro gas chromatography instruments; (b) triple quadrupole gas chromatography-mass spectrometry instruments; and (c) inductively coupled plasma-mass spectrometry instruments.

- a. Micro gas chromatography instruments are portable gas chromatography instruments that are used primarily in the oil, mining, and waste disposal industries to detect the presence of certain toxins in air or in emissions. Unlike other types of gas chromatography equipment, these instruments are designed to be used in the field, and therefore are small and light enough to be portable, and sufficiently robust to withstand travel and field use in a variety of environments.
- b. Triple quadrupole gas chromatography-mass spectrometry instruments combine a gas chromatograph with a triple quadrupole mass spectrometer. They are extraordinarily sensitive devices that provide molecular-level analysis of the components of a sample and are commonly used to test for pesticides in food, drugs in blood, and

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environmental contaminants, such as lead, in drinking water.

- c. Inductively coupled plasma-mass spectrometry instruments combine inductively coupled plasma technology and mass spectrometry technology and are used for the analysis of inorganic materials. The most common application for the instrument is testing water samples, such as drinking, ground, waste, and seawater, for the presence of toxic metals, like arsenic, mercury, or lead.

8. 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 lines of commerce. To compete in the relevant product markets in the United States, a firm must establish a local sales force, service infrastructure, and reputation among purchasers in the relevant product markets.

V. STRUCTURE OF THE MARKETS

9. In the United States, Agilent and Varian are the sole competitors in the \$6.8 million market for micro gas chromatography instruments. Agilent and Varian account for approximately 75 percent and 25 percent of the market, respectively, and directly compete on price, service, and product innovation. As a result, the Acquisition would significantly increase concentration and create a monopoly.

10. The market for triple quadrupole gas chromatography-mass spectrometry instruments is highly concentrated as measured by the Herfindahl-Hirschman Index ("HHI"). In the United States, there are only four suppliers of triple quadrupole gas chromatography-mass spectrometry instruments. The Acquisition would reduce the number of suppliers from four to three, leaving Agilent significantly larger than any of its remaining competitors in this \$7 million market. Post-acquisition, the combined Agilent and Varian would have in excess of a 48 percent share of the U.S.

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market. The other two competitors, Thermo Fisher Scientific, Inc. and Waters Corp., have market shares of approximately 36 percent and 16 percent, respectively. The post-merger HHI would be 3,882 points and the acquisition will increase the HHI level by 1,157 points. This market concentration level far exceeds the range in which a proposed acquisition is likely to create market power or enhance the likelihood that it can be exercised successfully.

11. The market for inductively coupled plasma-mass spectrometry instruments is highly concentrated as measured by the HHI. In the United States, there are only four suppliers of inductively coupled plasma-mass spectrometry instruments. Agilent accounts for 40 percent of the \$26 million market for inductively coupled plasma-mass spectrometry instruments and the Acquisition would entrench Agilent further as the dominant supplier of inductively coupled plasma-mass spectrometry instruments in the United States and increase concentration significantly. Post-acquisition, the combined Agilent and Varian would have in excess of a 48 percent share of the U.S. market. The other two competitors, Thermo and PerkinElmer, Inc., have market shares of approximately 14 percent and 37 percent, respectively. The post-merger HHI would be 3,948 points and the acquisition will increase the HHI level by 705 points. This market concentration level far exceeds the range in which a proposed acquisition is likely to create market power or enhance the likelihood that it can be exercised successfully.

VI. ENTRY CONDITIONS

12. Neither new entry nor entry by existing suppliers from outside the United States into the relevant product markets described in Paragraph 6 sufficient to deter or counteract the anticompetitive effects of the proposed acquisition is likely to occur within two years. Entry into the relevant product markets *de novo* requires a significant amount of time and resources. In order to be successful, a new entrant must develop technology that

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is at least equivalent to the incumbent technologies in terms of performance and reliability. A new entrant must also develop around or obtain licenses for existing intellectual property. Finally, a new entrant must establish a U.S. sales force, support, capability, and reputation for robust and reliable instrument performance. Companies selling relevant products outside of the United States face the same reputation, sales, and service barriers as new entrants. Therefore, entry into the relevant line of commerce would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition.

VII. EFFECTS OF THE ACQUISITION

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

- a. by eliminating actual, direct, and substantial competition between Agilent and Varian for the sale of each of the relevant products in the United States;
- b. by increasing the likelihood that Respondent would unilaterally exercise market power in the U.S. markets for each of the relevant products;
- c. by increasing the likelihood that U.S. customers would be forced to pay higher prices for each of the relevant products;
- d. by increasing the likelihood that consumers would experience lower levels of innovation and service in the U.S. markets for each of the relevant products; and
- e. by increasing the likelihood and degree of coordinated interaction between or among suppliers in the U.S. markets for each of the relevant products.

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VIII. VIOLATIONS CHARGED

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

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-fifth day of June, 2010, issues its Complaint against said Respondent.

By the Commission.

Decision and Order

DECISION AND ORDER
[Redacted Public Version]

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of Varian, Inc. (“Varian”) by Agilent Technologies, Inc. (“Respondent Agilent”), and Respondent Agilent having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent Agilent 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 Agilent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent Agilent 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 Agilent 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 Agilent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

Decision and Order

1. Respondent Agilent 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 5301 Stevens Creek Boulevard, Santa Clara, California 95051.

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. "Agilent" means Agilent Technologies, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Agilent Technologies, Inc. (including Varian, after the Acquisition Date), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Varian" means Varian, Inc., 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 3120 Hansen Way, Palo Alto, California 94304.
- C. "Commission" means the Federal Trade Commission.
- D. "Acquisition" means Respondent Agilent's acquisition of Varian.
- E. "Acquisition Date" means the date on which the

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Acquisition is consummated.

- F. “Confidential Business 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, contracts, cost information, marketing methods, technologies, processes, or other trade secrets.
- G. “Copyrights” means rights to all original works of authorship of any kind directly Related To the Agilent Micro GC Products, Varian Triple Quad Products, or Varian ICP-MS Products, as applicable, and any registrations and applications for registrations thereof, including, but not limited to, the following: all such rights with respect to all promotional, marketing and advertising materials, educational and training materials for the sales force, and sales forecasting models; copyrights in all process development data and reports Relating To the research and development of the Agilent Micro GC Products, Varian Triple Quad Products, or Varian ICP-MS Products, as applicable, or of any materials used in the research, Development, manufacture, marketing or sale of the Agilent Micro GC Products, Varian Triple Quad Products, or Varian ICP-MS Products, including copyrights in all raw data, statistical programs developed (or modified in a manner material to the use or function thereof (other than through user preferences)) to analyze research data, market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information; all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks Relating To the

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Agilent Micro GC Products, Varian Triple Quad Products, or Varian ICP-MS Products; all copyrights in analytical and quality control data; and all correspondence with governmental agencies.

- H. “Designated Employee” means Designated Micro GC Employee, Designated ICP-MS Employee, or Designated Triple Quad Employee.
- I. “Development” means all research and development activities, including, without limitation, the following: test method development; stability testing; process development; manufacturing scale-up; development-stage manufacturing; quality assurance/quality control development; statistical analysis and report writing; and conducting experiments for the purpose of obtaining any and all product approvals or certifications. Develop means to engage in Development.
- J. “Divested Business” means the Micro GC Business, the ICP-MS Business, or the Triple Quad Business.
- K. “Divested Products” means the Agilent Micro GC Products, the Varian ICP-MS Products, or the Varian Triple Quad Products.
- L. “Effective Date” means the Micro GC Effective Date, the ICP-MS Effective Date, or the Triple Quad Effective Date.
- M. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Acquisition Date, and includes all reissues, additions,

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divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions, Related To any product of or owned by Respondent Agilent as of the Acquisition Date.

- N. "Person" means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, division, or department, or other business or legal entity.
- O. "Relating To" or "Related To" means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- P. "Software" means computer programs Related To the production and use of Agilent Micro GC Products, Varian Triple Quad Products, or Varian ICP-MS Products, respectively, including all software implementations of algorithms, models, and methodologies whether in source code or object code form, databases and compilations, including any and all data and collections of data, all documentation, including user manuals and training materials, Related To any of the foregoing and the content and information contained on any website; *provided, however*, that Software does not include software that can readily be purchased or licensed from sources other than Respondent Agilent and which has not been modified in a manner material to the use or function thereof (other than through user preference settings).
- Q. "Trade Dress" means the current trade dress of a particular product or Person including, without limitation, product packaging, logos, and the lettering of the product trade name, brand name, or corporate

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name.

- R. “Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Agilent Micro GC Products, Varian Triple Quad Products, and Varian ICP-MS Products.

[Micro GC Definitions]

- S. “Agilent-Inficon Micro GC Divestiture Agreement” means all the divestiture agreements, licenses, assignments, and other agreements entered into by Inficon and Respondent Agilent for the sale of the Agilent Micro GC Business. The Agilent-Inficon Micro GC Divestiture Agreement is attached as Confidential Exhibit A to this Order.
- T. “Agilent Micro GC Products” means the Micro GC instruments, Developed, manufactured and sold by Agilent, including but not limited to, Agilent models G2801-300A; G2802-3000A; G2803A-300A; G2804A-300A; G2805A-300A; G2806A-300A; and G2807A-300A.
- U. “Agilent Micro GC Business” means:
1. Agilent Micro GC Information;
 2. Agilent Micro GC Intellectual Property;

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Provided, however, that the Agilent Micro GC Intellectual Property does not include Agilent Micro GC Shared Intellectual Property.

Provided, further, however, that the Agilent Micro GC Intellectual Property does not include the corporate names or corporate Trade Dress of Agilent, or the related logos thereof.

3. Agilent Micro GC Inventory; and
 4. Agilent Micro GC Tangible Assets.
- V. “Agilent Micro GC Intellectual Property” means all of the following Related To the Agilent Micro GC Products including, but not limited to:
1. Copyrights;
 2. Patents;
 3. Software;
 4. Trademarks;
 5. Trade Dress;
 6. trade secrets, know-how, drawings, utility models, designs, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process, protocols, methods and other confidential or proprietary technical, business, Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;
 7. rights to obtain and file for Patents and Copyrights and registrations thereof;

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8. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing; and
 9. the exclusive right to all Agilent intellectual property used solely in the Development, manufacturing, storage, distribution and sale of the Agilent Micro GC Products including, but not limited to, Software, computer programs, Patents, licenses (including, licenses to third-party Software if transferable and sub-licenses to Software modified by Agilent), know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets, technical information (including, but not limited to, material and final product specifications), marketing information, protocols (including, but not limited to, operational manuals), quality control information, Trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property.
- W. “Agilent Micro GC Information” means all information owned by, or in the possession or control of, Respondent Agilent that is not in the public domain and that is Related To the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Agilent Micro GC Products including, but not limited to, information not otherwise included in the Agilent Micro GC Intellectual Property, customer lists, current and historical

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customer purchases and data, historical data, complaints, safety history, all data and information Relating To any of Agilent's approvals, clearances, licenses, registrations, permits, franchises, product registrations, authorizations, or certifications issued by any federal, state, municipal, or foreign authority, or any third party, registrar or certification body Relating To the Agilent Micro GC Products including, without limitation, all filings, engineering and design documentation, manufacturing and test results and procedures, and any other information possessed by Agilent in any location Relating To the Agilent Micro GC Products.

- X. "Agilent Micro GC Inventory" means all inventory of raw materials, intermediate work in progress, spare parts, prototypes, and finished Agilent Micro GC Products, wherever located.
- Y. "Agilent Micro GC Tangible Assets" means all of Respondent's rights, title, and interest in all physical assets Relating To the Development, manufacture, sale, and distribution of the Agilent Micro GC Products including, without limitation, the following:
1. all machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property located at or Relating To a facility owned and operated by Respondent at No. 412 Ting Lun Road, Wai Gao Qiao Free Trade Zone, Shanghai, 200131, P.R. China.
 2. all machinery, fixtures, equipment, vehicles, transportation and storage facilities, furniture, tools, supplies, stores, spare parts, and other tangible personal property located at or Relating To a facility owned and operated by Respondent at

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2850 Centerville Road, Wilmington, Delaware.

Provided, however, Agilent Micro GC Tangible Assets does not include any real property, plant facilities, or buildings located at Respondent Agilent's facilities in Shanghai, China or Wilmington, Delaware.

- Z. "Agilent Micro GC Shared Intellectual Property" means the Agilent Micro GC Intellectual Property that is not used by Agilent exclusively for the Agilent Micro GC Business.
- AA. "Designated Micro GC Employee" means the employee or person filling the job descriptions listed in Confidential Exhibit C to this Order. "Designated Micro GC Employee" may include any other person not listed on Confidential Exhibit C to this Order who has been identified by the Micro GC Acquirer and the Monitor, and determined by the Commission staff to have devoted more than 25% of his/her time to Agilent Micro GC Products in the twelve (12) months preceding the Acquisition Date.
- BB. "Inficon" means Inficon Inc., a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its international headquarters located at Hintergasse 15B, CH-7310 Bad Ragaz, Switzerland and its principal place of business located in the United States at Two Technology Place, East Syracuse, New York 13057-9714.
- CC. "Manifold Supply Agreement" means the agreement between the Micro GC Acquirer and Respondent Agilent under which Respondent Agilent will produce the nickel-plated manifold used in the production of the Agilent Micro GC Products, which shall be approved by the Commission and become a part of the

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Micro GC Divestiture Agreement.

- DD. “Micro GC” means a portable (transportable by one person) gas chromatograph having intimately connected column, injector valve and detectors, an ability to run on a 200 watt or lower capacity battery or power supply, and a carrier gas requirement of 1 to 5 mL/min per channel or less.
- EE. “Micro GC Acquirer” means the Person specified by name in this Order, or the Person approved by the Commission, to acquire the Agilent Micro GC Business pursuant to Paragraph II or Paragraph VII of this Order. The Micro GC Acquirer may be the same Person as the Triple Quad Acquirer and the ICP-MS Acquirer.
- FF. “Micro GC Acquirer Employee” means any person employed by the Micro GC Acquirer who has been determined by the Micro GC Acquirer, the Monitor, and Commission staff to have devoted any of his/her time to Agilent Micro GC Products after the Micro GC Effective Date.
- GG. “Micro GC Contracts” means:
1. Micro GC Customer Contracts;
 2. Micro GC Sales and Distribution Contracts;
 3. Micro GC Flow Parts Contracts;
 4. Micro GC Service Contracts; and
 5. Micro GC Supply Contracts.
- HH. “Micro GC Customer Contracts” means the customer contracts for the purchase and sale of Agilent Micro

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GC Products. Micro GC Customer Contracts shall include contracts between Agilent and a customer that are not exclusively for the purchase and sale of Agilent Micro GC Products, but may also include other Agilent products, to the extent that such contracts pertain to the purchase and sale of Agilent Micro GC Products.

- II. “Micro GC Sales and Distribution Contracts” means the contracts between Agilent and Persons who sell and distribute the Agilent Micro GC Products including, but not limited to, those contracts identified in Confidential Exhibit M.
- JJ. “Micro GC Divestiture Agreement” means all the divestiture agreements, licenses, assignments, and other agreements entered into by the Micro GC Acquirer and Respondent Agilent, including the Agilent-Inficon Micro GC Divestiture Agreement, pursuant to Paragraph II.
- KK. “Micro GC Effective Date” means the date on which the divestitures, licensing, and assignments, pursuant to Paragraph II or Paragraph VII of this Order, are consummated.
- LL. “Micro GC Flow Parts Contracts” means the contracts between Agilent and Micralyne, Inc. for the supply and maintenance of flow parts for the manufacture and production of Agilent Micro GC Products, attached as Confidential Exhibit D.
- MM. “Micro GC Service Contracts” means the contracts under which Respondent Agilent provides repair and maintenance services for the Agilent Micro GC Products.

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- NN. “Micro GC Supply Contracts” means the contracts under which Respondent Agilent purchases inputs used in the manufacture and production of the Agilent Micro GC Products.
- OO. “Remedial Micro GC Agreement” means the following:
1. the Agilent-Inficon Micro GC Divestiture Agreement if such agreement has not been rejected by the Commission pursuant to Paragraph II.F of this Order; and
 2. any agreement between Respondent Agilent and a Commission-approved Micro GC Acquirer (or between a Divestiture Trustee and a Commission-approved Micro GC Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be granted, licensed, delivered or otherwise conveyed, that have been approved by the Commission to accomplish the requirements of this Order.
- PP. “Varian Micro GC Products” means Micro GC instruments Developed, manufactured or sold by Varian including, but not limited to, products contained in the Varian CP-4900 series.

[Triple Quad Definitions]

- QQ. “Bruker” means Bruker Corporation, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its international headquarters and principal place of business located in the United States at 40 Manning Road, Billerica,

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Massachusetts 01821.

- RR. “Agilent-Bruker Divestiture Agreement” means all the divestiture agreements, licenses, assignment, and other agreements entered into by Bruker and Respondent Agilent for the sale of the Varian Triple Quad Business and the Varian ICP-MS Business. The Agilent-Bruker Divestiture Agreement is attached as Confidential Exhibit B to this Order.
- SS. “Agilent Triple Quad Products” means Triple Quad instruments manufactured, researched, Developed or sold by Agilent that combine a gas chromatograph with a triple quadrupole mass spectrometer including, but not limited to, the Agilent 7000A product series.
- TT. “Designated Triple Quad Employee” means the employee or person filling the job descriptions listed in Confidential Exhibit E to this Order. “Designated Triple Quad Employee” may include any other person not listed on Confidential Exhibit E to this Order who has been identified by the Triple Quad Acquirer and the Monitor, and determined by Commission staff to have devoted more than 25% of his/her time to Varian Triple Quad Products in the twelve (12) months preceding the Acquisition Date.
- UU. “Remedial Triple Quad Agreement” means the following:
1. the Agilent-Bruker Divestiture Agreement, if such agreement has not been rejected by the Commission pursuant to Paragraph III.F of this Order; and
 2. any agreement between Respondent Agilent and a Commission-approved Triple Quad Acquirer (or

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between a Divestiture Trustee and a Commission-approved Triple Quad Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be granted, licensed, delivered or otherwise conveyed, that have been approved by the Commission to accomplish the requirements of this Order.

- VV. "Triple Quad" means an instrument that combines a gas chromatograph with a triple quadrupole mass spectrometer.
- WW. "Triple Quad Acquirer" means the Person specified by name in this Order, or the Person approved by the Commission, to acquire the Varian Triple Business pursuant to Paragraph III or Paragraph VII of this Order. The Triple Quad Acquirer may be the same Person as the Micro GC Acquirer or the ICP-MS Acquirer.
- XX. "Triple Quad Acquirer Employee" means any person employed by the Triple Quad Acquirer who has been determined by the Triple Quad Acquirer, the Monitor, and Commission staff to have devoted any of his/her time to Varian Triple Quad Products after the Triple Quad Effective Date.
- YY. "Triple Quad Contracts" means:
1. Triple Quad Customer Contracts;
 2. Triple Quad Sales and Distribution Contracts;
 3. Triple Quad Service Contracts; and

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4. Triple Quad Supply Contracts.

- ZZ. “Triple Quad Customer Contracts” means the customer contracts for the purchase and sale of Varian Triple Quad Products. Triple Quad Customer Contracts shall include contracts between Varian and a customer that are not exclusively for Varian Triple Quad Products, but may also include other Varian products, to the extent that such contracts pertain to the purchase and sale of Varian Triple Quad Products.
- AAA. “Triple Quad Sales and Distribution Contracts” means the contracts between Varian and Persons who sell and distribute the Varian Triple Quad Products including, but not limited to, those contracts identified in Confidential Exhibit F.
- BBB. “Triple Quad Divestiture Agreement” means all the divestiture agreements, licenses, assignments, and other agreements entered into by the Triple Quad Acquirer and Respondent Agilent pursuant to Paragraph III of this Order, including the Agilent-Bruker Divestiture Agreement.
- CCC. “Triple Quad Effective Date” means the date on which the divestitures, licensing, and assignments, pursuant to Paragraph III or Paragraph VII of this Order, are consummated.
- DDD. “Triple Quad Laboratory GC Supply Agreement” means an agreement between the Triple Quad Acquirer and Respondent Agilent under which Respondent Agilent will produce laboratory gas chromatographs for incorporation into the Varian Triple Quad Products, which shall be approved by the Commission and become a part of the Triple Quad Divestiture Agreement.

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- EEE. “Triple Quad Service Contracts” means the contracts under which Varian provides repair and maintenance services for the Varian Triple Quad Products.
- FFF. “Triple Quad Supply Contracts” means the contracts for the supply of inputs used in the manufacture and production of the Varian Triple Quad Products including, but not limited to, the contracts identified in Confidential Exhibit G.
- GGG. “Triple Quad Vacuum Pump Supply Agreement” means an agreement between the Triple Quad Acquirer and Respondent Agilent under which Respondent Agilent will produce vacuum pumps used in the production of the Varian Triple Quad Products, which shall be approved by the Commission and become a part of the Triple Quad Divestiture Agreement.
- HHH. “Vacuum Pump Intellectual Property” means the Varian intellectual property Related To the manufacture and production of the vacuum pump used in the GC-MS 360 Varian Triple Quad Product, currently known as the Dual Flow Turbo Pump for CSB/SMB part number 9300010100, including, but not limited to, Software, computer programs, patents, licenses, know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets (including, but not limited to, recipes and formulae), technical information (including, but not limited to, material and final product specifications), protocols (including, but not limited to, operational manuals), research and development, quality control information and the modifications or improvements to such intellectual property.

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III. “Varian Triple Quad Products” means Triple Quad instruments Developed, manufactured, or sold by Varian before the Triple Quad Effective Date including, but not limited to, the Varian products designated as GC-MS 300, GC-MS 320, and GC-MS 360, which also can be modified for use as a single quadropole gas chromatograph/mass spectrometer.

JJJ. “Varian Triple Quad Business” means:

1. Varian Triple Quad Tangible Assets;
2. Varian Triple Quad Information;
3. Varian Triple Quad Intellectual Property;

Provided, however, that the Varian Triple Quad Intellectual Property does not include Varian Triple Quad Shared Intellectual Property;

Provided, further, however, that the Varian Triple Quad Intellectual Property does not include the corporate names or corporate Trade Dress of Varian, or the related logos thereof or the corporate names or corporate Trade Dress of any other corporations or companies owned or controlled by Respondent Agilent or the related logos thereof; and

4. Varian Triple Quad Inventory.

KKK. “Varian Triple Quad Information” means all information owned by, or in the possession or control of, Varian, that is not in the public domain and that is Related To the research, Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of

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the Varian Triple Quad Products including but not limited to, customer lists, current and historical customer purchases and data, historical data, complaints, safety history, all data and information Relating To any of Varian's approvals, clearances, licenses, registrations, permits, franchises, product registrations, authorizations, or certifications issued by any federal, state, municipal, or foreign authority, or any third party, registrar or certification body Relating To the Varian Triple Quad Products including, without limitation, filings, engineering and design documentation, manufacturing and test results and procedures, and any other information possessed by Varian in any location Relating To the Varian Triple Quad Products.

LLL. "Varian Triple Quad Intellectual Property" means all of the following Related To each Varian Triple Quad Product owned by Varian or for which Varian has the right to sub-license to third parties as of the Acquisition Date including but not limited to:

1. Copyrights;
2. Patents;
3. Software;
4. Trademarks;
5. Trade Dress;
6. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process, protocols, methods and other confidential or proprietary technical, business, research,

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Development and other information, and all rights in any jurisdiction to limit the use or disclosure thereof;

7. rights to obtain and file for Patents and Copyrights and registrations thereof;
8. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing; and
9. the exclusive right to all Varian Triple Quad intellectual property used solely in the research, Development, manufacturing, storage, distribution and sale of Varian Triple Quad Products including, but not limited to, Software, computer programs, Patents, licenses (including, licenses to third-party software if transferable and sub-licenses to software modified by Varian), know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets (including, but not limited to, recipes and formulae), technical information (including, but not limited to, material and final product specifications), marketing information, protocols (including, but not limited to, operational manuals), quality control information, Trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property.

MMM. "Varian Triple Quad Inventory" means all inventory of raw materials, intermediate work in progress, spare

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parts, prototypes, and finished Varian Triple Quad Products, wherever located. *Provided, however,* that spare parts inventory, and demonstration and research inventory Related To Varian Triple Quad Products shall be allocated between the Varian Triple Quad Acquirer and Respondent Agilent in a manner that is approved by the Commission and the Monitor.

NNN. “Varian Triple Quad Shared Intellectual Property” means the Varian Triple Quad Intellectual Property that is not used by Varian exclusively for the Varian Triple Quad Business, including but not limited to, Vacuum Pump Intellectual Property.

OOO. “Varian Triple Quad Tangible Assets” means all of Varian’s rights, title, and interest in the physical assets and businesses located at or Relating To a facility owned and operated by Varian at 2700 Mitchell Drive, Walnut Creek, California, and Relating To the research, Development, manufacture, sale, and distribution of the Varian Triple Quad Products including, but not limited to, the assets identified in the Triple Quad Divestiture Agreement. *Provided, however,* that the Varian Triple Quad Tangible Assets does not include any real property, plant facilities, or buildings located at Varian’s facility in Walnut Creek, California.

[ICP-MS Definitions]

PPP. “Agilent ICP-MS Products” means ICP-MS instruments Developed, manufactured, or sold by Agilent, including but not limited to, the Agilent 7700 product series.

QQQ. “ICP-MS” means instruments that combine inductively coupled plasma technology and mass spectrometry technology, used for the analysis of inorganic

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materials.

RRR. "Remedial ICP-MS Agreement" means the following:

1. the Agilent-Bruker Divestiture Agreement, if such agreement has not been rejected by the Commission pursuant to Paragraph IV.F of this Order; and
2. any agreement between Respondent Agilent and a Commission-approved ICP-MS Acquirer (or between a Divestiture Trustee and a Commission-approved ICP-MS Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets to be granted, licensed, delivered or otherwise conveyed, that have been approved by the Commission to accomplish the requirements of this Order.

SSS. "Varian ICP-MS Products" means ICP-MS instruments Developed, manufactured, or sold by Varian before the ICP-MS Effective Date including, but not limited to, the Varian products designated as 810-MS and 820-MS.

TTT. "Varian ICP-MS Business" means:

1. Varian ICP-MS Tangible Assets;
2. Varian ICP-MS Information;
3. Varian ICP-MS Intellectual Property;

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Provided, however, that the Varian ICP-MS Intellectual Property does not include Varian ICP-MS Shared Intellectual Property;

Provided, further, however, that the Varian ICP-MS Intellectual Property does not include the corporate names or corporate Trade Dress of Varian, or the related logos thereof or the corporate names or corporate Trade Dress of any other corporations or companies owned or controlled by Respondent Agilent or the related logos thereof; and

4. Varian ICP-MS Inventory.

UUU. "Varian ICP-MS Information" means all information owned by, or in the possession or control of, Varian, that is not in the public domain and that is Related To the Development, manufacture, marketing, commercialization, importation, exportation, cost, supply, sales, sales support, or use of the Varian ICP-MS Products including but not limited to, customer lists, current and historical customer purchases and data, historical data, complaints, safety history, all data and information Relating To any of Varian's approvals, clearances, licenses, registrations, permits, franchises, product registrations, authorizations, or certifications issued by any federal, state, municipal, or foreign authority, or any third party, registrar or certification body Relating To the Varian ICP-MS Products including, without limitation, filings, engineering and design documentation, manufacturing and test results and procedures, and any other information possessed by Varian in any location Relating To the Varian ICP-MS Products.

VVV. "Designated ICP-MS Employee" means the employee or person filling the job descriptions listed in

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Confidential Exhibit H to this Order. “Designated ICP-MS Employee” may include any other person not listed on Confidential Exhibit H to this Order who has been identified by the Triple Quad Acquirer and the Monitor, and determined by Commission staff to have devoted more than 25% of his/her time to Varian ICP-MS Products in the twelve (12) months preceding the Acquisition Date.

WWW. “Varian ICP-MS Intellectual Property” means all of the following Related To each Varian ICP-MS Product owned by Varian or for which Varian has the right to sub-license to third parties as of the Acquisition Date including but not limited to:

1. Copyrights;
2. Patents;
3. Software;
4. Trademarks;
5. Trade Dress;
6. trade secrets, know-how, utility models, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions, quality control methods in process, protocols, 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;
7. rights to obtain and file for Patents and Copyrights and registrations thereof;

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8. rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing; and
 9. the exclusive right to all Varian ICP-MS intellectual property used solely in the research, Development, manufacturing, storage, distribution and sale of Varian ICP-MS Products including, but not limited to, Software, computer programs, Patents, licenses (including, licenses to third-party software if transferable and sub-licenses to software modified by Varian), know-how (including, but not limited to, flow sheets, process and instrumentation diagrams), risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications and drawings), trade secrets (including, but not limited to, recipes and formulae), technical information (including, but not limited to, material and final product specifications), marketing information, protocols (including, but not limited to, operational manuals), quality control information, Trademarks, trade names, service marks, logos, and the modifications or improvements to such intellectual property.
- XXX. "Varian ICP-MS Shared Intellectual Property" means the Varian ICP-MS Intellectual Property that is not used by Varian exclusively for Varian ICP-MS Products.
- YYY. "Varian ICP-MS Tangible Assets" means all of Varian's rights, title, and interest in the physical assets located at or Relating To a facility owned and operated by Varian at 679 Springvale Road, Mulgrave, Victoria,

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(Melbourne), Australia and Relating To the Development, manufacture, sale, and distribution of the Varian ICP-MS Products including, without limitation, the assets identified in the ICP-MS Divestiture Agreement. *Provided, however,* that the Varian ICP-MS Tangible Assets does not include any real property, plant facilities, or buildings located at Varian's facility in Melbourne, Australia.

ZZZ. "ICP-MS Acquirer" means the Person specified by name in this Order, or the Person approved by the Commission, to acquire the Varian Triple Quad Business pursuant to Paragraph IV or Paragraph VII of this Order. The ICP-MS Acquirer may be the same Person as the Micro GC Acquirer or the Triple Quad Acquirer.

AAAA. "ICP-MS Contracts" means:

1. ICP-MS Customer Contracts;
2. ICP-MS Sales and Distribution Contracts;
3. ICP-MS Service Contracts; and
4. ICP-MS Supply Contracts.

BBBB. "ICP-MS Customer Contracts" means the customer contracts for the Varian ICP-MS Products. ICP-MS Customer Contracts shall include contracts between Varian and a customer that are not exclusively for Varian ICP-MS Products, but may also include other Varian products to the extent that such contracts Relate To the purchase and sale of Varian ICP-MS Products.

CCCC. "ICP-MS Sales and Distribution Contracts" means the contracts between Varian and Persons who sell and

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distribute the Varian ICP-MS Products, including but not limited to, those contracts identified in Confidential Exhibit I.

DDDD. "ICP-MS Divestiture Agreement" means all the divestiture agreements, licenses, assignments, and other agreements entered into by the ICP-MS Acquirer and Respondent Agilent including the Agilent-Bruker Divestiture Agreement pursuant to Paragraph IV of this Order.

EEEE. "ICP-MS Effective Date" means the date on which the divestitures, licensing, and assignments, pursuant to Paragraph IV or Paragraph VII of this Order, are consummated.

FFFF. "ICP-MS Inventory" means all inventory of raw materials, intermediate work in progress, spare parts, prototypes, and finished Varian ICP-MS Products, wherever located. *Provided, however,* that spare parts inventory, and demonstration and research inventory Related To Varian ICP-MS Products shall be allocated between the Varian ICP-MS Acquirer and Respondent Agilent in a manner that is approved by the Commission and the Monitor.

GGGG. "ICP-MS Service Contracts" means the contracts under which Varian provides repair and maintenance services for the Varian ICP-MS Products.

HHHH. "ICP-MS Supply Contracts" means the contracts for the supply of inputs used in the manufacture and production of the ICP-MS Products. including, but not limited to, the contracts identified in Confidential Exhibit J.

IIII. "ICP-MS Rotary Pump Supply Agreement" means an agreement between the ICP-MS Acquirer and

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Respondent Agilent under which Respondent Agilent will produce rotary pumps used in the production of the Varian ICP-MS Products, which shall be approved by the Commission and become a part of the ICP-MS Divestiture Agreement.

- JJJJ. "ICP-MS Turbo Pump Supply Agreement" means an agreement between the ICP-MS Acquirer and Respondent Agilent under which Respondent Agilent will produce turbo pumps used in the production of the Varian ICP-MS Products, which shall be approved by the Commission and become a part of the ICP-MS Divestiture Agreement.

II.**[Micro GC Divestiture]****IT IS FURTHER ORDERED** that:

- A. Within ten (10) days of the Acquisition Date, Respondent Agilent shall divest the Agilent Micro GC Business and assign the Micro GC Contracts, absolutely and in good faith, to Inficon, pursuant to, and in accordance with, the Agilent-Inficon Micro GC Divestiture Agreements. The Agilent-Inficon Micro GC Divestiture Agreement (which shall include, among other things, the divestiture agreement, the assignments, and licenses) between Respondent Agilent and Inficon shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Inficon, or to reduce any obligations of Respondent Agilent under such agreements, and such agreement, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof.

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Provided, however, with respect to assets that are to be divested or agreements entered into pursuant to Paragraphs II.B., II.C., and II.D., at the Micro GC Acquirer's option, Respondent Agilent need not divest such assets or enter into such agreements only if the Micro GC Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

Provided, further, however, that if any of the Micro GC Customer Contracts, or the Micro GC Sales and Distribution Contracts, or the Micro GC Supply Contracts are not assignable or the contracting Person refuses to accept the Micro GC Acquirer, Respondent Agilent shall use reasonable best efforts to facilitate the Micro GC Acquirer's acquisition of a similar contract with similar terms from the customer, distributor, seller, or Person, respectively. Any such contracts shall be subject to the restrictions set forth in Paragraph II.E. of this Order.

Provided, further, however, that if any of the Micro GC Service Contracts are not wholly assignable, Respondent Agilent shall enter into a transition services agreement to assign the rights to provide repair and maintenance services for the Agilent Micro GC Products to the Micro GC Acquirer.

- B. Respondent Agilent shall, at the Micro GC Acquirer's option, grant to the Micro GC Acquirer a fully paid-up, irrevocable, royalty-free license to the Shared Micro GC Intellectual Property in the Micro GC field of use.
- C. Respondent Agilent shall, at the Micro GC Acquirer's option, enter into a Manifold Supply Agreement absolutely and in good faith, to supply the Micro GC Acquirer with the manifold plates used in the

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production of the Agilent Micro GC Products. The Manifold Supply Agreement shall be subject to the prior approval of the Commission and become a part of the Micro GC Divestiture Agreement. The Manifold Supply Agreement shall include, among other things:

1. no minimum or maximum purchase requirements;
 2. an option for the Micro GC Acquirer to terminate the Manifold Supply Agreement with six (6) months notice;
 3. an option for the Micro GC Acquirer to make an initial purchase of a sufficient quantity of manifold plates to assure a supply for twelve (12) months; and
 4. priority for fulfilment of the Micro GC Acquirer's requirements for manifold plates before any of Respondent Agilent's internal requirements, or any other of Respondent Agilent's external commitments.
- D. Respondent Agilent shall, not later than the Micro GC Effective Date and at the Micro GC Acquirer's option, enter into one or more transition services agreements for the provision of services to be provided by Respondent Agilent to the Micro GC Acquirer. Such agreements shall be subject to the prior approval of the Commission and become a part of the Micro GC Divestiture Agreement.
1. Such agreements may include, among other things:
 - a. an agreement for sales training and support;

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- b. an agreement for technical assistance. Such technical assistance agreement may include, among other things, training in the assembly and service of Agilent Micro GC Products.
 - c. an agreement for information technology services, including but not limited to, data migration services; and
 - d. a supply of columns and other consumables used by the Agilent Micro GC Products.
2. Respondent Agilent shall not terminate any transition services agreement before the end of the term approved by the Commission without:
- a. the written agreement of the Micro GC Acquirer and thirty (30) days prior notice to the Commission; or,
 - b. in the case of a proposed unilateral termination by Respondent Agilent due to an alleged breach of an agreement by the Micro GC Acquirer, sixty (60) days notice of such termination. *Provided, however,* such sixty (60) days notice shall be given only after the parties have:
 - (1) attempted to settle the dispute between themselves, and
 - (2) engaged in arbitration and received an arbitrator's decision, or
 - (3) received a final court decision after all appeals.
- E. Respondent Agilent shall, within three (3) days of the

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Micro GC Effective Date, (1) notify all parties to Micro GC Sales and Distribution Contracts that Agilent waives any and all rights to exclusivity that would limit sales to only products manufactured and sold by Agilent, thereby enabling sales of the Agilent Micro GC Products after their acquisition by the Micro GC Acquirer; and (2) refrain from selling Varian Micro GC Products to or through the other parties to said Micro GC Sales and Distribution Contracts for a period of one (1) year.

- F. If, at the time the Commission determines to make this Order final, the Commission notifies Respondent Agilent that Inficon is not an acceptable acquirer of the Agilent Micro GC Business or that the manner in which the divestiture was accomplished is not acceptable, then, after receipt of such written notification:
1. Respondent Agilent shall immediately notify Inficon of the notice received from the Commission and shall as soon as practicable effect the rescission of the Agilent-Inficon Divestiture Agreement; and
 2. Respondent Agilent shall, within one-hundred-twenty (120) days from the date this Order becomes final, divest the Agilent Micro GC Business and assign the Micro GC Contracts (including by sub-assignment if necessary) absolutely and in good faith, at no minimum price, to a Micro GC Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.
- G. Any Remedial Micro GC Agreement that has been approved by the Commission between Respondent

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Agilent (or a Divestiture Trustee) and a Commission-approved Acquirer of the Agilent Micro GC Business shall be deemed incorporated into this Order, and any failure by Respondent Agilent to comply with any term of such Remedial Micro GC Agreement related to the Agilent Micro GC Business shall constitute a failure to comply with this Order.

- H. The purposes of this Paragraph II of the Order are: (1) to ensure the continuation of the Agilent Micro GC Business as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, (2) to ensure that the Micro GC Acquirer has the intention and ability to produce Agilent Micro GC Products at facilities independent of Respondent Agilent, and (3) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

III.**[Varian Triple Quad Divestiture]**

IT IS FURTHER ORDERED that,

- A. Within ten (10) days of the Acquisition Date, Respondent Agilent shall divest the Varian Triple Quad Business and assign the Triple Quad Contracts absolutely and in good faith, to Bruker pursuant to, and in accordance with, the Agilent-Bruker Divestiture Agreement. The Triple Quad Divestiture Agreement (which shall include, among other things, the divestiture agreement, the assignments, and licenses) between Respondent Agilent and Bruker shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Bruker or to reduce any obligations of Respondent Agilent under such agreements, and such

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agreement, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof.

Provided, however, that for the divestiture of the Varian Triple Quad Business to Bruker pursuant to this Paragraph III.A., the Varian Triple Quad Business shall not include the excluded assets identified in Section 2.2 of the Agilent-Bruker Divestiture Agreement, attached as Confidential Exhibit L.

Provided, further, however, with respect to assets that are to be divested or agreements entered into pursuant to Paragraphs III.B., III.C., and III.D., at the Triple Quad Acquirer's option, Respondent Agilent need not divest such assets or enter into such agreements only if the Triple Quad Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

Provided, further, however, that if any of the Triple Quad Customer Contracts, or Triple Quad Sales and Distribution Contracts, or the Triple Quad Supply Contracts are not assignable or the contracting Person refuses to accept the Triple Quad Acquirer, Respondent Agilent shall use reasonable best efforts to facilitate the Triple Quad Acquirer's acquisition of a similar contract with similar terms from the customer, distributor, seller, or Person, respectively. Any such contracts shall be subject to the restrictions set forth in Paragraph III.E of this Order.

Provided, further, however, that if any of the Triple Quad Service Contracts are not wholly assignable, Respondent Agilent shall assign the rights to provide

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repair and maintenance services for the Triple Quad Products to the Triple Quad Acquirer.

- B. Respondent Agilent shall, at the Triple Quad Acquirer's option, grant to the Triple Quad Acquirer a fully paid-up, irrevocable, royalty-free license to the Triple Quad Shared Intellectual Property in the Triple Quad field of use. The license shall include the right to modify the Varian Triple Quad to create a single-quadrupole mass spectrometer.
- C. Respondent Agilent shall, at the Triple Quad Acquirer's option, enter into a Triple Quad Laboratory GC Supply Agreement and a Triple Quad Vacuum Pump Supply Agreement, absolutely and in good faith, to supply the Triple Quad Acquirer with the laboratory gas chromatographs and vacuum pumps used in the production of the Varian Triple Quad Products. The Triple Quad Laboratory GC Supply Agreement and the Triple Quad Vacuum Pump Supply Agreement shall be subject to the prior approval of the Commission and become a part of the Triple Quad Divestiture Agreement.
 - 1. The Triple Quad Vacuum Supply Contract shall include, among other things:
 - a. no minimum or maximum purchase requirements;
 - b. an option for the Triple Quad Acquirer to terminate the Triple Quad Vacuum Supply Contract with sixty (60) days notice;
 - c. a provision that the Triple Quad Acquirer's requirements for vacuum pumps be given priority and met before fulfilling any of Respondent Agilent's internal requirements, or

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any other of Respondent Agilent's external commitments; and

- d. six (6) months notice to the Triple Quad Acquirer of any anticipated changes to production capacity, output, or to changes in the performance or quality of the laboratory gas chromatographs.
2. The Triple Quad Laboratory GC Supply Agreement shall include, among other things:
 - a. no minimum or maximum purchase requirements;
 - b. an option for the Triple Quad Acquirer to terminate the Triple Quad Laboratory GC Supply Contract with sixty (60) days notice;
 - c. a provision that the Triple Quad Acquirer's requirements for laboratory gas chromatographs be given priority and met before fulfilling any of Respondent Agilent's internal requirements, or any other of Respondent Agilent's external commitments; and
 - d. six (6) months notice to the Triple Quad Acquirer of any anticipated changes to production capacity, output, or to changes in the performance or quality of the vacuum pump.
 3. During the terms of the Triple Quad Laboratory GC Supply Agreement and the Triple Quad Vacuum Pump Supply Agreement, Respondent Agilent shall not terminate such contracts before

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the end of the term approved by the Commission without:

- a. the written agreement of the Triple Quad Acquirer and thirty (30) days prior notice to the Commission; or,
 - b. in the case of a proposed unilateral termination by Respondent Agilent due to an alleged breach of an agreement by the Triple Quad Acquirer, sixty (60) days notice of such termination. *Provided, however,* such sixty (60) days notice shall be given only after the parties have:
 - (1) attempted to settle the dispute between themselves, and
 - (2) engaged in arbitration and received an arbitrator's decision, or
 - (3) received a final court decision after all appeals.
- D. Respondent Agilent shall, not later than the Triple Quad Effective Date and at the Triple Quad Acquirer's option, enter into one or more transition agreements for the provision of services and supplies to be provided by Respondent Agilent to the Triple Quad Acquirer. Such agreements shall be subject to the prior approval of the Commission and become a part of the Triple Quad Divestiture Agreement.
1. Such agreements may include, among other things:
 - a. an agreement for technical assistance;
 - b. assistance in the transfer of the Varian Triple

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Quad Business;

- c. training for employees of the Triple Quad Acquirer; and
 - d. a supply of columns and other consumables used by the Varian Triple Quad Products.
2. Respondent Agilent shall not terminate any transition services agreement before the end of the term approved by the Commission without:
- a. the written agreement of the Triple Quad Acquirer and thirty (30) days prior notice to the Commission; or,
 - b. in the case of a proposed unilateral termination by Respondent Agilent due to an alleged breach of an agreement by the Triple Quad Acquirer, sixty (60) days notice of such termination. *Provided, however,* such sixty (60) days notice shall be given only after the parties have:
 - (1) attempted to settle the dispute between themselves, and
 - (2) engaged in arbitration and received an arbitrator's decision, or
 - (3) received a final court decision after all appeals.
- E. Respondent Agilent shall, within three (3) days of the Triple Quad Effective Date:
1. notify all parties to the Triple Quad Sales and

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Distribution Contracts that Agilent waives any and all rights to exclusivity that would limit sales to only products manufactured and sold by Agilent, thereby enabling sales of the Varian Triple Quad Products after the acquisition by the Triple Quad Acquirer, and

2. refrain from selling Agilent Triple Quad Products to or through the other parties to said Triple Quad Sales and Distribution Contracts for a period of one (1) year.
- F. If, at the time the Commission determines to make this Order final, the Commission notifies Respondent Agilent that Bruker is not an acceptable acquirer of the Varian Triple Quad Business or that the manner in which the divestiture was accomplished is not acceptable, then, after receipt of such written notification:
1. Respondent Agilent shall immediately notify Bruker of the notice received from the Commission and shall as soon as practicable effect the rescission of the Agilent-Bruker Divestiture Agreement; and
 2. Respondent Agilent shall, within one-hundred-twenty (120) days from the date this Order becomes final, divest the Varian Triple Quad Business and assign the Triple Quad Contracts (including by sub-assignment if necessary) absolutely and in good faith, at no minimum price, to a Triple Quad Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.
- G. Any Remedial Triple Quad Agreement that has been approved by the Commission between Respondent

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Agilent (or a Divestiture Trustee) and a Commission-approved Acquirer of the Varian Triple Quad Business shall be deemed incorporated into this Order, and any failure by Respondent Agilent to comply with any term of such Remedial Triple Quad Agreement related to the Varian Triple Quad Business shall constitute a failure to comply with this Order.

- H. The purposes of this Paragraph III of the Order are: (1) to ensure the continuation of the Varian Triple Quad Business as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, (2) to ensure that the Triple Quad Acquirer has the intention and ability to produce the Varian Triple Quad Products at facilities independent of Respondent Agilent, and (3) and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

IV.**[Varian ICP MS Divestiture]**

IT IS FURTHER ORDERED that:

- A. Within ten (10) days of the Acquisition Date, Respondent Agilent shall divest the Varian ICP-MS Business and assign the ICP-MS Contracts, absolutely and in good faith, to Bruker pursuant to, and in accordance with, the Agilent-Bruker Divestiture Agreement. The ICP-MS Divestiture Agreement (which shall include, among other things, the divestiture agreement, the assignments, and licenses) between Respondent Agilent and Bruker shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of Bruker or to reduce any obligations of

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Respondent Agilent under such agreements, and such agreement, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof.

Provided, however, that for the divestiture of the Varian ICP-MS Business to Bruker pursuant to this Paragraph IV.A., the Varian ICP-MS Business shall not include the excluded assets identified in Section 2.2 of the Agilent-Bruker Divestiture Agreement, attached as Confidential Exhibit L.

Provided, further, however, with respect to assets that are to be divested or agreements entered into pursuant to Paragraphs IV.B. and IV.D at the ICP-MS Acquirer's option, Respondent Agilent need not divest such assets or enter into such agreements only if the ICP-MS Acquirer chooses not to acquire such assets or enter into such agreements and the Commission approves the divestiture without such assets or agreements.

Provided, further, however, that if any of the Varian ICP-MS Customer Contracts, or ICP-MS Sales and Distribution Contracts, or ICP-MS Supply Contracts are not assignable or the contracting Person refuses to accept the ICP-MS Acquirer, Respondent Agilent shall use reasonable best efforts to facilitate the ICP-MS Acquirer's acquisition of a similar contract with similar terms from the customer, distributor, seller, or similar Person supplying such service. Any such contract shall be subject to the restrictions set forth in Paragraph IV.E of this Order.

Provided, further, however, that if any of the Varian ICP-MS Service Contracts are not wholly assignable, Respondent Agilent shall assign the rights to provide

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repair and maintenance services for the Varian ICP-MS Products to the ICP-MS Acquirer.

- B. Respondent Agilent shall, at the ICP-MS Acquirer's option, grant to the ICP-MS Acquirer a fully paid-up, irrevocable, royalty-free license to the ICP-MS Shared Intellectual Property in the ICP-MS field of use.
- C. Respondent Agilent shall enter into an ICP-MS Rotary Pump Supply Agreement and an ICP-MS Turbo Pump Supply Agreement with the ICP-MS Acquirer absolutely and in good faith. The ICP-MS Rotary Pump Supply Agreement and the ICP-MS Turbo Pump Supply Agreement shall become a part of the ICP-MS Divestiture Agreement.
 - 1. The ICP-MS Rotary Pump Supply Agreement and ICP-MS Turbo Pump Supply Agreement shall include, among other things:
 - a. no minimum or maximum purchase requirements;
 - b. an option for the ICP-MS Acquirer to terminate the ICP-MS Rotary Pump Supply Agreement and the ICP-MS Turbo Pump Supply Agreement with sixty (60) days notice; and
 - c. a provision that the ICP-MS Acquirer's requirements for rotary pumps and turbo pumps be given priority and met before fulfilling any of Respondent Agilent's internal requirements, or any other of Respondent Agilent's external commitments.
 - 2. During the terms of the ICP-MS Rotary Pump Supply Agreement and the ICP-MS Turbo Pump

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Supply Agreement:

- a. Respondent Agilent shall not terminate the ICP-MS Rotary Pump Supply Agreement or the ICP-MS Turbo Pump Supply Agreement before the end of the terms approved by the Commission without:
 - (1) the written agreement of the ICP-MS Acquirer and thirty (30) days prior notice to the Commission; or,
 - (2) in the case of a proposed unilateral termination by Respondent Agilent due to an alleged breach of an agreement by the ICP-MS Acquirer, sixty (60) days notice of such termination. *Provided, however,* such sixty (60) days notice shall be given only after the parties have:
 - (a) attempted to settle the dispute between themselves, and
 - (b) engaged in arbitration and received an arbitrator's decision, or
 - (c) received a final court decision after all appeals.
- D. Respondent Agilent shall, not later than the ICP-MS Effective Date and at the ICP-MS Acquirer's option, enter into one or more transition services agreements for the provision of services to be provided by Respondent Agilent to the ICP-MS Acquirer. Such agreements shall be subject to the prior approval of the Commission and become a part of the ICP-MS Divestiture Agreement.

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1. Such agreements may include, but are not limited to an agreement for technical assistance. Such transition services agreements shall include, among other things, assistance in the transfer of the Varian ICP-MS Business and providing training for employees of the ICP-MS Acquirer.
 2. Respondent Agilent shall not terminate any transition services agreement before the end of the term approved by the Commission without:
 - a. the written agreement of the ICP-MS Acquirer and thirty (30) days prior notice to the Commission; or,
 - b. in the case of a proposed unilateral termination by Respondent Agilent due to an alleged breach of an agreement by the ICP-MS Acquirer, sixty (60) days notice of such termination. *Provided, however,* such sixty (60) days notice shall be given only after the parties have:
 - (1) attempted to settle the dispute between themselves, and
 - (2) engaged in arbitration and received an arbitrator's decision, or
 - (3) received a final court decision after all appeals.
- E. Respondent Agilent shall, within three (3) days of the ICP-MS Effective Date (1) notify all parties to the ICP-MS Sales and Distribution Contracts that Agilent waives any and all rights to exclusivity that would limit sales to only products manufactured and sold by

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Agilent, thereby enabling sales of the Varian ICP-MS Products after their acquisition by the ICP-MS Acquirer and (2) refrain from selling Agilent ICP-MS Products to or through the other parties to said ICP-MS Sales and Distribution Contracts for a period of one (1) year.

- F. If, at the time the Commission determines to make this Order final, the Commission notifies Respondent Agilent that Bruker is not an acceptable acquirer of the Varian ICP-MS Business or that the manner in which the divestiture was accomplished is not acceptable, then, after receipt of such written notification:
1. Respondent Agilent shall immediately notify Bruker of the notice received from the Commission and shall as soon as practicable effect the rescission of the Agilent-Bruker Divestiture Agreement; and
 2. Respondent Agilent shall, within one-hundred-twenty (120) days from the date this Order becomes final, divest the Varian ICP-MS Business, assign the ICP-MS Customer Contracts and the ICP-MS Sales and Distribution Contracts (including by sub-assignment if necessary) absolutely and in good faith, at no minimum price, to an ICP-MS Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.
- G. Any Remedial ICP-MS Agreement that has been approved by the Commission between Respondent Agilent (or a Divestiture Trustee) and a Commission-approved Acquirer of the Varian ICP-MS Business shall be deemed incorporated into this Order, and any failure by Respondent Agilent to comply with any term of such Remedial ICP-MS Agreement related

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to the Varian ICP-MS Business shall constitute a failure to comply with this Order.

- H. The purposes of this Paragraph IV of the Order are: (1) to ensure the continuation of the Varian ICP-MS Business as a going concern in the same manner in which it conducted business as of the date the Consent Agreement is signed, (2) to ensure that the ICP-MS Acquirer has the intention and ability to produce the Varian ICP-MS Products at facilities independent of Respondent Agilent, and (3) 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. Except in the course of performing its obligations under the Micro GC Divestiture Agreement, the Triple Quad Divestiture Agreement, the ICP-MS Divestiture Agreement, or as expressly allowed pursuant to this Order:
1. Respondent Agilent shall not provide, disclose or otherwise make available any Confidential Business Information Relating To the Agilent Micro GC Business, the Varian Triple Quad Business, or the Varian ICP-MS Business to any Person; and
 2. Respondent Agilent shall not use any Confidential Business Information Relating To the Agilent Micro GC Business, the Varian Triple Quad Business, or the Varian ICP-MS Business for any reason or purpose. Among other things, Respondent Agilent shall not use such Confidential

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Business Information:

- a. to assist or inform Respondent Agilent employees who Develop, manufacture, solicit for sale, sell, or service Respondent Agilent products that compete with the products divested pursuant to this Order. For example, Respondent Agilent employees who had positions Related To the sale of Agilent Micro GC Products shall not be allowed to use any Confidential Business Information they may have about customers or the Agilent Micro GC Products to assist Respondent Agilent in the sale of the Varian Micro GC products Respondent Agilent is acquiring in the Acquisition;
 - b. to interfere with any suppliers, distributors, resellers, or customers of the Persons who acquired the divested businesses;
 - c. to interfere with any contracts divested or assigned pursuant to this Order; or
 - d. to interfere in any other way with the Persons who acquired the divested businesses pursuant to this Order or with the businesses divested pursuant to this Order.
- B. The requirements of this Paragraph V do not apply to Confidential Business Information that Respondent Agilent demonstrates:
1. was or becomes generally available to the public other than as a result of a disclosure by Respondent Agilent, or
 2. was available, or becomes available, to Respondent

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Agilent on a non-confidential basis, but only if, to the knowledge of Respondent Agilent, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.

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

- A. Mr. Mark Byers of Grant Thornton, United Kingdom (with the direct assistance of Ms. Marti Kopacz of Grant Thornton, United States and Mr. Greg Keith, Grant Thornton, Australia) shall serve as the Monitor pursuant to the agreement executed by the Monitor and Respondent Agilent and attached as Exhibit K ("Monitor Agreement") and Confidential Exhibit K-1 (Monitor compensation). The Monitor is appointed to assure that Respondent Agilent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order.
- B. The Monitor Agreement shall require that, no later than one (1) day after the Acquisition Date, Respondent Agilent transfers to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to this Order and the Asset Maintenance Order, and consistent with the purposes of the Decision and Order.
- C. No later than one (1) day after the Acquisition Date, Respondent Agilent shall, pursuant to the Monitor Agreement, transfer to the Monitor all rights, powers, and authorities necessary to permit the Monitor to perform his duties and responsibilities, pursuant to and consistent with, the purposes of the Decision and

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Order.

- D. Respondent Agilent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
1. The Monitor shall have the power and authority to monitor Respondent Agilent's compliance with the terms of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission including, but not limited to:
 - a. Assuring that Respondent Agilent expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order; and
 - b. Monitoring any agreements between Respondent Agilent and the Micro GC Acquirer, the Triple Quad Acquirer, or the ICP-MS Acquirer.
 2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Agilent's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, Related To Respondent Agilent's compliance with its obligations under the Order. Respondent Agilent shall cooperate with any reasonable request of the Monitor and shall

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take no action to interfere with or impede the Monitor's ability to monitor Respondent Agilent's compliance with the Order.

4. The Monitor shall serve, without bond or other security, at the expense of Respondent Agilent on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Agilent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
5. Respondent Agilent shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Monitor.
6. The Monitor Agreement shall provide that within one (1) month from the date the Monitor is appointed pursuant to this paragraph, and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance by Respondent Agilent of its obligations under the Order.

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7. Respondent Agilent may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor:
1. The Commission shall select the substitute Monitor, subject to the consent of Respondent Agilent, which consent shall not be unreasonably withheld. If Respondent Agilent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Agilent of the identity of any proposed Monitor, Respondent Agilent shall be deemed to have consented to the selection of the proposed Monitor.
 2. Not later than ten (10) days after appointment of the substitute Monitor, Respondent Agilent shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to

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permit the Monitor to monitor Respondent Agilent's compliance with the relevant terms of the Order in a manner consistent with the purposes of the Order.

- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- H. A Monitor appointed pursuant to this Order may be the same person appointed as the Divestiture Trustee pursuant to the relevant provisions of this Order.

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

- A. If Respondent Agilent has not fully complied with the obligations as required by Paragraphs II, III, and IV of this Order, the Commission may appoint a Divestiture Trustee to divest the Agilent Micro GC Business, the Varian Triple Quad Business, and the Varian ICP-MS Business (if not divested), and enter into other agreements, assignments, and licenses, in a manner that satisfies the requirements of this Order.

In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent Agilent shall consent to the appointment of a Divestiture Trustee in such action to effectuate the divestitures and other obligations as described in Paragraphs II, III, and IV. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VII shall

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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 Agilent to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Agilent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Agilent 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 Agilent of the identity of any proposed Divestiture Trustee, Respondent Agilent shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent Agilent 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 divestitures required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VII, Respondent Agilent 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,

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the Divestiture Trustee shall have the exclusive power and authority to divest the Agilent Micro GC Business, divest the Varian Triple Quad Business, and/or divest the Varian ICP-MS Business, and enter into all agreements, licenses and assignments as described in Paragraphs II, III, and IV of this Order.

2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to divest the Agilent Micro GC Business, divest the Varian Triple Quad Business, and/or divest the Varian ICP-MS Business, and enter into all agreements, licenses and assignments as described in Paragraphs II, III, and IV of this Order, absolutely and in good faith, at no minimum price, to one or more acquirers that receives the prior approval of the Commission and in a manner that receives 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 or periods may be extended by the Commission; *provided, however,* the Commission may extend the divestiture period only two (2) times.
3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Agilent shall develop such financial or other information as the Divestiture Trustee may request and shall

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cooperate with the Divestiture Trustee. Respondent Agilent shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Agilent shall extend the time for divestiture under this Paragraph VII in an amount equal to the delay, as determined by the Commission.

4. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Agilent'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 for assets and businesses to be divested pursuant to Paragraph II, Paragraph III, and Paragraph IV, respectively, 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 Agilent from among those approved by the Commission;

Provided further, however, that Respondent Agilent 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 Agilent, on such reasonable and customary terms and conditions as the Commission

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or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Agilent, 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 the Respondent Agilent, 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 Agilent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets

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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 Agilent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 10. Respondent Agilent 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.
 11. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be

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necessary or appropriate to accomplish the obligations under Paragraphs II, III, and IV of this Order.

- G. The Divestiture Trustee(s) appointed pursuant to Paragraph VI of this Order may be the same Person appointed as the Monitor pursuant to Paragraph V of this Order.

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

- A. Beginning no later than the Acquisition Date until ninety (90) days after each of the Micro GC Effective Date, the Triple Quad Effective Date, and the ICP-MS Effective Date, Respondent Agilent shall, in a manner consistent with local labor laws:
1. facilitate employment interviews between each Designated Micro GC Employee and the Micro GC Acquirer, between each Designated Triple Quad Employee and the Triple Quad Acquirer, and between each Designated ICP-MS Employee and the ICP-MS Acquirer, including providing the names and contact information for such employees and allowing such employees reasonable opportunity to interview with the Micro GC Acquirer, the Triple Quad Acquirer, or the ICP-MS Acquirer, respectively, and shall not discourage such employee from participating in such interviews;
 2. not interfere in employment negotiations between each Designated Micro-GC Employee and the Micro-GC Acquirer, or between each Designated Triple Quad Employee and the Triple Quad Acquirer; or between each Designated ICP-MS

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Employee and the ICP-MS Acquirer;

3. with respect to each Designated Micro GC Employee, Designated Triple Quad Employee, or Designated ICP-MS Employee who receives an offer of employment from the Micro GC Acquirer, the Triple Quad Acquirer or the ICP-MS Acquirer, respectively:
 - a. not prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict:
 - (1) the Designated Micro GC Employee from being employed by the Micro GC Acquirer, and shall not offer any incentive to the Designated Micro GC Employee to decline employment with the Micro GC Acquirer; or
 - (2) the Designated Triple Quad Employee from being employed by the Triple Quad Acquirer, and shall not offer any incentive to the Designated Triple Quad Employee to decline employment with the Triple Quad Acquirer, or
 - (3) the Designated ICP-MS Employee from being employed by the ICP-MS Acquirer, and shall not offer any incentive to the Designated ICP-MS Employee to decline employment with the ICP-MS Acquirer.
 - b. cooperate with:
 - (1) the Micro GC Acquirer in effecting transfer of the Designated Micro GC Employee to the employ of the Micro GC Acquirer, if the Designated Micro GC Employee

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accepts an offer of employment from the Micro GC Acquirer;

(2) the Triple Quad Acquirer in effecting transfer of the Designated Triple Quad Employee to the employ of the Triple Quad Acquirer, if the Designated Triple Quad Employee accepts an offer of employment from the Triple Quad Acquirer; and

(3) the ICP-MS Acquirer in effecting transfer of the Designated ICP-MS Employee to the employ of the ICP-MS Acquirer, if the Designated ICP-MS Employee accepts an offer of employment from the ICP-MS Acquirer.

c. eliminate any contractual provisions or other restrictions entered into or imposed by Respondent Agilent that would otherwise prevent the Designated Micro GC Employee, Designated Triple Quad Employee, or Designated ICP-MS Employee from being employed by the Micro GC Acquirer, Triple Quad Acquirer, or ICP-MS Acquirer, respectively;

d. eliminate any confidentiality restrictions that would prevent:

(1) the Designated Micro GC Employee who accepts employment with the Micro GC Acquirer from using or transferring to the Micro GC Acquirer any information Relating To the operation of the Agilent Micro GC Business;

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- (2) the Designated Triple Quad Employee who accepts employment with the Triple Quad Acquirer from using or transferring to the Triple Quad Acquirer any information Relating To the operation of the Varian Triple Quad Business; and
 - (3) the Designated ICP-MS Employee who accepts employment with the ICP-MS Acquirer from using or transferring to the ICP-MS Acquirer any information Relating To the operation of the Varian ICP-MS Business.
- e. unless alternative arrangements are agreed upon with the Micro GC Acquirer, the Triple Quad Acquirer, or the ICP-MS Acquirer, retain the obligation for the benefit of:
- (1) any Designated Micro GC Employee who accepts employment with the Micro GC Acquirer, all accrued bonuses, vested pensions, and other accrued benefits;
 - (2) any Designated Triple Quad Employee who accepts employment with the Triple Quad Acquirer, all accrued bonuses, vested pensions, and other accrued benefits; and
 - (3) any Designated ICP-MS Employee who accepts employment with the ICP-MS Acquirer, all accrued bonuses, vested pensions, and other accrued benefits.
- B. Respondent Agilent shall not, for a period of two (2) years following the Micro GC Effective Date, Triple Quad Effective Date, and ICP-MS Effective Date, respectively, directly or indirectly, solicit, induce, or

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attempt to solicit or induce:

1. any Designated Micro GC Employee who is employed by the Micro GC Acquirer or any Micro GC Acquirer Employee to terminate his or her employment relationship with the Micro GC Acquirer, unless that employment relationship has already been terminated by the Micro GC Acquirer; *provided, however*, Respondent Agilent may place general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the Micro GC Acquirer's employees; *provided further, however*, Respondent Agilent may hire Designated Micro GC Employees who apply for employment with Respondent Agilent as long as such employees were not solicited by Respondent Agilent in violation of this Paragraph.
2. any Designated Triple Quad Employee who is employed by the Triple Quad Acquirer or any Triple Quad Acquirer Employee to terminate his or her employment relationship with the Triple Quad Acquirer, unless that employment relationship has already been terminated by the Triple Quad Acquirer; *provided, however*, Respondent Agilent may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the Triple Quad Acquirer's employees; *provided, further, however*, Respondent Agilent may hire Designated Triple Quad Employees who apply for employment with Respondent Agilent as long as such employees were not solicited by Respondent Agilent in violation of this Paragraph.

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3. any Designated ICP-MS Employee who is employed by the ICP-MS Acquirer or any ICP-MS Acquirer Employee to terminate his or her employment relationship with the ICP-MS Acquirer, unless that employment relationship has already been terminated by the ICP-MS Acquirer; *provided, however*, Respondent Agilent may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the ICP-MS Acquirer's employees; *provided further, however*, Respondent Agilent may hire Designated ICP-MS Employees who apply for employment with Respondent Agilent as long as such employees were not solicited by Respondent Agilent in violation of this Paragraph.

IX.

IT IS FURTHER ORDERED that for a period of ten (10) years from the date this Order becomes final:

- A. Respondent Agilent shall not, without the prior approval of the Commission, acquire, directly or indirectly, any assets divested pursuant to this Order; and
- B. Respondent Agilent shall not, without providing advance written notification to the Commission in the manner described in this Paragraph IX.B., directly or indirectly, acquire:
 1. any stock, share capital, equity, or other interest in any Person, corporate or non-corporate, that produces, designs, manufactures, or sells Micro GC instruments, Triple Quad instruments, or ICP-MS instrument in or into the United States; or

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2. any assets used at the time of the acquisition, or during the six (6) month period prior to the acquisition, in the design, manufacture, production, or sale of Micro GC instruments, Triple Quad instruments, or ICP-MS instruments in or into the United States.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent Agilent and not of any other party to the transaction. Respondent Agilent shall provide the Notification to the Commission at least thirty days prior to consummating the transaction (hereinafter referred to as the “first waiting period”). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Agilent shall not consummate the transaction until thirty days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

Provided, however, that prior notification shall not be required by this paragraph for a transaction for

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which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

Provided, further, however, that prior notification shall not be required by this Paragraph IX.B. for any acquisition after which Respondent Agilent would not hold more than one percent of the outstanding securities or other equity interest in any Person described in this Paragraph IX.B.

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

- A. Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent Agilent has fully complied with Paragraphs II, III, IV, and VIII.A. of this Order, Respondent Agilent 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 Agilent shall submit at the same time a copy of its report concerning compliance with this Order to the Monitor or Divestiture Trustee, if any Divestiture Trustee has been appointed pursuant to this Order. Respondent Agilent shall include in its report, 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 Agilent shall include in its report copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations.

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- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, Respondent Agilent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order. Respondent Agilent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Order and copies of all written communications to and from all persons Relating To this Order. Additionally, Respondent Agilent shall include in its compliance report whether or not it (i) made any notifiable acquisitions pursuant to Paragraph IX. Respondent Agilent shall include a description of such acquisitions including, but not limited to, the identity of the Person or assets acquired, the location of the Person or assets, and a detailed description of the assets or Person and its Micro GC, Triple Quad, or ICP-MS sales or manufacturing.

XI.

IT IS FURTHER ORDERED that:

- A. Until the Effective Date of a Divested Business, Respondent Agilent shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of the Divested Business to minimize any risk of loss of competitive potential for the Divested Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divested Business, except for ordinary wear and tear. Respondent Agilent shall not

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sell, transfer, encumber or otherwise impair the Divested Business (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the Divested Business.

- B. Respondent Agilent shall retain all of Respondent Agilent's rights, title, and interest in a Divested Business until the Effective Date of such Divested Business.
- C. Until the Effective Date of a Divested Business, Respondent Agilent shall maintain the operations of the Divested Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets, as necessary) and/or as may be necessary to preserve the marketability, viability, and competitiveness of the Divested Business and shall use its best efforts to preserve the existing relationships with the following: suppliers, vendors, distributors, customers, governmental agencies, employees, and others having business relations with the Divested Business.
- D. Until the Effective Date of a Divested Business, Respondent Agilent shall maintain a work force at the equivalent or larger size, and with equivalent or better training and expertise, to what has been associated with the Divested Business as of its Effective Date.
- E. Until the Effective Date of a Divested Business, Respondent Agilent shall provide the Designated Employees of the Divested Business with reasonable financial incentives to continue in their positions and to Develop, and manufacture the Divested Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and

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competitiveness of the Divested Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent Agilent until the Effective Date has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to prevent any diminution of the competitiveness of the Divested Business.

- F. The purpose of this Paragraph XI is to maintain the full economic viability, marketability and competitiveness of each Divested Businesses until its Effective Date, to minimize any risk of loss of competitive potential for each Divested Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of each Divested Business, except for ordinary wear and tear.

XII.

IT IS FURTHER ORDERED that Respondent Agilent shall notify the Commission at least thirty (30) days prior to any proposed:

- A. dissolution of the Respondent Agilent;
- B. acquisition of, merger with, or consolidation by Respondent Agilent; or
- C. other change in the Respondent Agilent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

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XIII.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent Agilent, Respondent Agilent shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. access, during business office hours of Respondent Agilent 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 Agilent related to compliance with this Order, which copying services shall be provided by Respondent Agilent at its expense; and
- B. to interview officers, directors, or employees of Respondent Agilent, who may have counsel present, regarding such matters.

XIV.

IT IS FURTHER ORDERED that this Order shall terminate on June 25, 2020.

By the Commission.

**CONFIDENTIAL EXHIBITS
A THROUGH M**

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

Analysis to Aid Public Comment

ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

I. Introduction

The Federal Trade Commission (“Commission”) has accepted from Agilent Technologies, Inc. (“Agilent”), subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”), which is designed to remedy the anticompetitive effects resulting from Agilent’s proposed acquisition of Varian, Inc. (“Varian”). Under the terms of the Consent Agreement, Agilent will: (1) divest the assets of its Micro Gas Chromatography (“Micro GC”) instruments business to Inficon Group (“Inficon”), a subsidiary of Inficon Holding AG; and (2) divest the assets of Varian’s Triple Quadrupole Gas Chromatography-Mass Spectrometry (“3Q GC-MS”) and Inductively Coupled Plasma-Mass Spectrometry (“ICP-MS”) instruments businesses to Bruker Corp. (“Bruker”), within ten days of closing its acquisition of Varian.

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

Pursuant to an Agreement and Plan of Merger dated July 26, 2009, Agilent plans to acquire Varian for approximately \$1.5 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 FTC Act, as amended, 15 U.S.C. § 45, by lessening competition in the markets for Micro GC, 3Q GC-MS and ICP-MS instruments (“the Products”).

Analysis to Aid Public Comment

II. The Parties

Agilent, headquartered in Santa Clara, California, is a global supplier of scientific measurement instruments and related products and services. Agilent's broad range of products and services includes equipment used to test cell phones and communications equipment, machines that determine the contents of human tissue and environmental samples, and microarrays that are used to analyze gene expression, which are commonly used in cancer research.

Varian is headquartered in Palo Alto, California, and supplies scientific instruments and chemical analysis technologies to customers worldwide. Varian's products, which employ various analytical techniques to test samples of many types, are used by academic researchers, forensics laboratories, food safety and agriculture laboratories, pharmaceutical companies, and chemical and oil and gas firms. Varian also offers a line of vacuum pumps, which are important components in a variety of scientific instruments and industrial processes.

III. The Products and Structure of the Markets

Micro GCs are portable gas chromatography instruments that are used primarily in the oil, mining, and waste disposal industries to detect the presence of toxins in the air or in emissions. Micro GC instruments are designed for field use and, accordingly, must be small and light enough to be portable and sufficiently robust to withstand travel and use in a variety of environments. Because Micro GC customers strongly value portability, they would not switch to any other analytical technique or product if the price of Micro GCs were to increase by five to ten percent. In the United States, Agilent and Varian are the sole competitors in the market for Micro GC instruments. Agilent and Varian account for approximately 75 percent and 25 percent of the market by revenue, respectively, and directly compete for sales on the basis of price, service, and product innovation.

Analysis to Aid Public Comment

3Q GC-MS instruments combine a front-end gas chromatograph with a triple quadrupole mass spectrometer. 3Q GC-MSs offer extraordinarily high sensitivity and are used to identify and quantify trace amounts of substances in a wide variety of samples, such as performance-enhancing drugs in blood and pesticides in food. Less sensitive GC-MSs are widely available, and substantially less expensive, but they are not substitutes for 3Q GC-MSs because they lack the capability to detect compounds at very low concentrations and cannot differentiate among structurally-similar compounds. Where the significantly greater performance of a 3Q GC-MS is required, customers would not switch to other instruments or technologies even if the price of 3Q GC-MSs increased by five to ten percent. In the United States, there are four competitors supplying 3Q GC-MS instruments. Post-acquisition, the combined Agilent and Varian would have in excess of a 48 percent share of the U.S. market by revenue. The other two competitors, Thermo Fisher Scientific, Inc. (“Thermo”) and Waters Corp., have market shares of approximately 36 percent and 16 percent, respectively.

ICP-MS instruments combine inductively coupled plasma technology and mass spectrometry technology and are used for the analysis of inorganic materials. The most common application for ICP-MS is testing water samples, such as drinking, ground or waste water, for the presence of toxic metals, like arsenic, mercury, or lead. ICP-MS is the only technology approved by the Environmental Protection Agency for testing drinking water. Because customers require the sensitivity provided by ICP-MS, and because many customers perform tests pursuant to regulatory guidelines, they would not switch to any other technique or device if the price of ICP-MS instruments were to increase by five to ten percent. In the United States, there are only four suppliers of ICP-MS instruments. Agilent accounts for 40 percent of the ICP-MS market by revenue, and a combined Agilent and Varian would have in excess of a 48 percent share of the U.S. market. The other two competitors, Thermo and

Analysis to Aid Public Comment

PerkinElmer, Inc. have market shares of approximately 14 percent and 37 percent, respectively.

The relevant geographic area in which to evaluate the markets for Micro GC, 3Q GC-MS, and ICP-MS instruments is the United States. Because Micro GC, 3Q GC-MS, and ICP-MS customers require local sales, service, and support, a supplier that lacks the local infrastructure necessary to provide these services is not a viable alternative for U.S. customers.

IV. Entry

Neither new entry nor repositioning and expansion sufficient to deter or counteract the anticompetitive effects of the proposed acquisition is likely to occur within two years. A new entrant to the Micro GC, 3Q GC-MS, or ICP-MS instrument markets would face significant barriers to entry. A new entrant would have to design, develop, and test a product, and would have to establish a service and support infrastructure in the United States. Perhaps most importantly, a new entrant would have to develop a reputation for quality and reliability, and it would take at least several years to acquire a reputation on par with the current Micro GC, 3Q GC-MS, and ICP-MS suppliers. Accordingly, new entry by a domestic or foreign firm would not be timely, likely, or sufficient to counteract the anticompetitive effects that would arise as a result of the acquisition.

V. Effects of the Acquisition

Agilent and Varian are the only two competitors in the market for Micro GC instruments. By creating a monopoly and eliminating the substantial competition between Agilent and Varian, the proposed acquisition would cause the purchasers of Micro GC instruments to pay higher prices and experience reduced levels of service and slower innovation rates.

With only four suppliers, the market for 3Q GC-MS instruments is highly concentrated. 3Q GC-MSs are generally

Analysis to Aid Public Comment

purchased through a competitive evaluation process, which fosters competition for features, reliability, performance, price, and service. Agilent and Varian's 3Q GC-MSs are positioned similarly in terms of their features, price, and performance. The elimination of the direct competition between the Agilent and Varian 3Q GC-MS products would allow Agilent to increase prices, slow the pace of innovation, and/or decrease service levels. In addition, the fact that there would be only three suppliers after the proposed acquisition leads to an increased likelihood of coordination among the remaining competitors.

The market for ICP-MS instruments is also highly concentrated, and Agilent's acquisition of Varian would leave only three suppliers. The ICP-MS instruments of the various suppliers compete on the basis of reliability, price, product features, performance, and service. Because Agilent and Varian directly compete with each other for many sales, and because Varian is frequently the low-priced competitor, Agilent would have a strong post-acquisition incentive to increase ICP-MS prices. The transaction would also facilitate coordination among the three remaining firms.

VI. The Consent Agreement

The proposed Consent Agreement eliminates the competitive concerns raised by Agilent's proposed acquisition of Varian by requiring the divestiture of Agilent's assets relating to the manufacture and sale of Micro GC instruments and Varian's assets relating to the manufacture and sale of 3Q GC-MS and ICP-MS instruments. Agilent and Varian have reached agreements to sell the Micro GC assets to Inficon and the 3Q GC-MS and ICP-MS assets to Bruker, within ten days of closing the acquisition.

Inficon possesses the resources and capability to acquire the Micro GC assets and replace Agilent as an effective competitor in the Micro GC market. Inficon, headquartered in Switzerland,

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manufactures analytical instruments for gas analysis, measurement, and control. Inficon currently supplies several products complementary to Micro GC instruments, including portable GC-MS analyzers. Inficon has an existing worldwide infrastructure for the marketing and sales of its analyzers, and therefore is well-positioned to replace the competition that will be lost as a result of the proposed transaction.

Headquartered in Billerica, Massachusetts, Bruker is a global provider of life-sciences scientific instruments, as well as solutions for molecular and materials research and industrial and applied analysis. Bruker's acquisition of the Varian 3Q GC-MS and ICP-MS product lines will complement Bruker's existing strengths in the analytical instruments market. Bruker manufactures a variety of high-performance mass spectrometry instruments, including product lines adjacent to the 3Q GC-MS and ICP-MS businesses. As a result, Bruker has a significant existing global infrastructure that will enable it to quickly support additional business expansion and replace the loss of competition posed by Agilent's acquisition of Varian.

Pursuant to the Consent Agreement, Inficon will receive the assets necessary to replicate Agilent's Micro GC instrument business, and Bruker will receive the assets necessary to replicate Varian's 3Q GC-MS and ICP-MS instrument businesses. In addition to ensuring that the employees of the relevant businesses will continue their employment with the acquirers, the Consent Agreement requires Agilent to provide Inficon and Bruker with access to additional Agilent employees who may be needed to facilitate the transition of the assets associated with each of the Products. The Consent Agreement also requires Agilent to transfer all relevant intellectual property and all contracts and confidential business information associated with each of the Products. Combined, these provisions ensure that Inficon and Bruker fully and immediately restore the competition that will be eliminated by the acquisition.

Analysis to Aid Public Comment

The Commission may appoint an interim monitor to oversee the divestiture of the Products at any time after the Consent Agreement has been signed. In order to ensure that the Commission remains informed about the status of the proposed divestitures, the proposed Consent Agreement requires the parties to file periodic reports with the Commission until the divestiture is accomplished. If the Commission determines that Agilent has not fully complied with its obligations under the Decision and Order within ten days after the date the Decision and Order becomes final, the Commission may appoint a divestiture trustee to divest the Micro GC, 3Q GC-MS, and ICP-MS assets to a Commission-approved acquirer.

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

Interlocutory Orders, etc.

**INTERLOCUTORY, MODIFYING, VACATING,
AND MISCELLANEOUS ORDERS**

INTEL CORPORATION

Docket No. 9341. Order, January 19, 2010

Opinion and Order denying respondent's motion to disqualify Commissioner Rosch with respect to any adjudicative proceeding against Intel.

OPINION AND ORDER OF THE COMMISSION
DENYING MOTION FOR DISQUALIFICATION

By Leibowitz, Chairman:

Intel Corporation interacted with Commissioner Rosch for many months, attempting to persuade him to vote against a complaint in this matter without ever voicing a concern about his involvement in the case. But on December 15, after being informed of the Commissioner's tentative views on the matter and within hours of the Commission's vote to initiate the present case, it filed a motion to disqualify him on the ground that he served as Intel's primary outside antitrust counsel from about 1987 until mid-1993 ("Motion").¹ In its Motion, Intel neither specifies any relevant confidential information that Commissioner Rosch possesses as a result of his representation, nor makes any

¹ The Motion sought to disqualify Commissioner Rosch both from participating in the current adjudication and from voting on whether to issue a complaint. Because the latter act is non-adjudicative, it does not fall under FTC Rule 4.17, 16 C.F.R. § 4.17, and, therefore, Commissioner Rosch's denial of that request was final. The denial was also understandable in light of the eleventh-hour nature of the request, its apparent tactical nature in light of the many hours of meetings Commissioner Rosch held with Intel over an extended period of time at Intel's request with no hint of disqualification being raised, and the absence of a connection between the current matter and the work Commissioner Rosch did for Intel over a decade and a half ago.

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allegation of partiality by Commissioner Rosch against Intel. Instead, the bulk of the Motion is dedicated to showing simply that Commissioner Rosch represented Intel before the Commission in another antitrust matter a number of years ago. After careful consideration, we find as follows: the matters upon which Commissioner Rosch previously advised Intel are so distant in time – and concern technology, allegations, and business relationships that are so dissimilar to those relevant to the present matter² – that they are not at all “substantially related” to the current proceeding. Further, Intel has identified no basis for a reasonable person to question Commissioner Rosch’s ability to be impartial in adjudicating this proceeding. Accordingly, we deny Intel’s motion to disqualify Commissioner Rosch.³

Background:

Pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, the Federal Trade Commission issued a Complaint on December 16, 2009. The Complaint alleges that, since 1999, Intel has illegally used its dominant market position to stifle competition and strengthen its monopoly in the markets for Central Processing Units (“CPUs”)⁴ and to create a monopoly for

² The present matter concerns conduct from 1999 to the present.

³ Commissioner Rosch has declined to recuse himself from further participation in the Intel proceeding (Docket No. 9341). Commissioner Rosch’s statement concerning Intel’s disqualification motion is hereby placed on the public record as Attachment A to this opinion (“Statement”).

⁴ The Complaint describes a CPU as a type of microprocessor used in a computer system; that is, as an integrated circuit chip that is often described as the “brains” of a computer system. The Complaint alleges that the microprocessor performs the essential functions of processing system data and controlling other devices integral to the computer system. According to the Complaint, a CPU requires a chipset to communicate with other parts of the computer.

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Intel in the markets for graphics processing units (“GPUs”).⁵ The Complaint alleges that Intel’s primary competitors in the CPU markets include Advanced Micro Devices (“AMD”) and Via Technologies (“Via”). Other key players allegedly include original equipment manufacturers (“OEMs”) that use CPUs such as Hewlett-Packard/Compaq, Dell, IBM, Lenovo, Toshiba, Acer/Gateway, Sun, Sony, NEC, Apple, and Fujitsu. The Complaint alleges that Intel’s primary competitors in the GPU markets include Nvidia and ATI, an affiliate of AMD.

The Complaint alleges, among other things, that Intel carried out an anticompetitive campaign using threats and rewards aimed at the world’s largest OEMs to coerce them not to buy rival CPUs and used exclusive or restrictive dealing to prevent OEMs from marketing machines with rival CPUs. In addition, the Complaint alleges, Intel secretly redesigned key software, known as a compiler, in a way that deliberately stunted the performance of competitors’ CPUs, and then told its customers and the public that software performed better on Intel’s CPUs than on those of its rivals, failing to disclose that the difference was largely or entirely due to Intel’s creation of a compiler designed to deceive consumers about competing products.

The Complaint also alleges that Intel’s CPU dominance was threatened by the innovation of GPU manufacturers, prompting Intel to engage in similar unfair practices that will create a dangerous possibility that Intel will obtain a monopoly in the relevant GPU markets. For example, the Complaint alleges that Intel has, among other things: engaged in deceptive practices relating to competitors’ efforts to enable their GPUs to interoperate with Intel’s newest CPUs; adopted a new policy of denying interoperability for certain competitive GPUs; established

⁵ The Complaint alleges that GPUs originated as specialized integrated circuits for the processing of computer graphics, but that as they have evolved, they have taken on greater functionality. The Complaint alleges that computers may achieve faster performance by offloading other computationally intensive needs from CPUs to GPUs.

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various barriers to interoperability; degraded certain connections between GPUs and CPUs; made misleading statements to industry participants about the readiness of Intel's GPUs; and engaged in unlawful bundling or tying of Intel's GPUs with its CPUs, resulting in below-cost pricing of relevant products.

Intel now moves to disqualify Commissioner Rosch, stating that "Commissioner Rosch served as Intel's primary outside antitrust counsel from about 1987 until Intel decided to change antitrust counsel in mid-1993." Motion at 2. Intel claims that Commissioner Rosch's previous work as Intel's chief antitrust outside counsel – including in connection with a "similar investigation" by the FTC – is "substantially related" to the Intel matter presently before the Commission. *Id.* at 8.

Specifically, Intel asserts that Commissioner Rosch "obtained substantial confidential information by reason of his representation of Intel, including information regarding Intel's business practices, legal strategies, and approach to antitrust compliance." Murray Declaration, ¶ 12.⁶ To support its disqualification motion, Intel has submitted several documents, of which the principal ones may be summarized as follows:⁷

⁶ Although Intel has not revealed specific confidences that were shared with then-Attorney Rosch (Murray Declaration, ¶ 4), in light of the nature of his former representation, we assume its claim is true with respect to the time period during which the former representation took place. Thus, given the limited disclosures made by Intel, our review is necessarily limited to a careful examination at the subject matter level of the scope of the former representation as it relates to the scope of the present Intel proceeding. As we explain below, we conclude, after taking a close look at Intel's submissions regarding the scope of Commissioner Rosch's previous representation, that there is no factual nexus between the matters in which Commissioner Rosch advised and the one presently before the Commission and whatever confidences were obtained are not relevant to the instant proceeding.

⁷ Motion, Attachment 5 is not discussed here as it does nothing to support or negate Intel's arguments. A characterization of the FTC's previous investigation by an unnamed newspaper does little to validate the actual matters in dispute at the time. We believe a better source to assess the nature and scope of the

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* **Motion, Attachment 1 [redacted]**⁸

* **Motion, Attachment 2 [redacted]**

* **Motion, Attachment 4 [redacted]**

Discussion:

For the reasons discussed below, we do not believe a reasonable person with knowledge of the relevant facts would question Commissioner Rosch's impartiality. Nor do we find any substantial relationship between the current case and the previous investigation. Finding no basis for recusal, we deny Intel's disqualification motion.

Legal Standard

Pursuant to FTC Rule 4.17, Intel's "motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed." 16. C.F.R. § 4.17(c). Intel argues and Commissioner Rosch has stated his agreement that "Commissioners, acting as judges, are held to the recusal standards applicable to the federal judiciary." Motion at 6; Statement at 2. In general, we also agree.⁹ Although Intel relies upon three different authorities, the federal judicial recusal

previous proceeding is the investigative subpoena, which Intel has submitted as Attachment 3, which we discuss along with Attachment 6 at pp.7-8, *infra*.

⁸ [redacted]

⁹ We find one significant difference between judicial disqualification standards and agency disqualification standards to be noteworthy. Namely, the separation of functions provisions of the Administrative Procedure Act allow an agency or its members to vote on whether to initiate a case or proceeding after reviewing pertinent information. 5 U.S.C. § 554(d). Federal judges, in contrast, may not participate in a decision to initiate any case they may later decide.

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standard, 18 U.S.C. § 455, is the relevant standard here.¹⁰ That standard provides in relevant part:

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy. . . .

28 U.S.C. § 455.

¹⁰ As a Federal employee, Commissioner Rosch is subject to the “Standards of Ethical Conduct for Employees of the Executive Branch,” 5 C.F.R. § 2635 (“Standards of Conduct”). *See also* FTC Rule 5.1, 16 C.F.R. § 5.1. We do not separately assess the impact of the Standards of Conduct because the reasonable person impartiality assessment therein mirrors what is contained in 28 U.S.C. 455(a). (The federal statute arguably raises the bar higher by requiring recusal unless the parties’ consent is obtained and, unlike the Standards of Conduct, there is no provision for authorizing one’s participation in certain circumstances. Because we have determined a reasonable person would not question Commissioner Rosch’s ability to be impartial, we do not address whether his participation is otherwise appropriate under the Standards of Conduct.) Moreover, Intel’s reliance upon Rule 3-310(E) of the California Rules of Professional Conduct is misguided. On its face, the rule bars attorneys from representing “adverse interests” and thus deals with attorney, not judicial, disqualification. Intel has not explained how or why provided a rational basis for Congress, the FTC, or even the state of California may have intended intending for Rule 3-310(E) (or comparable state bar rules, generally) to apply in these circumstances, and we can perceive no such reason..

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Application of Section 455(a)

We are principally concerned with the Section 455(a) basis for disqualification,¹¹ which arguably could be invoked if Commissioner Rosch served as counsel for Intel in connection with a *substantially related* matter.¹² As discussed below, we find no such substantial relationship. With no other viable potential impediments to his participation, we deny Intel's motion.

¹¹ With respect to the Section 455(b)(1) basis for disqualification, Intel has failed to provide any evidence of personal bias or prejudice. It is not even clear that Intel intended to make such an allegation. Although it references case law on the subject, Intel has not provided any facts that might be in any way relevant to this issue. The theory that Commissioner Rosch may have personal knowledge of disputed evidentiary facts relevant to the present Intel proceeding is similarly unsupported. Commissioner Rosch denies having such knowledge. Statement at 7-8. Given the nature of the prior representation, Intel presumably shared confidential information with its attorney. Nonetheless, the key is whether and to what extent such information relates to the present proceeding. Consequently, Intel's concerns in this vein are addressed by our inquiry into whether the matters are substantially related. With respect to the Section 455(b)(2) basis for disqualification--as Intel itself concedes--the present matter before the Commission is not the *same* matter in which Commissioner Rosch represented Intel. *See, e.g.*, Motion at 8 (Commissioner Rosch served as lead outside counsel "in a similar [FTC] investigation"). The current Complaint concerns alleged practices that took place from 1999 to the present. Thus, the events which give rise to the present proceeding took place long after (that is, from 6 to 16 years after) Commissioner Rosch ceased to be Intel's chief antitrust outside counsel. Accordingly, recusal is not warranted under 28 U.S.C. § 455(b)(2).

¹² We note that, although the federal cases Commissioner Rosch discusses with respect to the Section 455(a) standard do not use the term "substantially related," *see* Statement 8-9, they do address whether the proceedings in question concern related matters. *See, e.g., Cippollone v. Liggett Group, Inc.*, 802 F.2d 658, 659 (3d Cir. 1986) (length of time between matters, difference in parties and legal issues presented, as well as lack of factual nexus between matters, serve as basis for determination that there was no reason to question the judge's impartiality); *Renteria v. Schellpeper*, 936 F.Supp. 691, 694 (D. Neb. 1996) (no reasonable basis to question impartiality absent a showing that "the earlier case was 'sufficiently related' to the 'issues in dispute' before the judge in the pending case").

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In considering whether matters are substantially related for purposes of judicial recusal, courts have considered both the facts and the legal issues involved. “Initially, the trial judge must make a factual reconstruction of the scope of the prior legal representation.” *Westinghouse Electric Corp. v. Gulf Oil Corp.*, 588 F.2d, 221, 225 (7th Cir. 1978). If there is a factual nexus, courts must consider “whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those [prior] matters.” *Id.* If it is apparent such confidences were shared, the court must determine whether it “is relevant to the issues raised in the litigation pending against the former client.” *Id.* If all three indicators are present, the matters are substantially related and essentially deemed the same for conflicts purposes, with doubts to “be resolved in favor of disqualification.” *Id.*¹³

Our review of Intel’s submissions in support of its motion demonstrates to us that Commissioner Rosch’s participation in the prior Commission investigation was limited in scope to addressing the implications of specific licensing disputes and arrangements based on events that took place at various times between approximately 1983 and 1993.¹⁴ These discrete matters are wholly unrelated to the present Intel proceeding, which concerns conduct since 1999. Intel has not demonstrated how the previous licensing disputes relate to the present proceeding beyond potential overlap in broad legal categories. Antitrust

¹³ The Federal agency ethics regulations provide similar guidance addressing when seemingly separate proceedings should be considered the same matter. *See, e.g.*, 5 C.F.R § 2641.201(h)(5) (factors to consider include whether there is a nexus between the same basic facts, the same or related parties, related issues, the same confidential information, and the amount of time elapsed); FTC Rule 4.1(b)(1), n.1, 16 C.F.R. § 4.1(b)(1), n.1.

¹⁴ [redacted]

Instead, that letter indicates a certain skepticism towards allegations made by AMD that Intel should consider useful. In any event, as discussed *infra*, its context is limited to factual patterns not relevant to the present proceeding.

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matters generally, and in technology industries specifically, often involve similar theories of wrongdoing, such as economic tying, applied to a variety of factual circumstances. However, prior familiarity with legal theories is not enough to disqualify Commissioner Rosch. *See Michael v. Intracorp., Inc.*, 179 F.3d 847 (10th Cir. 1999) (prior knowledge of the type of case or the defenses presented is insufficient to justify recusal). If recusal were automatically to follow such tangential commonalities, the Commission would be unable to rely upon experienced, well-informed professionals to decide complex matters. *See Cipollone*, 802 F.2d at 659-660 (“If Judges could be disqualified because their background in the practice of law gave them knowledge of the legal issues which might be presented in cases coming before them, then only the least-informed and worst-prepared lawyers could be appointed to the bench.”). Further, there are significant differences in time. As stated above, the present Complaint concerns behavior from 1999 to the present, whereas the FTC’s previous investigation in which Commissioner Rosch represented Intel principally focused on conduct that took place from 1985 through 1990. A closer examination of the relevant investigative subpoenas reveals a larger time gap with respect to certain issues. *See, e.g.*, Motion, Attachment 6, ¶ 3 [redacted] as compared to Motion, Attachment 3, ¶ 3 [redacted].

Of course, there is commonality with respect to several interested parties—namely Intel, AMD, and the FTC. However, there are also important differences. For example, a number of CPU manufacturers have exited the marketplace over the last decade. Moreover, any common ground in terms of interested parties is negated by key differences in the products and allegations at issue. Although the term “microprocessor” was used by Intel then and now, we are not dealing with the same product. Information about a putative “television sets” market two decades ago would have little relevance to the competitive dynamics of the market for the products currently sitting (perhaps it is more accurate to say ‘mounted’) in American family rooms today, though the same words may be used to describe the products. Similarly, there is no *a priori* reason to believe that any

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information Commissioner Rosch may have gained about the markets for the products at issue—in the matters on which he represented Intel—is relevant to the present matter, and we have searched the Motion in vain for evidence from which to infer such a relationship. Indeed, in the course of this proceeding, Intel has repeatedly asserted that the relevant technologies are constantly evolving. *See* Intel Submission to Commission at 4, 5, 7, 30, and 38 (Nov. 27, 2009). Further, in the sixteen years since Commissioner Rosch advised Intel, eight generations of Moore's law (the seminal statement on the evolution of computer chips) have passed. *See* Wikipedia, Moore's Law, http://www.en.wikipedia.org/wiki/Moore's_law#cite.¹⁵ The eight iterations of Moore's law have produced microprocessors that are approximately 250 times more powerful, and in that time span, competitors and customers have emerged, have vanished, or have been unrecognizably transformed.¹⁶

Taking into account these differences, we find there is no pertinent nexus between the facts at issue in the prior representation and the present Intel matter. Thus, whatever confidences Commissioner Rosch may have obtained in the course of his prior representation, Intel has presented no evidence that they are relevant to the current proceeding. Furthermore, Intel was aware of its prior relationship with Commissioner Rosch when it first learned of the present matter at least 18 months ago, and nevertheless willingly chose to repeatedly interact with him and other FTC officials throughout the investigative phase without questioning Commissioner Rosch's involvement or

¹⁵ Moore's law, which states that the number of transistors that can be inexpensively placed on an integrated circuit has doubled approximately every two years, is of course named after Gordon Moore, a long-term executive at Intel.

¹⁶ To take only a handful of examples of how these markets have changed, **[redacted]**. The products of these major mainframe manufacturers in the 1980s now exist only in virtual form on the website of the IPSJ Computer Museum. *See* <http://www.museum.ipsj.or.jp/en/computer/main/0079.html> and <http://museum.ipsj.or.jp/en/computer/os/fujiitsu/0013.html>.

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whether he might possess confidential information that should not be shared with the staff during the investigative phase. Statement 1, 9-10. As a consequence, it is highly doubtful that, in Intel's own view, Commissioner Rosch actually possesses any confidential information relevant to this matter.

Absent a factual nexus between the matters—and with no evidence of confidential information shared that would be relevant to the instant proceeding—we have determined that the matters in which Commissioner Rosch formerly represented Intel are not substantially related to the present proceeding. Accordingly, we have concluded that a reasonable person with knowledge of the relevant facts would not question Commissioner Rosch's ability to be impartial. Accordingly,

IT IS ORDERED THAT the motion of Intel seeking Commissioner Rosch's disqualification with respect to any adjudicative proceeding against Intel is denied.

By the Commission, Commissioner Kovacic recused, and Commissioner Rosch not participating.

ATTACHMENT A

STATEMENT OF COMMISSIONER J. THOMAS ROSCH ON RESPONDENT'S MOTION FOR DISQUALIFICATION [REDACTED PUBLIC VERSION]

Approximately 18 months ago, the Federal Trade Commission authorized the use of compulsory process to investigate the alleged conduct of Intel Corporation ("Intel") in the microprocessor markets. Since that time, this Commissioner met

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with Intel officials on at least three occasions and spent hundreds of hours considering, among other things, the staff's theories, the applicable case law, and the underlying documents involved in this case in order to determine whether there was a "reason to believe" that a complaint should issue and on what bases. During that period, although it willingly provided the Commission numerous white papers and participated in nearly six hours of meetings with this Commissioner, Intel never suggested (nor did any other participant for that matter) that there was any basis for disqualification. Notwithstanding that fact, on the day before the Commission's final vote to pursue administrative litigation, Intel moved to disqualify this Commissioner pursuant to 16 C.F.R. § 4.17, "from participation in any adjudicative proceeding against Intel, including voting on whether to issue a complaint." (Mot. of Intel Corp. for Disqualification of Commissioner J. Thomas Rosch ("Mot.") at 2.)

Although Intel relies on three different authorities to try to make its case (the federal judicial recusal standard, the Office of Government Ethics regulations, and the California Rules of Professional Conduct), the crux of Intel's argument is that a reasonable person would conclude that, because this Commissioner served as Intel's primary outside antitrust counsel from 1987 until mid-1993 – including in conjunction with an FTC investigation opened in 1991 – this Commissioner cannot impartially consider whether Intel's alleged conduct since 1999 should create antitrust liability. Intel points to no confidential information that this Commissioner possesses from the 1987-1993 representation that is relevant to the Commission's recently issued complaint, which concerns alleged conduct from 1999 forward. Intel points to no public statements that this Commissioner has made that supply any evidence of prejudgment. And Intel does not and cannot show that the Commission's recently issued administrative complaint constitutes the same matter in controversy as the investigation that this Commissioner handled on Intel's behalf more than a decade and a half ago. For these

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reasons and others discussed below, disqualification is not warranted.

**DISQUALIFICATION IS NOT WARRANTED UNDER
ANY OF THE GOVERNING STANDARDS**

Intel argues that this Commissioner is subject to disqualification under three authorities: (1) the recusal standards “applicable to judges and FTC Commissioners alike;” (2) the Office of Government Ethics (OGE) regulations; and (3) Rule 3-310(E) of the California Rules of Professional Conduct. (Mot. at 2, 4-10.) None of these arguments supports disqualification of this Commissioner.

A. Federal Judicial Recusal Standard

Pursuant to Rule 4.17 of the Commission’s Rules of Procedure, Intel’s “motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed.” 16 C.F.R. § 4.17(c). As Intel acknowledges, “Commissioners, acting as judges, are held to the recusal standards applicable to the federal judiciary.” (Mot. at 6 (emphasis added).) Under that standard, set forth in 28 U.S.C. § 455 (“Disqualification of justice, judge, or magistrate”), disqualification is appropriate where (1) “in private practice he served as lawyer in the matter in controversy,” 28 U.S.C. § 455(b)(2); (2) “he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding,” *id.* § 455(b)(1); or (3) his “impartiality might reasonably be questioned,” *id.* § 455(a). None of those considerations supports disqualification on the facts here.

1. First, Intel does not assert that this Commissioner served as a lawyer “in the matter in controversy” here. *Id.* § 455(b)(2). That would be impossible because the Commission only opened its formal investigation into this matter in 2008 – nearly a decade and a half after Intel says this Commissioner stopped representing Intel. (Mot. at 2.) Moreover, the FTC staff’s 1991 investigation,

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upon which Intel principally relies (Mot. at 3, 8, 9; Murray Declaration (“Murray Decl.”) ¶¶ 5-9, Attach. 1-5) and in which this Commissioner represented Intel, was a completely separate case from the case initiated by the current complaint. At issue in the investigation initiated in 1991 – nearly eighteen years ago – was whether Intel had illegally acquired monopoly power in the central processing unit (“CPU”) markets. (See Mot. Attach. 5 (describing investigation as inquiry into whether Intel “broke any antitrust laws in becoming the dominant supplier of microprocessors”).) That is a fundamentally different question from whether, as the current complaint now alleges, Intel has engaged in a course of conduct designed to (1) illegally maintain its monopoly power in those CPU markets, and (2) attempt to monopolize the graphics markets. *See* Administrative Complaint, *In the Matter of Intel Corp.*, FTC Docket No. 9341 (Dec. 16, 2009). This Commissioner’s representation of Intel during the investigation initiated in 1991 had nothing to do with monopoly maintenance based on alleged conduct respecting microprocessors, which allegedly began in 1999, and that investigation did not involve the graphics markets alleged in the current complaint at all.

Beyond that, to this Commissioner’s knowledge, Intel did not engage in [redacted] during this Commissioner’s representation, and the motion does not contain any evidence that this Commissioner made representations to the Commission staff or anyone else about those practices. (Mot. at 2.) To be sure, when the FTC initiated its investigation in 1991, this Commissioner did attempt to define the relevant market for microprocessors in which Intel participated (*id.*) as a market in which numerous other microprocessor producers, including IBM and Sun participated. (Likewise, in the FTC’s 1997 suit against Intel, Intel’s then-counsel also defined the relevant market as one in which there were numerous participants beside Intel.) This Commissioner never, however, asserted that the market would remain as it was defined at that time. Similarly, in the investigation initiated in 1991, the Commission staff did inquire about “exclusive dealing”

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and “bundling,” including “economic tying,” as well as whether Intel engaged in a refusal to license to AMD, but this Commissioner specifically told the Commission staff that antitrust liability would depend on the facts relevant to the particular practice at issue, not that those practices were either legal or illegal under all circumstances. (Compare Mot. at 2 with Attach. 1 at 3-9 and Attach. 4 at 3, 5.)

Moreover, even if the facts involved in the 1991 investigation and the current complaint were the same, the law governing those facts has not stood still. For example, the principal predatory pricing cases that Intel has thus far invoked in white papers and discussions preceding the current complaint, *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008), were not decided until after the 1991 investigation. Judge Wilken’s decision suggesting a modification of predatory pricing standards in *Meijer, Inc. v. Abbott Labs*, 544 F. Supp. 2d 995 (N.D. Cal. 2008), likewise came at a later date. Additionally, since this Commissioner’s representation of Intel ended, there have been several important decisions regarding loyalty discounts and economic tying. See, e.g., *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (2000); *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2009 U.S. App. LEXIS 23765 (9th Cir. Oct. 29, 2009); *LePage’s Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003). Finally, the courts have supplied important decisions regarding refusals to license and the implications of product design decisions. See *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997); *C. R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340 (Fed. Cir. 1998). Thus, both the facts and the law applied to those facts have evolved during the ensuing period spanning more than a decade and a half.

Of course, the investigations initiated in 1991 and 2008 respectively were not without certain broad factual similarities: the Commission (as opposed to DOJ or private plaintiffs) initiated both investigations; Intel was the subject of both investigations; both investigations were based on alleged antitrust violations; and

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both investigations involved markets related to the CPU industry (and the associated market definition questions). But simply because two cases have factual similarities at a high level of factual and/or legal generality does not mean that they qualify as the same “matter in controversy.” If that were so, anytime a Commissioner provided counsel to a firm with monopoly power while in private practice, that firm could always invariably move to disqualify that Commissioner in a future investigation – even more than a decade and a half later – on the ground that the Commissioner was involved in a representation involving the same “matter in controversy.” That is not the law.

Intel implies otherwise. It asserts that disqualification is appropriate because the current action is “substantially related” to this Commissioner’s prior representation of Intel in conjunction with the Commission’s 1991 investigation (Mot. 6-7, Attach. 1). Intel’s claim that the disqualification of a federal judge should turn on a “substantially related” analysis is without any precedent. Indeed, after admitting that “Commissioners, acting as judges, are held to the recusal standards applicable to the federal judiciary,” (Mot. at 6 (emphasis added)), Intel cites two state court decisions (from 1978 and 1992, respectively) that applied the “substantially related” analysis. (Mot. at 7 (citing *Rushing v. City of Georgiana*, 361 So.2d 11 (Ala. 1978) and *Davis v. Neshoba County General Hospital*, 611 So.2d 904 (Miss. 1992).) Intel’s reliance on these state court decisions is not accidental: Intel does not cite a single federal case applying the “substantially related” standard to evaluate the disqualification of a federal judge or Commissioner because, as far as this Commissioner can ascertain, there are no such cases. *See generally River West, Inc. v. Nickel*, 188 Cal. App. 3d 1297, 1299, 1302 (Cal. Ct. App. 1987) (explaining that “substantial relationship” is a “legal point of significance in attorney disqualification” that is “used in identifying an impermissible conflict of interest in an attorney’s representation of successive clients”) (emphasis added).

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In any event, as discussed above, for the same reasons that the 2009 complaint and the investigation initiated in 1991 do not present “the same matter in controversy,” they cannot be said to be “substantially related”: the two separate matters were based on different alleged conduct during different time periods and involved different theories of liability.

2. Second, along the same lines, this Commissioner does not have “personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.” 28 U.S.C. § 455(b)(1). As to “personal bias or prejudice,” Intel contends that disqualification is warranted under *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970), because this Commissioner “has in some measure adjudged the facts” in advance of this case. (Mot. at 6.) However, in contrast to the prejudgment cases that Intel cites, Intel does not cite any evidence of prejudgment here.

In *Texaco, Inc. v. FTC*, 336 F.2d 754, 759 (D.C. Cir. 1964), *rev'd on other grounds*, 381 U.S. 739 (1965), for example, the D.C. Circuit held that then-Chairman Paul Rand Dixon was disqualified from participating in an appeal where he delivered a speech that said “[w]e are well aware of the practices that plague you . . . you know the practices – price fixing, price discrimination, . . . you know the companies” and named the respondents. *See also id.* at 760 (“In this case, a disinterested reader of Chairman Dixon's speech could hardly fail to conclude that he had in some measure decided in advance that Texaco had violated the Act.”). Likewise, in *Cinderella Career & Finishing Schools*, the D.C. Circuit reached the same conclusion in light of a speech that Chairman Dixon gave during the pendency of another appeal before the Commission that, again, strongly implied that the respondent had engaged in the deception at issue in the appeal. 425 F.2d at 589-91 (finding that “Commissioner Dixon has exercised questionable discretion and very poor judgment indeed, in directing his shafts and squibs at a case awaiting his official action”). These cases do not help Intel. To the contrary, Intel asserts that prior to the current complaint this Commissioner had

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argued that Intel's previous conduct was lawful. (Mot. at 3, Murray Decl. ¶¶ 5-11, Attach. 1-5.)

Nor does Intel adduce any evidence that this Commissioner has "personal knowledge of disputed evidentiary facts" concerning "this proceeding." 28 U.S.C. § 455(b)(1). Indeed, as previously noted, such knowledge would be impossible because the conduct that was the subject of the investigation initiated in 1991 is not the subject of the current complaint, which only goes back to 1999. This Commissioner has no knowledge – beyond what the staff has adduced during its Part 2 investigation and what Intel has asserted – about any of Intel's alleged conduct during the relevant time period. Indeed, it is ironic for Intel to claim that the facts relating to practices that were investigated a decade and a half ago (or the "confidential" information allegedly shared with this Commissioner at or about that time) are the same or even similar to the facts or other information relating to the practices alleged in the current complaint, given Intel's repeated assertions that the technology and products in these markets have constantly "evolved" over the years. (*See Intel Submission to Commission at 4, 5, 7, 30 38 (Nov. 27, 2009).*)

Moreover, even if this Commissioner had acquired personal knowledge of disputed evidentiary facts (which, again, he did not), numerous federal courts have held that the passage of a substantial period of time – here more than a decade and a half since his representation of Intel ended – if not determinative, militates against the disqualification of a federal judge. *See, e.g., Cipollone v. Liggett Group, Inc.*, 802 F.2d 658, 659 (3d Cir. 1986) ("Even if American Tobacco Company were a party to [this] case, the long passage of time [9 years] since Judge Hunter's last representation of that Company requires the conclusion that no reasonable person could question his impartiality."); *Renteria v. Schellpeper*, 936 F. Supp. 691, 696-697 (D. Neb. 1996) (refusing to disqualify federal judge based on representation of parties in prior litigation where same claims were not involved and where the case at issue did not arise until "long after the judge left

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private practice”). And with good reason: it would be unreasonable to conclude that a decade and a half after his representation of Intel ended, this Commissioner has retained any relevant confidential information in an industry as prone to innovation and research and development as this one.

Numerous other federal courts have likewise so held. *See Chitimacha Tribe of Louisiana v. Harry L. Laws Company, Inc.*, 690 F.2d 1157, 1166 (5th Cir. 1982) (recusal not warranted where judge had represented the defendant in unrelated matters at least six years earlier); *Jenkins v. Bordenkircher*, 611 F.2d 162, 165-67 (6th Cir. 1979) (recusal not required where trial judge had prosecuted defendant for several unrelated crimes during the period four to thirteen years prior to the time of trial); *Gravenmier v. United States*, 469 F.2d 66, 67 (9th Cir. 1972) (where trial judge was of counsel in prior prosecution six years before present unrelated prosecution, recusal not required); *Darlington v. Studebaker-Packard Corp.*, 261 F.2d 903, 906 (7th Cir. 1959) (recusal not warranted where trial judge had represented defendant in unrelated matters for a period of four to five years which ended three to four years before judge's decision); *Royal Air Maroc v. Servair, Inc.*, 603 F. Supp. 836 (S.D.N.Y. 1985) (prior representation by trial judge of defendant's parent corporation in unrelated matter twelve years earlier no basis for recusal). *Cf. Schurz Communs. v. FCC*, 982 F.2d 1057, 1061 (7th Cir. 1992) (Posner, J.) (noting that in ruling on a recusal motion based on the judge's involvement in a previous matter, “[t]he lapse of time is of course one factor”).

3. Finally, because this Commissioner did not represent Intel in the same matter in controversy and has not otherwise retained relevant confidential information, there is no basis to conclude that this Commissioner's impartiality more generally can reasonably be questioned. Intel itself offers no other independent arguments regarding this Commissioner's impartiality. To the contrary, its past behavior speaks volumes. Indeed, the timing of this motion to disqualify establishes that Intel itself – arguably the “most interested” person – does not truly believe that

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disqualification is proper. For nearly 18 months, Intel did not question the propriety of this Commissioner's participation (or the FTC's integrity if he were to participate), even though Intel was on notice of the FTC's investigation and this Commissioner's active participation. More specifically:

- Intel's CEO, its current General Counsel, as well as its lead outside counsel, all met with this Commissioner as a prospective decision-maker in this matter in mid-July of 2008. At no time during that meeting did any of the Intel people suggest that there was anything improper about this Commissioner's participation.
- Later, in May of 2009, Intel's lead outside counsel spoke with this Commissioner as a decision-maker in this matter. No suggestion was made during that conversation that there was anything improper about this Commissioner's participation.
- Recently, on December 3, Intel's current General Counsel and its lead outside counsel met again with this Commissioner as a prospective decision-maker, this time for about two hours. At that meeting, this Commissioner informed Intel that he had tentatively formed a "reason to believe" that a complaint should issue. Again, no suggestion was made that there was anything improper about this Commissioner's participation in this matter.
- Finally, it is this Commissioner's understanding that in the several days leading up to the Commission's decision to vote out a complaint, Intel's General Counsel had a number of conversations with the Chairman about this matter – including a conversation just a few hours before this motion was filed. At no time during those conversations did Intel ever suggest that this Commissioner's participation in the matter was in any way improper.

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It was not until the day before the Commission issued the administrative complaint – more than 18 months after the Commission authorized the use of compulsory process – that Intel, having unsuccessfully rolled the dice that this Commissioner’s participation would prevent the issuance of a complaint, moved to disqualify this Commissioner from participating.

The law is well established, however, that Intel cannot have its cake and eat it too. Motions to disqualify must be “filed with reasonable promptness after the ground for such a motion is ascertained.” *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992); *see also Santiago v. Ford Motor Co.*, 206 F. Supp. 2d 294, 298 (D.P.R. 2002) (“Section 455(a) requires that a party raise the issue of disqualification of the judge at the earliest moment after acquiring knowledge of the facts providing a basis for disqualification.”). This rule exists to prohibit parties from gaming the system. *Schurz Communs.*, 982 F.2d at 1060 (Posner, J.) (“Litigants cannot take the heads-I-win-tails-you-lose position of waiting to see whether they win and if they lose moving to disqualify a judge who voted against them.”); *E. & J. Gallo Winery*, 967 F.2d at 1295 (noting that, although a judge has a self-enforcing duty to recuse himself, “it does not necessarily follow that a party having information that raises a possible ground for disqualification can wait until after an unfavorable judgment before bringing the information to the court’s attention”). The Commission therefore “should be less inclined to grant a recusal when,” as here, “the movant has waited until the last possible moment to bring up the recusal.” *Santiago*, 206 F. Supp. 2d at 298.

For the foregoing reasons, the standards applicable to the disqualification of federal judges (and to FTC Commissioners) do not support disqualification here.

B. Office of Government Ethics Regulations

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Intel also argues that the applicable OGE regulations, which the Commission's Rules of Practice incorporate by reference, 16 C.F.R. § 5.1, require this Commissioner's disqualification.

1. To begin with, those regulations apply the same "reasonable person" standard set forth in the body of law governing federal judicial disqualifications described above. See 5 C.F.R. § 2635.502(d) (requiring disqualification where an employee's participation in a particular matter "would raise a question in the mind of a reasonable person about his impartiality"). For the reasons discussed above, disqualification is not warranted.

2. Additionally, even if there were a basis to conclude that a reasonable person might question the Commissioner's impartiality, the OGE regulations establish that disqualification would nevertheless be improper for another reason. As Intel concedes, the OGE regulations specifically treat "the interest of the Government in the employee's participation" as a consideration that trumps even whether "a reasonable person may question the integrity of the agency's programs and operations." (Mot. at 4.) Given the circumstances in this case, this second consideration is also fatal to Intel's motion.

When former Chairman Majoras left the Commission in April 2008, the agency was left with just four Commissioners. Additionally, because Commissioner Kovacic recused himself from voting on the motion to issue the administrative complaint, the agency was left with just three participating Commissioners on this important matter. The disqualification of this Commissioner, based on his representation of Intel more than a decade and a half ago, not only would deprive the Commission of his expertise and experience in handling complex antitrust litigation, but would also leave the Commission with just two active Commissioners as decision-makers on this very important matter. Moreover, there is no guarantee that those two Commissioners would agree, thus creating the risk that the

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Commission would be left with a 1-1 split on decisions that must be made at the Commission level. Not only would such an outcome be contrary to the public interest, but the result of having just two Commissioners (whether they agree or not) consider a matter of such importance far outweighs whatever impartiality Intel believes lingers here based on a representation that occurred a decade and a half ago.

The circumstances on the horizon will not necessarily improve in this regard. Commissioner Harbour's term expired in September 2009. For the time being, Commissioner Harbour has agreed to hold over until her successor is sworn in. Commissioner Harbour, however, is free to leave at any point regardless of whether her successor is sworn in. Moreover, although the President has nominated two new Commissioners and their hearings have taken place, it is unknown at this time (1) when their confirmations will take place, and (2) whether either of those Commissioners will have her own conflict (based on prior employment or financial assets) with this matter.

As the federal courts have recognized, these circumstances can and should factor into the calculus of whether the disqualification of a presidential appointee is appropriate. *See, e.g., Cheney v. United States Dist. Court*, 541 U.S. 913, 915-16 (2004) (Scalia, J., in chambers) (holding that doubts should not be resolved in favor of recusal where recusal would mean the Court would be functioning with fewer than all nine justices and where it would risk the possibility of a tie vote); *Center for Auto Safety v. FTC*, 586 F. Supp. 1245, 1250 (D.D.C. 1984) (noting, in the context of a regulatory commission, "if one member of such a commission is disqualified or recused, he cannot, under the law, be replaced, and the body may thus be left, as in this case, unable to make an effective decision by virtue of an even split" and that such a consideration should, in appropriate circumstances, bear on the disqualification analysis).

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C. California Rules of Professional Conduct

Third and finally, Intel assert that Rule 3-310(E) of the California Rules of Professional Conduct (the bar to which this Commissioner is admitted) requires disqualification. This claim also fails for at least three different reasons.

1. First, the text of the Commission's Disqualification Rule provides that a motion to disqualify "shall be determined in accordance with legal standards applicable to the proceeding in which the motion was filed." 16 C.F.R. § 4.17(c). Intel does not cite (and, after much searching, this Commissioner has been unable to locate) any authority that supports Intel's claim that the standard for a motion to disqualify should be governed by state ethics rules. Instead, the federal common law, see, e.g., *Cinderella Career & Finishing Schools*, 425 F.2d at 591, and the text of the applicable federal regulations, see 16 C.F.R. § 5.1 (incorporating OGE regulations by reference), supply the sum total of the law that governs this motion. There is no authority to show that Congress or the FTC intended for the disqualification of Commissioners of federal agencies to turn on the varying state bar rules, state advisory opinions, and state common law – particularly given that membership in any state bar (or any legal training) is not even a prerequisite to serve as a Commissioner in the first place.

2. Second, California did not intend for Rule 3-310(E) to apply in these circumstances. To start with, the rule's text provides that a bar member "shall not, without the informed written consent of [a] former client, accept employment adverse to the . . . former client where, by reason of the representation of the . . . former client, the member has obtained confidential information material to the employment." CRPC 3-310(E). This Commissioner, of course, accepted his "employment" as a Commissioner before the compulsory process was authorized in this matter. It was therefore impossible for this Commissioner to obtain Intel's consent at that time. Even if such consent had been

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possible to obtain, however, Rule 3-310(E) does not clearly contemplate such “consent” in a situation where, in adjudicative proceedings, the Commissioner does not represent anyone, but is instead an arbiter. Here, the drafters intended for the rule to apply to a practicing lawyer who takes on a “representation” “adverse to a former” client.

Any doubt as to whether the rule applies only to cases where an attorney takes on an adverse representation is resolved by the rule’s heading, which is captioned: “avoiding the representation of adverse interests.” CRPC 3-310(E). Consistent with the rule’s text, nothing in that heading suggests that the rule was ever intended to apply to situations where a lawyer serves in a position akin to a federal judge and, therefore, is not “adverse” to either side. See *Gonzales v. Super. Ct. of Los Angeles County*, 3 Cal. 2d 260, 263 (Cal. 1935) (“It is an elementary rule of construction that chapter and section headings in the codes are entitled to considerable weight in interpreting the various sections and should be given effect according to their import, to the same extent as though they were included in the body of the law.”). Indeed, Intel’s citation to *River West*, 188 Cal. App. 3d at 1302-03 (Mot. at 9 n.4), underscores this point: that decision limits the rule that Intel invokes to “successive adverse representations.”

In short, Intel concedes that trying to apply Rule 3-310(E) to this Commissioner in his role as a Federal Trade Commissioner is like trying to pound a round peg into a square hole; it does not fit. (Mot. at 8 (“[N]o one can know now whether [Commissioner Rosch’s] consideration and decisions in this matter ultimately will be adverse”)) If the drafters of Rule 3-310(E) had intended for the rule to apply to the disqualification of federal officials sitting as judges, the rule would state as much. It does not. The mental gymnastics that are required to shoehorn California’s ethics rule into the analysis of when disqualification is appropriate under Commission Rule 4.17 prove too much.

3. Third, even if Rule 3-310(E) did supply a basis for disqualification here, Intel cannot prevail on the merits. As a

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threshold matter, this Commissioner must possess “confidential” information related to the merits of the pending case. Given that this Commissioner has not served as Intel’s counsel for more than a decade and a half and Intel’s own repeated descriptions about how quickly the technology and products are evolving, there is no reasonable basis to conclude that this Commissioner possesses any confidential information as Rule 3-310(E) contemplates.

CONCLUSION

For the foregoing reasons, this Commissioner declines to recuse himself from further participation in the Intel proceeding (Docket No. 9341).

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**DANIEL CHAPTER ONE
AND
JAMES FEIJO***Docket No. 9329 Order, January 25, 2010*

Order denying respondents' request for reconsideration of the Final Order issued December 18, 2009 and modified Final Order.

**ORDER RULING ON RESPONDENTS' PETITION
FOR RECONSIDERATION OF FINAL ORDER**

The Commission issued its Opinion and Final Order in this matter on December 18, 2009. Service of the Opinion and Final Order was completed on December 31, 2009, and the Final Order therefore would have become final and effective on March 4, 2010. 16 C.F.R. § 3.56(a); *accord* 15 U.S.C. § 45(g). On January 19, 2010, Daniel Chapter One and James Feijo (Respondents) filed a Petition for Reconsideration of Final Order (Petition). Respondents request the Commission to reconsider the Final Order on the ground that certain deadlines therein run from the date of service of the Final Order, and therefore could be interpreted to impose obligations on Respondents before the Final Order becomes final and effective in accordance with Section 5(g) of the FTC Act, 15 U.S.C § 45(g), and Commission Rule 3.56(a), 16 C.F.R. § 3.56(a). Respondents do not request reconsideration of the Opinion of the Commission. On January 25, 2010, Complaint Counsel filed an Opposition to Respondents' Petition.

The Commission has determined to deny the Petition because it does not comply with Commission Rule 3.55, 16 C.F.R. § 3.55; that is, it fails to raise any new questions "upon which the petitioner had no opportunity to argue before the Commission." The Order which the Chief Administrative Law Judge issued on August 5, 2009, as part of his Initial Decision, contains deadlines which similarly run from the date of service of the Order. Moreover, Paragraphs IV, VI, and IX of the Notice Order

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contained in the Administrative Complaint issued in this matter on September 16, 2008 contain deadlines which similarly run from the date of service of the Order. While the Respondents thus have had a number of opportunities to raise the deadline issue in their briefs and argument before the Commission, they failed to do so. Furthermore, as Complaint Counsel point out, to the extent that Respondents were uncertain as to the date on which each of the initial time periods specified in the Final Order would begin, the email message sent to all counsel of record by the Secretary advised that – consistent with the Commission Rules and Section 45(g) of the FTC Act – all such time periods would begin on the first business day after March 4, 2010; that is, on March 5, 2010.

For these reasons, the Commission has determined to deny the Petition. The Commission has nevertheless determined to modify the Final Order in certain nonsubstantive respects to clarify that the time periods within which the Respondents will be required to take certain actions required by the Modified Final Order will begin no sooner than the date on which the Modified Final Order becomes final and effective; that is, on the sixtieth day after service of the Modified Final Order. Accordingly,

IT IS ORDERED THAT the Final Order issued by the Commission on December 18, 2009 be, and it hereby is, modified to read as shown in the attached Modified Final Order;

IT IS FURTHER ORDERED THAT the initial time periods prescribed by Commission Rules 3.55 and 3.56(d), 16 C.F.R. §§ 3.55, 3.56(d), will begin on the first business day after service of the Modified Final Order; and

IT IS FURTHER ORDERED that the Modified Final Order – as supported and explained by the Opinion of the Commission issued on December 18, 2009 – will become final and effective on the sixtieth day after the Modified Final Order is served, pursuant to Section 5(g) of the FTC Act, 15 U.S.C § 45(g), and Commission Rule 3.56(a), 16 C.F.R. § 3.56(a).

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By the Commission.

MODIFIED FINAL ORDER

The Commission has heard this matter on the appeal of Respondents from the Initial Decision and on briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to enter the following order. Accordingly,

I.

IT IS HEREBY ORDERED that for purposes of this Order, the following definitions shall apply:

- A. “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.
- B. “Covered Product or Service” shall mean any dietary supplement, food, drug, or other health-related product, service, or program, including, but not limited to, BioShark, 7 Herb Formula, GDU, and BioMixx.
- C. “Food” and “drug” shall mean “food” and “drug” as defined in Section 15 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 55.
- D. “Advertisement” means any written or verbal statement, illustration, or depiction that is designed to effect a sale or to create interest in the purchasing of

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goods or services, whether it appears in a book, brochure, newspaper, magazine, pamphlet, leaflet, circular, mailer, book insert, letter, catalogue, poster, chart, billboard, public transit card, point of purchase display, packaging, package insert, label, film, slide, radio, television or cable television, video news release, audio program transmitted over a telephone system, infomercial, the Internet, e-mail, or in any other medium.

- E. Unless otherwise specified, "Respondents" shall mean Daniel Chapter One and its successors and assigns, affiliates, or subsidiaries, and its officer, James Feijo, individually and as an officer of the corporation; and each of the above's agents, representatives, and employees.
- F. "Commerce" shall mean "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.
- G. "Endorsement" shall mean "endorsement" as defined in 16 C.F.R. § 255.0(b).

II.

IT IS HEREBY ORDERED that Respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of BioShark, 7 Herb Formula, GDU, and BioMixx, or any substantially similar health-related program, service, or product, or any other 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 product or program names or endorsements, that such health-related program, service, product, or Covered Product or Service prevents, treats, or cures or assists in the prevention, treatment, or

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cure of any type of tumor or cancer, including but not limited to representations that:

1. BioShark inhibits tumor growth;
2. BioShark is effective in the treatment of cancer;
3. 7 Herb Formula is effective in the treatment or cure of cancer;
4. 7 Herb Formula inhibits tumor formation;
5. GDU eliminates tumors;
6. GDU is effective in the treatment of cancer;
7. BioMixx is effective in the treatment of cancer; or
8. BioMixx heals the destructive effects of radiation or chemotherapy;

unless the representation is true, non-misleading, and, 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 person, corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any Covered Product or Service, in or affecting commerce, shall not make any representation, in any manner, directly or by implication, including through the use of a product name, endorsement, depiction, or illustration, about the efficacy, performance, or health-related benefits of any Covered Product or Service unless the representation is true, non-misleading, and, at the time it is made, Respondents possess

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and rely upon competent and reliable scientific evidence that substantiates the representation.

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 or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration; and
- B. 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.

V.

IT IS FURTHER ORDERED that:

- A. Respondents shall, within seven (7) days after the final and effective date of this order, deliver to the Commission a list, in the form of a sworn affidavit, of all consumers who purchased BioShark, 7 Herb Formula, GDU, and/or BioMixx, on or after January 1, 2005 and until the date this order becomes final and effective. Such list shall include each consumer's name and address, the product(s) purchased, and, if available, the consumer's telephone number and email address;

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- B. Within forty-five (45) days after the final and effective date of this order, Respondents shall send by first class mail, postage prepaid, an exact copy of the notice attached as Attachment A to all persons identified in Part V.A., above. The face of the envelope containing the notice shall be an exact copy of Attachment B. The mailing shall not include any other documents; and

- C. Except as provided in this order, Respondents, and their officers, agents, servants, employees, attorneys, and representatives shall not sell, rent, lease, transfer, or otherwise disclose the name, address, telephone number, credit card number, bank account number, e-mail address, or other identifying information of any person who paid any money to any Respondent, at any time and until the date this order becomes final and effective, in connection with the purchase of BioShark, 7 Herb Formula, GDU, and/or BioMixx. *Provided, however,* that Respondents may disclose such identifying information to the FTC pursuant to Part V.A., above, or any law enforcement agency, or as required by any law, regulation, or court order.

VI.

IT IS FURTHER ORDERED that for a period of five (5) years after the last date of dissemination of any representation covered by this order, Respondents shall 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

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- C. All tests, reports, studies, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question such 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 shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the final and effective date 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 Feijo, 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 the individual 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 Paragraph 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.

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IX.

IT IS FURTHER ORDERED that Respondent DCO 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 DCO learns less than thirty (30) days prior to the date such action is to take place, Respondent DCO 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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

X.

IT IS FURTHER ORDERED that Respondents shall, within sixty (60) days after the final and effective date 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.

IT IS FURTHER ORDERED that this order will terminate on January 25, 2030, 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

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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 the Respondents did not violate any provision of this order, and the dismissal is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

ATTACHMENT A

LETTER TO BE SENT BY FIRST CLASS MAIL

[To be printed on letterhead of Daniel Chapter One]

[Name and address of recipient] [Date]

Dear [Recipient]:

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Our records show that you bought [**names of products**] from our website [**name of website**] or through a call center using our toll-free number. We are writing to tell you that the Federal Trade Commission (“FTC”) has found our advertising claims for these products to be deceptive because they were not substantiated by competent and reliable scientific evidence, and the FTC has issued an Order prohibiting us from making these claims in the future.

The Order entered against us by the FTC requires that we send you the following information from the FTC about the scientific evidence on these products:

Competent and reliable scientific evidence does not demonstrate that any of the ingredients in BioShark, 7 Herb Formula, GDU or BioMixx, are effective when used for prevention, treatment or cure of cancer.

It is important that you talk to your doctor or health care provider before using any herbal product in order to ensure that all aspects of your medical treatment work together. Some herbal products may interfere or affect your cancer or other medical treatment, may keep your medicines from doing what they are supposed to do, or could be harmful when taken with other medicines, or in high doses. It is also important that you talk to your doctor or health care provider before you decide to take any herbal product instead of taking cancer treatments that have been scientifically proven to be safe and effective in humans.

Sincerely,

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ATTACHMENT B

Daniel Chapter One
1028 East Main Road
Portsmouth, Rhode Island, 02871

[name and address of purchaser]

GOVERNMENT ORDERED NOTICE

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POLYPORE INTERNATIONAL, INC.*Docket No. 9327 Order, March 19, 2010*

Order granting respondent's request for additional time to file an appeal brief.

ORDER ON RESPONDENT'S MOTION FOR EXTENSION
OF TIME TO FILE APPEAL BRIEF

Respondent Polypore International, Inc. has filed a Motion for Extension of Time to File an Appeal Brief in which it requests an additional twenty-one days to file its appeal brief to the Commission. Complaint Counsel oppose the motion. For the reasons described below, the Commission grants the parties an additional seven days to file their respective appeal and answering briefs.

Commission Rule 3.52(b), 16 C.F.R. § 3.52(b),¹ gives parties thirty days after service of an Initial Decision to file an appeal brief to the Commission. The time periods prescribed by the Commission Rules of Practice ordinarily should afford parties to FTC proceedings sufficient time to file pleadings and briefs of sufficient quality and detail to aid in the preparation of Commission opinions and orders. Absent a Commission order granting an extension of time to the parties in this case, Respondent's appeal brief would be due on April 9, 2010.

Respondent has requested that its time to file an appeal brief be extended twenty-one days and for Complaint Counsel's time to file an answering brief likewise be extended an additional twenty-one days. Respondent seeks additional time "due to the

¹ On May 1, 2009, the Commission published several amendments to its Rules of Practice designed to expedite the Part 3 litigation process. *See* 74 Fed. Reg. 20205. These rules govern all proceedings initiated on or after May 1, 2009. *See id.*; *see also* 74 Fed. Reg. 1804 (establishing interim final rules for actions commenced after January 13, 2009). Because the complaint in this matter was issued on September 10, 2008, the Rules of Practice in effect prior to the amendments govern this proceeding.

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complexity of this matter, the length of trial, the size of the corresponding record, and the length of the initial decision.” (Motion ¶ 9.) Respondent notes that it will be challenging findings in four product markets, the remedy, and “certain procedural and evidentiary rulings.” (*Id.* ¶ 10.) Respondent also points out that the Initial Decision is 376 pages long with 1,289 factual findings, and that the month-long trial generated approximately 2,100 exhibits and 6,000 pages of transcript.

Under these circumstances, the Commission is willing to grant Respondent additional time to prepare its appeal brief. Respondent’s request for a twenty-one day extension, however, appears excessive. Respondent has already received more than two weeks of extra time to prepare its appeal brief because of delays in generating the public version of the Initial Decision.² In addition, the case will be less complex on appeal as a result of Complaint Counsel not appealing the ALJ’s dismissal of the monopolization count and Respondent not appealing the ALJ’s finding that its non-compete agreement is illegal. Finally, the Commission is mindful that in any litigation involving a consummated merger, unnecessary procedural delays may increase the risk of ongoing injury to consumers and competition. Accordingly,

IT IS ORDERED THAT Respondent shall file its appeal brief on or before April 16, 2010 and that Respondent’s appeal shall be deemed perfected for purposes of Rule 3.51(a), 16 C.F.R. § 3.51(a), if Respondent files its appeal brief by that date;

IT IS FURTHER ORDERED THAT Complaint Counsel shall file their answering brief on or before May 24, 2010; and

² The ALJ issued and the parties received the *in camera* version of the Initial Decision on February 22, 2010. The redacted public version of the Initial Decision was formally served on Respondent on March 10, 2010.

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IT IS FURTHER ORDERED THAT Respondent shall file its reply brief within seven days after service of Complaint Counsel's answering brief.

By the Commission.

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DANIEL CHAPTER ONE
AND
JAMES FEIJO

Docket No. 9329 Order, March 22, 2010

Order denying respondents' request for a stay of the modified Final Order issued January 25, 2010.

ORDER DENYING RESPONDENTS' APPLICATION FOR
STAY OF MODIFIED FINAL ORDER PENDING
PETITION FOR REVIEW

The Commission issued its Opinion on December 18, 2009 ("Opinion") and its Modified Final Order ("Order") on January 25, 2010.¹ The Commission's Order was served on Respondents Daniel Chapter One ("DCO") and James Feijo (collectively "Respondents") and counsel by February 1, 2010. Respondents' compliance is required no later than 60 days after service of the Order; that is, by April 2, 2010. 15 U.S.C. § 45(g)(2).

On February 25, 2010, pursuant to Rule 3.56 of the Commission's Rules of Practice, 16 C.F.R. § 3.56, Respondents moved for a stay of the Order until the later of the following: (1) the expiration of the time for filing a petition for review of the Order in a United States Court of Appeals; (2) the issuance of a final order regarding Respondents' petition for review; (3) the denial of a petition for panel rehearing; (4) the denial of a petition

¹ Citation references to the materials are abbreviated as follows:

"Op." refers to the Opinion of the Commission issued on December 18, 2009;

"Order" refers to the Modified Final Order issued on January 25, 2010;
and

"R. Mem." refers to Respondents' Memorandum in Support of Respondents' Application for Stay, filed on February 25, 2010.

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for rehearing *en banc*, or the expiration of the time for filing such petitions for rehearing; or (5) the denial of a petition for certiorari in the United States Supreme Court, or the expiration of time to file such petition.

Respondents have failed, however, to justify such relief is warranted. All factors for granting a stay weigh against granting the motion. Respondents have shown neither a likelihood of success on the merits on appeal, nor that they will suffer irreparable harm absent the requested relief. Moreover, given that other parties will be harmed if the stay is granted, it is not in the public interest to grant Respondents' motion. Accordingly, the Commission denies the motion.

Background

Respondents, DCO, a corporation sole organized under the laws of the State of Washington, and its overseer and trustee, James Feijo, advertise and sell four DCO products to the public – Bioshark, 7 Herb Formula, GDU, and BioMixx (“Challenged Products”).² Respondents claim the Challenged Products can prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. Respondents made these claims during their radio shows, over the internet, and through print media. Respondents' sales of the Challenged Products constitute 20 or 30 percent of the approximately \$2 million in annual sales of DCO products for the years 2006, 2007, and 2008.

The Commission's Opinion considered the record and arguments of counsel. The Commission analyzed whether the FTC has jurisdiction over Respondents; the claims Respondents made within their advertisements; whether Respondents' claims were properly substantiated; and Respondents' defenses and

² DCO currently sells 150 to 200 products, including the four products challenged in the Complaint.

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constitutional arguments. After finding the Commission has jurisdiction over Respondents and considering the record evidence presented by both parties, we concluded that Respondents did not have competent or reliable evidence to substantiate their claims that the Challenged Products treat, cure or prevent cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy.

Accordingly, the Commission issued a cease-and-desist Order against Respondents. Among other requirements, Respondents may make efficacy claims for products they sell only so long as the representations are true, non-misleading, and, at the time they are made, Respondents possess and rely on competent and reliable scientific evidence to substantiate their claims. The Order limits what they may say relating to the sale of certain products, but it does not otherwise limit their speech or religious practices. The Order also requires Respondents to send to all consumers who have bought the Challenged Products a letter notifying them the FTC found DCO's advertising claims for the Challenged Products to be deceptive because they were not substantiated by competent and reliable scientific evidence, and that the FTC has issued an Order prohibiting Respondents from making the claims in the future.

Before us now is Respondents' Application for Stay of Modified Final Order Pending Judicial Review.

Applicable Standard

Section 5(g) of the Federal Trade Commission Act provides that Commission cease and desist orders (except divestiture orders) take effect "upon the sixtieth day after such order is served," unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by ... the Commission" or "an appropriate court of appeals of the United States." 15 U.S.C. § 45(g)(2); *see also* 16 C.F.R. § 3.56(a). A party seeking a stay must first apply for such relief to the Commission, 15 U.S.C. §

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45(g)(2)(A), (B)(ii). Pursuant to Rule 3.56(c) of the Commission's Rules of Practice, an application for a stay must address the following four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. 16 C.F.R. § 3.56(c); *see, e.g., In the Matter of Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998). We consider these factors below.

Analysis

1. Likelihood of Respondents' Success on Appeal

Respondents correctly note that in assessing the likelihood of their success on the merits on appeal, the Commission need not "harbor doubt about its decision in order to grant the stay." *In the Matter of California Dental Ass'n*, 1996 FTC LEXIS 277, at *10 (May 22, 1996). Respondents also correctly state they may satisfy the "merits' factor if their argument on at least one claim is 'substantial' – so long as the other three factors weigh in their favor." R. Mem. at 1 (*citations omitted*). Finally, if the equities decidedly tip in favor of the Respondents it is enough that they "raise questions sufficiently serious and substantial to constitute 'fair ground for litigation.'" R. Mem. at 1-2 (*citations omitted*). Respondents' arguments, however, merely disagree with the Opinion of the Commission and raise no serious or substantial questions on the merits; disagreement does not establish a likelihood of success on appeal.

a. Jurisdiction

Respondents argue that the Commission does not have jurisdiction because DCO is a corporation sole operating under the laws of Washington, and as such is dedicated to religious, nonprofit purposes. They assert the Commission misapplied *Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405

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F.2d 1011 (8th Cir. 1969) when it found DCO's members derived a profit from DCO's activities. Respondents raised these arguments on appeal to the Commission and the Commission rejected them. *See* Op. at 6-8 (summarizing Respondents' same jurisdictional arguments).³ As we stated in *North Texas Specialty Physicians*, Docket No. 9312 (Jan. 20, 2006), merely repeating arguments the Commission rejected before does not provide the Commission with "sufficient reason to question its prior decision or any of the bases for it, and Respondent[s'] renewal of its legal arguments, without more, is insufficient to justify granting a stay." *Id.* at 3 (*citations omitted*).

The Commission does not question the seriousness of Respondents' religious beliefs, but controlling authorities refute their legal arguments. *California Dental Ass'n v. FTC*, 526 U.S. 756, 766-67 (1999) and *Community Blood Bank*, 405 2d at 1022, both hold the Commission's jurisdiction extends to a corporation organized to carry on business for its own profit or that of its members. The record here establishes that DCO carries on a business that inures to the economic benefit of Respondent James Feijo, its sole overseer and trustee of DCO's assets. DCO sells its products through publications, a call center, radio shows, and over the Internet. In addition, a number of retail stores and chiropractic centers in various states sell DCO products. Any consumer may purchase DCO's products. James Feijo's wife, Patricia Feijo, is a signatory to DCO's bank accounts and had check writing authority. DCO's revenue covered all of the Feijos' living expenses including two houses, cars, pool and gardening expenses, tennis and golf club expenses, and expenditures on retail items and restaurant bills. The evidence supports a finding

³ The Commission's factual findings must be accepted if they are supported by relevant evidence sufficient so that a reasonable mind might agree with the conclusions. *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986). *See also* Section 5(c) of the Act, 15 U.S.C. § 45(c), which provides that "(t)he findings of the Commission as to the facts, if supported by evidence, shall be conclusive" upon review in the Court of Appeals.

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that DCO was engaged in commercial activities and that the beneficiary of DCO's profit was James Feijo. Op. at 7, 8.

b. Substantiation

Respondents also question the propriety of the FTC's substantiation doctrine. They argue that the reasonable basis theory creates presumptions that violate both Sections 5 and 12 of the FTC Act, as well as the First Amendment commercial speech doctrine. Respondents raised these same arguments below and we continue to find them without merit.

Longstanding case law has consistently held that advertising claims can be found deceptive under Sections 5 and 12 of the FTC Act if they are shown either to be false or to lack a reasonable basis substantiating the claims made in the advertisement. *See, e.g., FTC v. National Urological Group*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008), *aff'd*, 2009 U.S. App. LEXIS 27388 (11th Cir. 2009); *FTC v. Pantron I*, 33 F.3d 1088, 1096 n.23 (9th Cir. 1994); *In the Matter of Thompson Med. Co.*, 104 F.T.C. 648, 818-19 (1984), *aff'd*, 791 F.2d 189 (D.C. Cir. 1986). Under the reasonable basis standard, claims about a product's attributes, performance or efficacy carry with them the express or implied representation that the advertiser possessed a reasonable basis substantiating the claims at the time they were made. *See Thompson*, 104 F.T.C. 648, at 813; *FTC v. Direct Mktg. Concepts*, 569 F. Supp. 2d 285, 298 (D. Mass. 2008); *In the Matter of Kroger Co.*, Docket No. C-9102, 1978 FTC LEXIS 332, at *15 (May 17, 1978). Although Respondents may not like the case law, they cannot dispute that courts continue to hold the FTC may show a respondent made deceptive claims if it did not have a reasonable basis for their advertisements. Applying that standard in the matter before us now and after reviewing the evidence, the Administrative Law Judge ("ALJ") and the Commission found Respondents did not possess any adequate substantiation for their health-related efficacy claims.

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Respondents assert the ALJ and the Commission misapplied the FTC Guide, *Dietary Supplements: An Advertising Guide for Industry*, (“Guide”) contending that the ALJ and the Commission applied the Guide as a fixed rule of law rather than a flexible standard. The standard’s flexibility, however, lies in its tailoring the level of substantiation required to the nature of the product claims at issue. Here, Respondents claimed that the Challenged Products could prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy. As the Guide itself notes, such claims about efficacy typically should be supported with competent and reliable scientific evidence. See Guide at 9. Further, case law supports holding the Respondents to a competent and reliable scientific standard for the efficacy claims they made. See *FTC v. Natural Solution, Inc.*, No. CV 06-6112-JFW, 2007 U.S. Dist. LEXIS 60783, at *11-12 (C.D. Cal. Aug. 7, 2007); *Nat’l Urological Group*, 645 F. Supp. 2d at 1189; *Direct Mktg.*, 569 F. Supp. 2d at 300, 303; *FTC v. QT, Inc.*, 448 F. Supp. 2d 908, 961 (N.D. Ill. 2006), *aff’d*, 512 F. 3d 858 (7th Cir. 2008). Finally, the ALJ and the Commission relied on expert testimony to determine what competent and reliable scientific evidence would adequately substantiate Respondents’ claims.

c. First Amendment Arguments

Respondents argue the Commission’s Opinion and Order unconstitutionally deprives them of free exercise of religion and freedom of speech, denies Respondents’ liberty and property without due process, and erroneously dismissed their Religious Freedom Restoration Act Claim. Respondents’ arguments are without merit.

The evidence established the primary purpose and effect of the speech at issue here – Respondents’ representations relating to the Challenged Products – was to sell those products, not to solicit charitable contributions. Op. at 13. Such commercial speech is accorded less protection than other constitutionally protected forms of speech. See *Central Hudson Gas & Elec. Corp. v. Pub.*

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Serv. Comm'n of N.Y., 447 U.S. 557, 562-63 (1980). Specifically, misleading or deceptive commercial speech is afforded no protection under the First Amendment. *See, e.g., Cent. Hudson*, 447 U.S. 557; *Edenfield v. Fane*, 507 U.S. 761 (1993); and *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999). Respondents' claims about the efficacy of the Challenged Products were not substantiated and were, therefore, deceptive. Op. at 11, 14.

Respondents argue their due process rights were violated because two of the sitting Commissioners pre-judged the matter. Respondents point to a speech made by Commissioner Rosch in 2008⁴ and Commissioner Harbour's statements during oral argument. Respondents' reliance on *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583 (D.C. Cir. 1970) is misplaced. In that case, the court noted that the statements relied on to show prejudice were made while the appeal was pending before the Commission; here Commissioner Rosch made these general statements about a "bogus cancer cure" sweep as only a small part of a larger speech on self-regulation. Commissioner Rosch delivered this speech almost a full year before Respondents had even filed their appeal in this case, before evidence was entered in the matter, and before the ALJ issued his Initial Decision (August 2009). Further, if Respondents had wanted to disqualify Commissioner Rosch, they should have sought his disqualification before now by the filing "of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee." 5 U.S.C. § 556(b). They have never made such a filing.

Nor is there any merit to Respondent's arguments based on Commissioner Harbour's comments during the oral argument before the Commission. Like any appellate tribunal, the Commission may properly probe and even challenge the positions

⁴ J. Thomas Rosch, *Self-Regulation And Consumer Protection: A Complement To Federal Law Enforcement*, before the 2008 National Advertising Division Annual Conference, at 16-17 (Sept. 23, 2008).

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being argued to it, as well as the practical ramifications of its ruling. In the present case, for example, there is no impropriety in inquiring into the potential that the continued sale of “cancer cures” whose efficacy is unsubstantiated could harm consumers who might turn to such products in place of other medical treatment. In any event, none of the statements to which Respondents refer could lead “a disinterested observer [to] conclude that (a commissioner) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.” *Gilligan, Will & Co. v. SEC*, 267 F.2d 461, 469 (2d Cir. 1959) (describing the grounds for disqualification). Moreover, there was ample evidence in the record to support the Commission’s decision in this matter.

Respondents’ final two arguments supporting their assertion that they are likely to succeed on the merits are that the FTC erroneously dismissed the Respondents’ Religious Freedom Restoration Act claim (“RFRA”) and that the FTC is forcing the Respondents to send a letter to consumers to which Respondents object for moral, ethical, and religious reasons. Respondents’ arguments again misapply the law to the facts in this matter. RFRA applies when the government substantially burdens a person’s exercise of religion. The case upon which Respondents rely is *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). In that case, the use of a hallucinogenic tea was central to the entity’s core beliefs, the tea was not sold or otherwise provided to non-believers, and the tea was only used during the sacramental rite of communion. Nothing in the record before us reveals similar facts. DCO was engaged in commercial activity by selling the Challenged Products and DCO engaged in deception to make those sales. DCO’s sales were not dependent upon a consumer’s belief system or whether they had any religious affiliation at all. DCO sold their products completely outside of any religious ceremony or sacrament.

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The Commission has not burdened Respondents' exercise of religion; it has only limited how DCO can sell its products. The Commission found the Respondents violated Section 5 of the FTC Act, which provides the Commission with the authority to fashion an order requiring respondents to cease and desist from such acts and practices. *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957). The Commission took great care in issuing the Order in this matter and making it clear that the letter informing consumers of the FTC's Opinion and Order plainly state it is the FTC's Order that requires Respondents to transmit the information. The Order does not require that Respondents profess to agree with the FTC or that Respondents modify their religious ministry in any way.

2. Irreparable Injury

Respondents argue that compliance with the Order "would be nearly fatal to the DCO ministry, imposing incalculable losses that can neither be accurately measured nor compensated, and causing serious harm to its 'good will.'" R. Mem. at 23. Respondents base this argument on the provisions of Paragraphs II and III which prohibit Respondents from making any representation about the efficacy of any of their products "unless the representation is true, non-misleading, and, at the time it is made, [DCO] possess[es] and rel[ies] upon competent and reliable scientific evidence that substantiate[s]" their claims. R. Mem. at 25 (*quoting* Paragraph III of the Order). These limitations, Respondents argue, will prevent them from selling any of their products, essentially shut down DCO, and injure the business's goodwill with its steady customers.⁵

Respondents may not recognize it, but the Commission's Order merely requires Respondents to follow the law. Paragraphs II and III of the Order cover both the Challenged Products as well as other products sold by Respondents and permit Respondents to

⁵ We accept Respondents' Declarations submitted for the purposes of supporting their irreparable harm argument, but do not find they are sufficient to meet their burden of showing irreparable injury.

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make efficacy claims relating to those products so long as the representations are true, non-misleading, and substantiated. Op. at 24. “In other words, Respondents are only obliged to do that which the case law under Sections 5 and 12 of the FTC Act has defined as necessary to avoid deception.” *Id.* The Commission would be hard pressed to find that irreparable injury results from an Order requiring marketers of health-related programs to make only true, substantiated representations about the products they are selling, especially after finding those marketers engaged in deceptive advertising for untested cancer cures. The Order has been tailored narrowly to apply only to their commercial advertising and only to the type of speech that has been found to be deceptive; the Order does not otherwise reach into Respondents’ religious speech or practices.

Paragraph V of the Order requires Respondents to send a letter to their customers notifying them of the Commission’s Opinion and Order and the findings therein. Respondents assert they will be irreparably harmed if they are compelled to send this letter on their letterhead to certain customers because such a requirement will violate their First Amendment freedoms of speech and religion. Respondents note, however, that if the government can demonstrate “that its mandate is ‘a narrowly tailored means of serving a compelling state interest,’” then a speaker can be required to make disclosures. R. Mem. at 22 (*quoting Pacific Gas & Electric Co. v. Cal. P.U.C.*, 475 U.S. 1, 19 (1986)). The compelling interest here is protecting cancer patients from deceptive advertising claims. The required letter is carefully limited to address only the issues in this matter. In particular, the letter is to be sent only to Respondents’ customers who purchased the four Challenged Products; it is drafted to show that the FTC found DCO’s advertising claims for those products to be deceptive and that the information about the scientific evidence relating to the products is from the FTC; and it is not drafted to force Respondents to say they agree with the FTC’s findings. The letter does not mention Respondents’ religious beliefs or teachings. The letter does not compel Respondents to state they

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have repudiated their faith or endorsed the FTC's Opinion. The letter is narrowly crafted to inform consumers about the FTC's Opinion and Order.

3. Degree of Injury to Other Parties and the Public Interest

The final remaining questions are whether a stay would harm other parties and whether it is in the public interest. *In the Matter of California Dental Ass'n*, 1996 FTC LEXIS 277, at *7-8. These two factors are stated separately, but the FTC considers them together because Complaint Counsel is responsible for representing the public interest by enforcing the law. *See Id.* at *8.

Respondents argue that a stay would not harm any party because they assert there is no evidence that any consumer was economically harmed or misled by Respondents' representations, and that there is no evidence in the record that the four Challenged Products have actually harmed anyone's medical or cancer treatment.

Respondents' argument ignores all the record evidence showing that Respondents engaged in deceptive advertising. And while Respondents may not believe that deception constitutes a "bona fide injury to any consumer," the Commission does. Consumers are harmed when they purchase products that are marketed to prevent, treat, or cure cancer, inhibit tumors, or ameliorate the adverse effects of radiation and chemotherapy, and there is no substantiation for those claims. As the findings of fact show, this harm arises if consumers forego beneficial and effective therapy for untested therapies like the ones at issue here. This harm comes from consumers risking their health to potential side effects and harmful interactions between Respondents' products and other therapies. These harms are real and they are substantial. Because of the nature of the harm, issuing a stay is not in the public interest.

Conclusion

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Taking all of these factors into consideration, the Commission has determined that a stay is inappropriate. Respondents are unlikely to succeed on the merits and in the Commission's judgment the potential harm to consumers from granting a stay substantially outweighs the potential harm to Respondents from denying the request for a stay. We find that DCO and James Feijo have not met their burden for showing a stay of the Modified Final Order pending judicial review is warranted. Accordingly,

IT IS ORDERED THAT the Respondents' Application for Stay of Modified Final Order Pending Judicial Review is **DENIED**.

By the Commission.

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CARILION CLINIC

Docket No. 9338

Order, March 26, 2010

Order approving respondent's application for Commission approval of proposed divestiture of the Center for Surgical Excellence, in accordance with the Commission's order.

LETTER APPROVING APPLICATION FOR DIVESTITURE OF ASSETS

Dear Mr. Lutes:

This letter responds to the January 19, 2010, Application for Approval of Divestiture of the Center for Surgical Excellence ("Application") requesting that the Commission approve Carilion Clinic's ("Carilion") divestiture of the Center for Surgical Excellence ("CSE") to Fairlawn Surgery Center, LLC ("Fairlawn") pursuant to the order in this matter. The Application was placed on the public record for comments for thirty days, until February 18, 2010, and two comments were received.

After consideration of the proposed transaction as set forth in the Application and supplemental documents, as well as other available information, the Commission has determined to approve the divestiture of CSE to Fairlawn. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Carilion's Application, and has assumed them to be accurate and complete.

By direction of the Commission

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DANIEL CHAPTER ONE
AND
JAMES FEIJO

Docket No. 9329 *Order, April 26, 2010*

Order denying respondents' request for a an extension of time to comply with Paragraph V. A of the Modified Final Order issued January 25, 2010.

ORDER

On April 13, 2010, pursuant to Commission Rule 3.22, Counsel for the Respondents filed a Motion For Extension of Time to Fully Comply With Paragraph V.A of Modified Final Order ("Motion"). The Motion requests that the Commission extend by fourteen days the time within which Respondents must fully comply with Paragraph V.A of the Modified Final Order issued by the Commission on January 25, 2010. The Modified Final Order became effective on April 2, 2010. Paragraph V.A of the Modified Final Order therefore required the Respondents to produce, by April 13, 2010, a list of all consumers who purchased – from January 1, 2005 through April 2, 2010 – one or more of the four Challenged Products from the Respondents. Respondents' Motion states that the Respondents have partially complied with this provision of the Modified Final Order.

On April 15, 2010, Complaint Counsel filed a Response to Respondents' Motion stating that the Motion was procedurally flawed in that it "is incorrectly styled as a motion for an extension pursuant to Commission Rule of Practice 3.22, rather than as a motion to modify the requirements of the Modified Final Order pursuant to Rule 2.51." Complaint Counsel state that as a consequence, the Respondents failed to provide, pursuant to Commission Rule 2.51(b), the required affidavit demonstrating in detail, *inter alia*, changed conditions of law or fact. Nonetheless, Complaint Counsel do not object to a brief extension as long as

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none of the other requirements or deadlines in the Modified Final Order are changed or extended.

The Commission has jurisdiction to determine whether to reopen the proceeding and modify the order. 16 C.F.R. § 3.72(a). The Commission has determined, however, that the Respondents have not provided the justification under the Commission Rules required to support granting the Motion. The Commission has therefore determined to deny the Respondents' Motion. However, the Commission has determined in its discretion to take no action to seek relief for Respondents' failure to comply by April 13, 2010 with Paragraph V.A, as long as Respondents fully comply with that provision on or before April 27, 2010. Accordingly,

IT IS ORDERED that Respondents' Motion For Extension of Time to Fully Comply With Paragraph V.A of Modified Final Order be, and it hereby is, denied.

By the Commission.

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**DANIEL CHAPTER ONE
AND
JAMES FEIJO**

Docket No. 9329 Order, May 6, 2010

Order granting the joint motion to correct the transcript of the oral argument.

ORDER GRANTING JOINT MOTION TO CORRECT
TRANSCRIPT OF ORAL ARGUMENT

Respondents and Complaint Counsel in this matter have filed a Joint Motion To Correct the December 3, 2009 Oral Argument Transcript. The Commission has determined to grant the Joint Motion, and to effect some additional corrections of typographical errors in the Oral Argument Transcript. Accordingly,

IT IS ORDERED THAT the Oral Argument Transcript be, and it hereby is, modified to effect the correction of typographical errors, and to read as shown in the attached corrected copy.

By the Commission.

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GEMTRONICS, INC.
AND
WILLIAM H. ISELY*Docket No. 9330* *Order, May 12, 2010*

Order granting the respondents' motion for an extension of time in which to file an appeal brief until June 12, 2010.

**ORDER GRANTING RESPONDENTS' MOTION FOR
EXTENSION OF TIME TO FILE APPEAL BRIEF**

On April 27, 2010, the Chief Administrative Law Judge issued an Initial Decision and Order Denying Respondents' Application For An Award of Attorney Fees and Other Expenses ("Initial Decision") in this matter. The Initial Decision was served on Respondents on May 3, 2010, and on May 5, 2010, Respondents timely filed a Notice of Appeal, pursuant to Commission Rule 3.83(h), 16 C.F.R. § 3.83(h), advising that they would appeal the Initial Decision. On May 10, 2010, Respondents filed a Motion requesting an extension of the deadline for filing their appeal brief until June 12, 2010. Complaint Counsel do not oppose the motion.

The Commission Rules applicable to this proceeding give the parties thirty days after service of the Initial Decision within which to perfect an appeal by filing an appeal brief before the Commission.¹ The time periods prescribed by the Commission Rules ordinarily should afford parties to Commission proceedings

¹ On May 1, 2009, the Commission published several amendments to its Rules of Practice designed to expedite the Part 3 litigation process. *See* 74 Fed. Reg. 20205. These rules govern all proceedings initiated on or after May 1, 2009. *See id.*; *see also* 74 Fed. Reg. 1804 (January 13, 2009) (establishing interim final rules for actions commenced after January 13, 2009). However, "[t]he rules that were in effect before January 13, 2009 . . . govern all . . . Commission adjudicatory proceedings [pending on January 13, 2009].". 74 Fed. Reg. 1804. Because this matter was already pending on January 13, 2009, the Rules of Practice in effect prior to the amendments govern this proceeding.

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sufficient time to file pleadings and briefs of sufficient quality and detail to aid in the preparation of Commission opinions and orders. In this instance, however, Respondent William Isely states in the Respondents' Motion that more time is necessary due to pressing personal issues, including in particular the need to care for his ailing wife, and the Commission is persuaded that these circumstances warrant granting the Motion. Because June 12, 2010, falls on a Saturday, the Commission has determined to extend the time for the Respondents to file their appeal brief until June 14, 2010. Accordingly,

IT IS ORDERED THAT Respondents shall file their appeal brief on or before June 14, 2010, and that Respondents' appeal shall be deemed perfected for purposes of Rule 3.52(b)(2), 16 C.F.R. § 3.52(b)(2), if Respondents file their appeal brief by that date;

IT IS FURTHER ORDERED THAT Complaint Counsel shall file their answering brief on or before July 26, 2010; and

IT IS FURTHER ORDERED THAT Respondents shall file their reply brief on or before August 4, 2010.

By the Commission.

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GEMTRONICS, INC.
AND
WILLIAM H. ISELY

Docket No. 9330 *Order, June 16, 2010*

Order granting S.M. Oliva's motion for leave to file a brief *amicus curiae* in support of Respondents William Isely and Gemtronics in this matter.

ORDER GRANTING MOTION FOR LEAVE TO FILE
BRIEF *AMICUS CURIAE*

On June 7, 2010, S.M. Oliva filed a timely motion for leave to file a brief *amicus curiae* in support of Respondents William Isely and Gemtronics in this matter, and attached a copy of the brief that he proposes to file. Neither Respondents nor Complaint Counsel filed an opposition to the motion.

Pursuant to Commission Rule 3.52(j), 16 C.F.R. § 3.52(j), the Commission has determined to grant the motion. Accordingly,

IT IS ORDERED THAT the motion of S.M. Oliva for leave to file a brief *amicus curiae* in this matter be, and it hereby is, **GRANTED**.

By the Commission.

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WHOLE FOODS MARKET, INC.

Docket No. 9324 Order, June 18, 2010

Order approving respondent's application for Commission approval of proposed divestitures to in accordance with the Commission's order.

LETTER APPROVING APPLICATION FOR DIVESTITURE OF ASSETS

Dear Mr. Morris:

This is in response to the Petition for Approval of Proposed Divestiture to A-M Holdings, LLC which you filed on February 23, 2010 ("A-M Petition"), the Petition for Approval of Proposed Divestiture to Healthy Investments, LLC which you filed on February 23, 2010 ("Healthy Investments Petition"), the Petition for Approval of Proposed Divestiture to Trader Joe's East, Inc. which you filed on March 4, 2010 ("Trader Joe's Petition"), the Petition for Approval of Proposed Divestiture to Luberski, Inc. which you filed on March 8, 2010 ("Luberski Petition"), and the Petition for Approval of Proposed Divestiture to Topco Associates LLC which you filed on March 8, 2010 ("Topco Petition") pursuant to the Order in Docket N. 9324 ("Order"). Each of the Petitions was subject to a thirty day public comment period. Public comments were filed with regard to the Trader Joe's Petition and the A-M Petition.

The Commission has determined to approve the A-M Petition, the Healthy Investments Petition, the Trader Joe's Petition, and the Luberski Petition, and to deny the Topco Petition.

A-M Holdings, LLC ("A-M") and Healthy Investments, LLC ("Healthy Investments") each intend to acquire a currently operating store from Whole Foods and operate a premium natural and organic supermarket at the location. They each have demonstrated the financial resources needed to acquire and

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operate the store in a viable manner. Divestiture to A-M and Healthy Investments is consistent with the purposes of the Order.

Trader Joe's East, Inc. ("Trader Joe's") intends to acquire a closed store location from Whole Foods. Whole Foods closed this location prior to the entry of the Order and has not operated a premium natural and organic supermarket at the location since the Order was entered. Under the Order, if the Commission does not approve the Trader Joe's Petition, no divestiture of this location will occur. Although Trader Joe's does not compete directly with Whole Foods in the premium natural and organic supermarket market, it does provide some level of competition to Whole Foods. Because the store location is currently closed, and is thus not competing in the market, the Commission has determined that approving the Trader Joe's Petition would better serve the purposes of the Order than having the location remain closed.

The A-M Petition and the Topco Petition each involve, in part, the acquisition of the rights to the "Alfalfa's" name and associated intellectual property. A-M also proposes to acquire the store at 1651 Broadway in Boulder, Colorado. That store currently operates under the "Alfalfa's" name. A-M proposes to continue to operate the store under the "Alfalfa's" name by acquiring the rights to the name as well as the store location. Topco Associates LLC ("Topco") does not propose to acquire any store locations in addition to the intellectual property it proposes to acquire. Topco proposes to use the "Alfalfa's" intellectual property to allow its member-owners to brand the natural and organic sections of their stores with the intellectual property, allowing its member-owners to create Alfalfa's cafes in their stores, and creating a group of products branded using the Alfalfa's intellectual property. Topco Petition at 3. Paragraph II.I. of the Order states "The purpose of the divestiture of the Assets To Be Divested is to ensure the viable and competitive operation of the Assets To Be Divested in the same business and in the same manner in which the Assets To Be Divested were engaged at the time of the announcement of the proposed acquisition of Wild Oats by Whole Foods and to remedy

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the lessening of competition alleged in the Commission's complaint." The Complaint alleged that the acquisition lessened competition in the operation of premium natural and organic supermarkets. The Commission has determined that the A-M Petition better satisfies the purposes of the divestiture than does the Topco Petition with regard to the "Alfalfa's" intellectual property. A-M intends to use the "Alfalfa's" intellectual property in the operation of a premium natural and organic supermarket. It will also use the intellectual property in the same manner as it was used at the time of the announcement of the proposed acquisition. Topco does not intend to use the "Alfalfa's" intellectual property in the operation of premium natural and organic supermarkets. It also does not intend to use the intellectual property in the same manner as it was used at the time of the announcement of the proposed acquisition. Accordingly, the Topco Petition does not satisfy the purposes of the divestiture of the "Alfalfa's" intellectual property. Therefore, the Commission has determined to approve the A-M Petition and to deny the Topco Petition as to the "Alfalfa's" intellectual property.

The Luberski Petition and the Topco Petition each involve, in part, the acquisition of the "Wild Oats" name and associated intellectual property. Luberski, Inc. ("Luberski") intends to develop and supply a Wild Oats labeled brand of natural and organic packaged food products. Luberski Petition at 2. Luberski also intends to use the Wild Oats intellectual property to open Wild Oats stores by licensing the name to developers. Letter from Charles F. Rule, Esq., to Kenneth A. Libby, Esq., April 19, 2010, at 4. Topco proposes to use the Wild Oats intellectual property to allow its member-owners to brand the natural and organic sections of their stores with the intellectual property, allowing its member-owners to create Wild Oats's cafes in their stores, and creating a group of products branded using the Wild Oats intellectual property. Topco Petition at 3. At the time of the announcement of the proposed acquisition, the "Wild Oats" intellectual property was used on products sold to third party retailers and as the name of stores. It was not used as the name of the natural and organic

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sections of other stores or as the name of cafes in other stores. Topco also has not shown how its proposed use of the “Wild Oats” intellectual property will remedy the lessening of competition alleged in the Commission’s complaint. The Commission has determined that Luberski’s proposed use of the “Wild Oats” intellectual property better satisfies the purposes of the divestiture than does Topco’s proposed use of the “Wild Oats” intellectual property. Therefore, the Commission has determined to approve the Luberski Petition and to deny the Topco Petition as to the “Wild Oats” intellectual property.

In granting its approval, the Commission relied on the information you submitted and the information submitted by the proposed acquirers and assumed it to be accurate and complete.

By direction of the Commission, Commissioner Ramirez and Commissioner Brill not participating.

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INTEL CORPORATION

Docket No. 9341. Order, June 21, 2010

Order withdrawing the matter from adjudication to allow the Commission to consider a proposed consent agreement.

ORDER WITHDRAWING MATTER FROM ADJUDICATION FOR THE PURPOSE OF CONSIDERING A PROPOSED CONSENT AGREEMENT

Complaint Counsel and Respondent having jointly moved that this matter be withdrawn from adjudication to enable the Commission to consider a proposed Consent Agreement; and

Complaint Counsel and Respondent having submitted a proposed Consent Agreement containing a proposed Decision and Order, executed by the Respondent and by Complaint Counsel and approved by the Director of the Bureau of Competition which, if accepted by the Commission, would resolve this matter in its entirety;

IT IS ORDERED, pursuant to Rule 3.25(c) of the Commission Rules of Practice, 16 C. F.R. § 3.25(c) (2010), that this matter in its entirety be, and it hereby is, withdrawn from adjudication until 12:01 a.m. on Friday, July 23, 2010, and that all proceedings before the Administrative Law Judge are hereby stayed during that time as the Commission evaluates the proposed Consent Agreement, pursuant to Rule 3.25(f), 16 C. F.R. § 3.25(f); and

IT IS FURTHER ORDERED, pursuant to Rule 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b), that the proposed Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission.

By the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

LIQUIFIED PETROLEUM GAS INVESTIGATION

FTC File No. 091 0115 Decision, January 8, 2010

RESPONSE TO RAMÓN GONZÁLEZ CORDERO'S AND RAMÓN
GONZÁLEZ SIMONET'S PETITION TO QUASH OR MODIFY CIVIL
INVESTIGATIVE DEMAND AND SUBPOENA AD TESTIFICANDUM

Dear Mr. Méndez-Gómez:

This letter advises you of the Commission's disposition of Petitioners' Request for Rehearing of Denial of Petition to Quash or Limit Compulsory Process in the Matter of Empire Gas Inc. and Liquilux Gas Corp. filed on December 10, 2009 ("Request"). On November 19, 2009, Petitioners Ramón González Cordero and Ramón González Simonet, officers, directors, and stockholders of Empire and Liquilux, timely filed a petition to quash or modify civil investigative demands ("CIDs") and subpoenas ad testificandum ("Petition") on the ground that the FTC Act does not give the FTC jurisdiction to investigate the conduct of Empire and Liquilux based on the state action doctrine. On December 3, 2009, Commissioner Harbour directed the issuance of a Letter Ruling denying the Petition on the grounds that the state action doctrine, if applicable, is an affirmative defense that must be asserted during the trial of any FTC claims alleging antitrust or FTC Act¹ violations.²

Petitioners now request a rehearing of the issues raised by the Petition before the full Commission. No new evidence or arguments are presented in support of this rehearing request.

¹ 15 U.S.C. § 45, as amended.

² The Petition also requested that the subpoenas be made returnable in Puerto Rico. Petitioners do not seek a rehearing on the denial of that request. Request at 1.

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Additionally, you ask the Commission to stay the return of the subpoenas until: (1) the Commission's decision on the Request; and (2) the Commission's compliance with Rule 2.6, 16 C.F.R. § 2.6, which directs that subpoena recipients be "advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged violation which is under investigation and the provisions of law applicable to such violation." Request at 2. For the reasons set forth herein, the Letter Ruling is affirmed; and the request for stay is denied as moot.

The State Action Doctrine Is An Affirmative Defense.

The Supreme Court determined in *Parker v. Brown*, 317 U.S. 341 (1943), the progenitor of the state action doctrine, that Congress did not intend by its adoption of the Sherman Act, 15 U.S.C. § 1, to permit the antitrust laws to regulate the sovereign activities of state governments. Subsequent cases have applied the doctrine to the FTC Act. *See, e.g., FTC v. Ticor Ins. Co.*, 504 U.S. 621 (1992). Petitioners incorrectly frame their state action argument as one involving the FTC's jurisdiction. *See* Petition at 1, 12. The state action doctrine is an affirmative defense, not a jurisdictional limitation. *South Carolina Board of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006) (denying an interlocutory appeal from an adverse ruling on respondent's state action defense).

In *FTC v. Monahan*, 832 F. 2d 688 (1st Cir. 1987) (Breyer, J.), the First Circuit held that a state action claim could not be used to deprive the Commission of the opportunity to investigate because doing so would improperly limit the Commission's ability to evaluate the facts that might form the basis for such a defense and allow the FTC to determine for itself whether there was a basis for pursuing a law enforcement action. *Id.* at 689-90 ("We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of" a state action defense.). The Letter Ruling

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correctly held that the state action doctrine, if applicable, would only be an affirmative defense that could be raised by Empire during the trial of any FTC allegations of an antitrust or FTC Act violation.³

The Request for A Stay Is Moot.

Petitioners ask for a stay until the Commission satisfies its obligations under Rule 2.6, and issues a ruling on the Request. The Commission satisfied its obligations under Rule 2.6 when it adopted a resolution fully describing the scope of the investigation. The Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation for this investigation states that the nature and scope of the investigation is:

To Determine whether Empire Gas (“Empire”), Tropigas de Puerto Rico, Liquilux Gas Corporation (“Liquilux”), or other unnamed persons, partnerships, or corporations have engaged or are engaging in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, through various acts or practices, including but not limited to, agreements to fix prices or allocate customers, exclusive dealing, or other

³ Even if Petitioners’ state action arguments were jurisdictional, investigations by administrative agencies should not be bogged down unnecessarily with jurisdictional challenges. *FTC v. Ken Roberts Co.*, 276 F. 3d 583, 584 (D.C. Cir. 2001); *United States v. Construction Prods. Research, Inc.* 73 F.3d 464, 470 (2d Cir. 1996) (“[A]t the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency’s jurisdiction or covered by the statute it administers; rather the coverage determination should wait until [a substantive law] enforcement action is brought against the subpoenaed party.”); *Monahan*, 832 F. 2d at 690; *FTC v. Swanson*, 560 F.2d 1, 2 (1st Cir. 1977) (“An agency’s investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission’s regulatory jurisdiction over appellants may be clouded but it is not plainly spurious.”). The Letter Ruling correctly held that the state action doctrine is not an immunity from investigation.

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conduct regarding liquified petroleum gas or related products in Puerto Rico; and to determine whether Empire or Liquilux has engaged or is engaging in unlawful acquisitions in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended.⁴

Petitioners' only remaining justification for a stay, the Commission's ruling on the Request, is mooted by the issuance of this letter disposing of the Request.⁵

Conclusion and Order

For all the foregoing reasons, **IT IS ORDERED THAT** the Letter Ruling be, and it hereby is, **AFFIRMED**.

By direction of the Commission.

⁴ Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation, FTC File No. 091-0115 (Sept. 15, 2009) ("Resolution"). The Resolution was attached to the CIDs and subpoenas, copies of which can be found in the Request, Appendix B.

⁵ Petitioners waived any claim that the CIDs or subpoenas should be quashed because the Resolution did not comply with Rule 2.6 when they failed to raise that claim in their Petition. *Wellness Support Network*, FTC File No. 072-3179 at 2 (Apr. 24, 2008) (Letter Ruling dismissing appeal from denial of petition to quash CID) ("The rule is clear on its face that all grounds for challenging a CID shall be joined in the initial application, absent some extraordinary circumstances. To construe the rule in any other fashion would serve no purpose other than inviting piecemeal challenges to CIDs and a parade of dilatory motions seeking seriatim deconstruction of each CID."). Petitioners have offered no explanation for not having raised this issue in the Petition.

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DEBT RELIEF USA, INC.*FTC File No. 092 3052 Decision, January 8, 2010*RESPONSE TO DEBT RELIEF USA, INC.'S PETITION TO QUASH CIVIL
INVESTIGATIVE DEMANDS FOR TESTIMONY

Dear Messrs. Reilly, Wojcik, and Bell:

The Commission is investigating whether Debt Relief USA, Inc. ("DRUSA") has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, in the advertisement and sales of debt relief products and services. On October 23, 2009, the Commission issued separate Civil Investigative Demands for testimony ("CIDs") to each of the Petitioners, individuals who are officers, directors and stockholders of DRUSA. On October 28, 2009, Petitioners filed their Petition to Quash CIDs ("Petition"), citing the pendency of bankruptcy proceedings involving DRUSA and the supposed protection of the "corporate veil" of DRUSA as grounds. Petition at 2. The Petition is wholly without merit, and must, therefore, be denied. In accordance with the provisions of Rule 2.7(e), 16 C.F.R. § 2.7(e), Petitioners shall comply with the CIDs on the following dates, at the times and places stated in the CIDs: Mr. Reilly on January 19, 2010; Mr. Wojcik on January 20, 2010; and Mr. Bell on January 21, 2010.

This letter advises you of the Commission's disposition of the Petition. This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), Petitioners have 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

¹ Computation of the time for appeal should be calculated from the date you receive the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the

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I. Petitioners Must Comply with the CIDs.

Petitioners are officers, directors and stockholders of DRUSA, and appear to possess information regarding DRUSA's sales and marketing of debt relief products and services to consumers. Petitioners have not claimed that the CIDs were issued for an improper purpose, or that the information that would be sought through their testimony would be irrelevant, privileged, or unduly burdensome to provide.²

Petitioners' arguments appear to be largely based on the assumption that the Commission's investigation of DRUSA's activities can only result in relief directed at DRUSA itself, and that the liquidation of DRUSA in bankruptcy "would negate the need for this action to continue." Petition at 3. This premise is incorrect. Petitioners may be independently liable for injunctive and monetary relief for the corporate acts of DRUSA in violation of the FTC Act. An individual may be liable for corporate violations of the FTC Act where it can be shown that such individual participated in or had control over corporate practices and had knowledge of such practices. *Fed. Trade Comm'n v. Amy Travel Serv.*, 875 F.2d 564, 573 (7th Cir. 1989).³ There is thus no

full Commission shall not stay the return date established pursuant to this decision.

² See *Fed. Trade Comm'n v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) ("It is well established that a district court must enforce a federal agency's investigative subpoena if the information sought is reasonably relevant, . . . -or, put differently, not plainly incompetent or irrelevant to any lawful purpose of the [agency], . . . -and not unduly burdensome to produce.") (internal quotations and citations omitted).

³ "Once corporate liability is established, the FTC must show that the individual defendants participated directly in the practices or acts or had authority to control them. . . . Authority to control the company can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer. . . . The

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need to “pierce the corporate veil” to impose liability on petitioners individually.

Accordingly, ascertaining the nature of each petitioner’s actions regarding and knowledge of DRUSA’s activities is plainly a proper subject of the Commission’s investigation. Further, in the absence of any contrary facts or authorities, each Petitioner must be held to be the best available source for evidence regarding that Petitioner’s knowledge of, and involvement in, the business operations of DRUSA. Moreover, it is highly likely that each Petitioner is one of the next best sources of evidence available regarding the other Petitioners’ knowledge of, and involvement in, the business operations of DRUSA.

Petitioners also invoke the automatic stay provided by the Bankruptcy Code as a ground for quashing the CIDs. Petition at 2.⁴ This argument is also without merit. The FTC is conducting a law enforcement investigation of the conduct of DRUSA and the petitioners. Pursuant to 11 U.S.C. § 362(b)(4), the stay provisions of 11 U.S.C. § 362(a) do not prevent the FTC from exercising its police and regulatory duties as an agency of the government of the United States regarding the conduct of DRUSA. Furthermore, Petitioners are not themselves in bankruptcy, and are not entitled to any of the protections of the Bankruptcy Code. In short, the Commission’s continuing investigation of DRUSA’s activities, including taking testimony from Petitioners, will not violate any provisions of the Bankruptcy Code.

FTC must show that the individual had some knowledge of the practices. The knowledge requirement is the key issue in this case.” *Id.* (citations omitted).

⁴ Petitioners also claim that the bankruptcy clerk failed to provide notice to all potential creditors of DRUSA in a timely fashion; and that such failure, in turn caused unnoticed creditors to ask the “FTC to protect their assets.” *Id.* Neither the timing or scope of notice provided to DRUSA’s creditors by the bankruptcy clerk nor the source of any complaints that may have alerted the Commission to possible law violations is relevant to the resolution of this Petition.

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II. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** the Petition be, and it hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT Petitioners shall comply with the CIDs on the following dates: Mr. Reilly on January 19, 2010; Mr. Wojcik on January 20, 2010; and Mr. Bell on January 21, 2010.

By direction of the Commission.

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CHURCH & DWIGHT, INC.*FTC File No. 091 0037 Decision, February 16, 2010*RESPONSE TO CHURCH & DWIGHT, INC.'S REQUEST FOR
REHEARING BY THE FULL COMMISSION OF THE DENIAL OF
PETITION TO QUASH OR LIMIT SUBPOENA DUCES TECUM AND
CIVIL INVESTIGATIVE DEMAND

Dear Mr. Hittinger:

This letter advises you of the Commission's disposition of Church & Dwight, Inc.'s ("C&D") Request for Rehearing by the Full Commission of the Denial of C&D's Petition and Request for Leave ("Request for Rehearing"). On November 13, 2009, C&D filed its Petition on the grounds that the subpoena and CID seek irrelevant Canadian marketing documents, and that it would be unduly burdensome for it to produce Canadian marketing documents that are located in Canada. On December 7, 2009, C&D filed its Request for Leave seeking to raise a further ground for quashing or modifying the subpoenas and CIDs in order to permit it to redact "irrelevant" information regarding C&D's non-condom products from otherwise responsive documents. On December 23, 2009, Commissioner Harbour directed the issuance of a Letter Ruling denying C&D any of the relief requested in either the Petition or Request for Leave on the grounds that: (1) C&D had allowed the time for filing a petition to quash to lapse before seeking an extension from staff of the deadline for filing a petition to quash; (2) C&D had not offered any credible justification for not having filed its Request for Leave at the same time as the Petition; and (3) even if the Petition and Request for Leave had not been time-barred, the requested relief would have been denied because (a) Canadian marketing documents and information regarding non-condom products are relevant to the investigation, (b) C&D had not proven that it would be unduly burdensome for it to produce its Canadian marketing documents, including those kept and maintained in Canada, and (c) C&D had not advanced any plausible data security justification that could

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only be remedied by its redaction of information related to its non-condom products from otherwise relevant documents.

On December 28, 2009, C&D filed its Request for Rehearing based on its disagreement with the Letter Ruling denying its Petition and Request for Leave. Request for Rehearing at 1. The Request for Rehearing presents no new evidence or arguments, and does not suggest that Commissioner Harbour's Letter Ruling is based on any mistakes of law or fact. The Request for Rehearing additionally asks the Commission to stay the January 26, 2010, return dates on the subpoena and CID "until such time as the full Commission has reviewed the Petition and Request [for Leave] and has reached a final decision on the important issues raised that have not heretofore been addressed by the Commission or the federal courts." Request for Rehearing at 1.¹

For substantially the same reasons as those stated in Commissioner Harbour's Letter Ruling of December 23, 2009, the Letter Ruling is affirmed, and the request for a stay of compliance pending the Commission's decision must be denied as moot.

¹ The alleged issues of first impression raised by C&D's claims for relief are not in fact self-evident. As Commissioner Harbour found, C&D's claims for relief are in most cases not even supported by the authorities cited by C&D in its Petition and Request for Leave. *See, e.g.*, Letter Ruling at 5. Counsel for C&D asks the Commission to decide these "important issues" without providing the Commission with any substantial assistance. Further, the issues that are self-evident from the Petition and Request for Leave are relatively settled. It is self-evident that relevant information has to be produced, even if that production entails some burden. *FTC v. Texaco*, 555 F.2d 862, 871-74, 882 (D.C. Cir. 1976); *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). It is also self-evident that the relevance of material to be produced must be measured against the purposes stated in the resolution authorizing the use of process. *Texaco*, 555 F.2d at 874. Finally, it is self-evident that the petitioner bears the burden of proving that the specifications of a subpoena or CID are unreasonable. *FTC v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979). And, as Commissioner Harbour found, it is equally self-evident that C&D has not factually or legally supported its claims for relief.

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For all the foregoing reasons, **IT IS ORDERED THAT** the Letter Ruling be, and it hereby is, **AFFIRMED**.

IT IS FURTHER ORDERED THAT C&D's request for a stay of compliance with the subpoena and CID be, and it hereby is, **DENIED** because it is moot.

By direction of the Commission.

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D. R. HORTON, INC. / LENNAR CORPORATION

FTC File Nos. 102 3050 and 102 3051 Decision, March 9, 2010

RESPONSE TO D. R. HORTON, INC. AND LENNAR CORP.'S
PETITIONS TO LIMIT OR QUASH CIVIL INVESTIGATIVE DEMANDS

Dear Mr. Kider:

The Commission is investigating whether DRH and LC, both builders and sellers of homes, have engaged, or are engaging, in unfair acts or practices or have violated, or are violating, the Consumer Credit Protection Act, in their marketing and sales of homes, and their related sales mortgage lending acts and practices. The use of compulsory process for the conduct of these investigations was authorized by the Commission based on two separate Commission resolutions which provide detailed statements of the scope and purpose of these investigations; a copy of each resolution was attached to the Civil Investigative Demands ("CIDs") that were separately served on DRH and LC. *See* DRH and LH Petitions at 2.¹ On December 11, 2009, DRH

¹ FTC Resolution Directing Use of Compulsory Process In Nonpublic Investigation: Unnamed Violators of the Equal Credit Opportunity Act (Aug. 1, 1994) describes the nature and scope of investigation authorized as follows:

To determine whether certain unnamed persons, partnerships, corporations, associations or other entities have been or may be engaged in acts or practices in violation of the Equal Credit Opportunity Act, 15 U.S.C. § 1691 *et seq.* and Regulation B, 12 C.F.R. § 202 *et seq.*, and to determine whether these persons, partnerships, corporations, associations or other entities have been or are engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. Such acts and practices may include, but are not limited to, discriminating in the extension of credit on the basis of national origin, color, age, religion, receipt of public assistance income, or because an applicant in good faith

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and LC timely filed substantially similar petitions to limit or quash the CIDs served upon them on the grounds that the CIDs: (1) seek information that is beyond the scope of the investigation authorized by the resolutions,² (2) request information that is too indefinite because the CIDs do “not identify any specific actions

exercised any right under the Consumer Credit Protection Act. This investigation is also to determine whether Commission Action to obtain redress of injury to consumers, or others would be in the public interest.

Id. at 1.

FTC Resolution Directing Use of Compulsory Process In Non-Public Investigations of Various Unnamed Loan Brokers, Lenders, Loan Servicers, and Other Marketers of Loans (Dec. 15, 2008) describes the nature and scope of investigation authorized as follows:

To determine whether unnamed persons, partnerships, corporations, or others have engaged or are engaging in deceptive or unfair acts or practices in or affecting commerce in the advertisement, marketing, sale, or servicing of loans and related products in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended. The investigation is also to determine whether various unnamed loan brokers, lenders, loan servicers, and other marketers of loans have engaged or are engaging in acts or practices in violation of the Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq., as amended. The investigation is also to determine whether Commission action to obtain monetary relief, including consumer redress, disgorgement, or civil penalties, would be in the public interest.”

Id. at 1. Taken together, those resolutions provide the basis against which the relevance and scope of materials or information being sought from DRH and LC will be determined. *Fed. Trade Comm’n v. Invention Submission Corp.*, 965 F.2d 1086, 1092 (D.C. Cir. 1992) (“... we have previously made clear that ‘the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence.’ [*Fed. Trade Comm’n v. Carter*, 636 F.2d 781, 789 (D.C. Cir. 1980)].”).

² DRH Petition at 9 (“Neither of these resolutions is designed to inquire into homebuilding or the practices related to the sale of [sic] home, nor could they reasonably be construed to do so.”); LC Petition at 8 (“Neither of these resolutions is designed to inquire into homebuilding or the practices related to the sale of homes, nor could they reasonably be construed to do so.”).

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or business practices [sic] it believes [DRH and LC] may have pursued . . .”³; (3) require the production of information and materials that are unduly burdensome to produce; and (4) command the production of privileged information.⁴ As discussed below, Petitioners have not provided adequate legal or factual support for the relief requested. Accordingly, their Petitions shall be denied, and the CIDs will be returnable on March 24, 2010.

This letter advises you of the Commission’s disposition of the Petitions. This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission’s delegate. *See* 16 C.F.R. § 2.7(d)(4). Pursuant to 16 C.F.R. § 2.7(f), 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.⁵

I. Preliminary Matters and Standard of Review

Petitioners are substantial, multi-state builders of homes. DRH “is a Fortune 500 company and, during the time period at issue here, was ranked as the largest homebuilder by units sold in the United States since 2003. The company employs approximately 3,000 workers nationwide. [DRH] builds single-family homes in 83 markets in 27 states. . . . The company has

³ DRH Petition at 6; LC Petition at 5 (“The CID does not identify any specific actions or business practices [that the Commission] believes [LC] may have pursued . . .”).

⁴ DRH Petition at 13 and 33; LC Petition at 12, n.4 and 29.

⁵ This letter ruling is being delivered by e-mail and express mail. The e-mail copy is provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established pursuant to this decision.

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four homebuilding segments: North, South, East, and West, which consist of 33 geographical divisions.”⁶ LC “is a Fortune 500 company that was ranked as the nation’s third largest homebuilder in 2008. Currently [LC] builds single-family homes in 41 markets in 16 states. . . . The Company has four homebuilding segments: East, Central, West, and Houston. These segments have homebuilding operations in . . . 14 states.”⁷ Each company appears to have a large number offices and facilities spread over a substantial portion of this country, and the managers of each office and facility have some degree of discretion regarding local operations.⁸ Each Petitioner has a subsidiary or affiliated company that provides mortgage loans and other loan-related services to Petitioners and buyers of Petitioners’ homes.⁹ Many of the objections expressed in the Petitions appear at bottom to be problems created by the business organization and management philosophies of the companies, not by the CIDs. The Commission is aware of no authority that would excuse a company from complying with law enforcement process because that company elected to create an unwieldy array of facilities and/or¹⁰ adopted a decentralized management style.

⁶ DRH Petition at 3.

⁷ LC Petition at 2.

⁸ *See, e.g.*, DRH Petition at 16 (“ . . . a full response to this interrogatory [regarding compliance training of employees] will require the Company to retrieve information from every office that was in existence at any time [during the relevant time period]”); LC Petition at 42 (“ . . . due to the decentralized nature of its homebuilding operations, this specification [the performance evaluation process] presents an undue burden because each office has responsibilities for the supervision of its employees and overall operation.”).

⁹ DRH Petition, Declaration of Jennifer Hedgepeth (Dec. 11, 2009) at ¶¶ 1-5 (DHI Mortgage Co., Ltd is an indirect subsidiary of DRH) (“Hedgepeth Decl.”); LC Petition, Declaration of Becky L. Moore (Dec. 11, 2009) at ¶¶ 1-3 (Universal American Mortgage Co. (“UAMC”) is a subsidiary of LC) (“Moore Decl.”).

¹⁰ Petitioners object to the CID instruction that requires the words “and” and “or” to be construed both conjunctively and disjunctively, as necessary, in order to insure completeness of responses. DRH Petition at 9-10; LC Petition at 8-9.

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These Petitions raise a recurrent law enforcement problem: the attempt “to get information from those who best can give it and who are most interested in not doing so.” *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950). In *Morton Salt*, the Court recognized that investigatory process should be enforced “if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *Id.* at 369. Subsequent court decisions have provided a more fulsome understanding of what it means to be “reasonably relevant” to the investigation. See, e.g., *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (“It is well established that a district court must enforce a federal agency’s investigative subpoena if the information is reasonably relevant . . . or, put differently, not plainly incompetent or irrelevant to any lawful purpose. . . and not unduly burdensome to produce.”) (citations and internal quotation marks omitted). The Courts recognize that

the question is whether the demand is unduly burdensome or unreasonably broad. Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest. The burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose. Broadness alone is not sufficient justification to refuse enforcement of a subpoena. Thus, courts have refused to modify subpoenas unless compliance threatens to unduly disrupt or seriously

The Commission prefers to write CID specifications in relatively simple language. Sentences using “and/or” tend to become more cumbersome and/or more difficult to follow and understand. Rather than increasing either burden or uncertainty, the challenged instruction both eliminates uncertainty, and, more importantly, limits the opportunities for semantic obfuscation or evasions on the part of CID respondents and counsel. Almost a century’s experience in process enforcement has taught the Commission that law enforcement benefits from limiting such latter opportunities.

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hinder normal operations of the business. . . . There is no doubt that these subpoenas are broad in scope, but the FTC's inquiry is a comprehensive one and must be so to serve its purposes. Further, the breadth complained of is in large part attributable to the magnitude of the producers' business operations.¹¹

II. The CIDs Request Information That Is Reasonably Relevant to the Investigation.

"The relevance of the material sought by the FTC must be measured against the scope and purpose of the FTC's investigation, as set forth in the Commission's resolution." *Texaco*, 555 F.2d at 874. Petitioners' claims that the CIDs seek information that is irrelevant to the investigation are based on a mistaken assumption of law and a semantic evasion. Petitioners contend that "[t]he CID does not identify any specific actions or business practices [sic] it believes [DRH or LC] may have pursued."¹² Unlike complaints or indictments, CIDs are not charging documents.¹³ CIDs, and the resolutions authorizing them, do not identify suspected unlawful conduct; rather, CIDs identify the subject matters that are being investigated. At this stage of the inquiry the FTC "is under no obligation to propound a narrowly focused theory of a possible future case." *Texaco*, 555 F.2d at 874. "Certainly a wide range of investigation is necessary and appropriate where, as here, multifaceted activities are involved, and the precise character of possible violations cannot be known in advance." *Id.* at 877.

Petitioners' claims that the resolutions are not "designed to inquire into homebuilding or the practices related to the sale of

¹¹ *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (footnotes omitted).

¹² DRH Petition at 6; LC Petition 5.

¹³ Likewise, Petitions to Limit or Quash are not discovery devices in the nature of a more particularized statement of the subject under investigation.

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[homes]” are simply wrong.¹⁴ Almost every residential real estate transaction involves at a minimum a purchase-money mortgage—that is to say, a loan product. Typically, the home being purchased is the collateral that secures the purchase-money mortgage, i.e., a loan related product. Each Petitioner concedes that the resolutions extend at least to “loans and related products.”¹⁵ Further, each resolution directs an inquiry to determine if monetary relief would be in the public interest. This latter inquiry would, at a minimum, include an inquiry into the fiscal integrity of the parties being investigated.

Neither the general objections of DRH and LC nor their particularized objections directed to individual specifications of the CIDs establish that any of the information or materials being sought by the CIDs are irrelevant to the investigation measured by the purposes set forth in the resolutions authorizing the use of process. Stated differently, all of the information sought by the CIDs is reasonably relevant to purposes of the inquiry determined by reference to the resolutions. The law requires nothing more.¹⁶

III. DRH and LC Have Provided Insufficient Evidence To Support Their Undue Burden Claim.

“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

¹⁴ DRH Petition at 9; LC Petition at 8.

¹⁵ DRH Petition at 9; LC Petition at 8.

¹⁶ Claims that the CIDs are too indefinite in their description of the information and materials to be produced are simply without merit. The Petitions viewed in their entirety actually demonstrate an overarching concern by DRH and LC that the specifications are so definite and inclusive as to preclude substantial room for credible avoidance of production.

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the particular specifications at issue)." *Nat'l Claims Service, Inc.*, 125 F.T.C. 1325, 1328-29 (Jun. 2, 1998). DRH and LC made no reasonable attempt to show factually that their responses to the CIDs would "unduly disrupt or seriously hinder normal operations of [their] business[es]."¹⁷ To the extent that DRH and LC have identified the records and the assumptions on which their claims of undue burden rest, those claims of burden lack credibility because they rest on their own misreadings of the specifications, instructions, and definitions of the CIDs. The assertions that the CIDs require the production of virtually every document generated by them in the last four years, DRH Petition at 9, LC Petition at 6, are based on erroneous constructions of the CIDs that fail to admit that many of the challenged specifications are specifically limited in scope to marketing, sales, or mortgage lending activity. Moreover, as to many specifications, Petitioners' asserted burden results in large part from their own decentralized management style and document storage. Burden caused by Petitioners' own organizational design cannot excuse them from compliance with the CIDs. Further, many of the additional claims of burden, *e.g.*, having to interview every current and former employee, or review every loan file, appear to be overblown. To the extent Petitioners have specific concerns of burden as to certain specifications, those concerns should be addressed to counsel and staff, who in appropriate circumstances and through good-faith negotiations can adjust production schedules, provide additional guidance as to specifications, and even modify certain specifications.¹⁸

¹⁷ *Texaco*, 555 F.2d at 882 ("Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.").

¹⁸ In fact, as LC acknowledged in its correspondence with staff dated February 22, 2010, staff has already "provide[d] a prioritization" of the specifications in the CID to LC, and asked that LC "make specific requests for relief" to avoid unnecessary burden on the company. Letter from David M. Souders, counsel for LC, to Rebecca J.K. Gelfond, counsel for FTC, at 3 (Feb. 22, 2010).

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The production burdens quantified by DRH and LC appear to include unrealistically high estimates of the number of staff hours required to comply because, as discussed above, the companies' estimates are based on erroneous, overblown constructions of the CIDs. Moreover, even if those quantified estimates of burden-hours had any credibility, they seem relatively insignificant when measured against the size of the companies. DRH claims that it would take 960 staff hours to review every document it has generated over the last four years. Hedgepeth Decl. ¶ 17. However, 960 work hours amounts to less than a week's work for 20 people. LC initially claimed that it would take it 1360 hours to conduct document review. Moore Decl. ¶ 13. Similarly, 1360 work hours is about 8½ days' work for 20 people. In *Texaco*, the company claimed that it would have to review over four million documents at a cost of approximately 62 work years and \$4 million. *Texaco*, 555 F.2d at 922 (Wilkey, J. and MacKinnon, J., dissenting). The suggestion that compliance by DRH and LC, Fortune 500 companies, would "unduly disrupt or seriously hinder [their] normal operations" is unsupported by the record.¹⁹

¹⁹ On February 22, 2010, LC filed a Supplemental Submission in Support of Its Petition to Limit or Quash Civil Investigative Demand ("LC Supplemental Petition"), in which LC states that it has "reevaluated the burden" of complying with the CID and provides two additional declarations supporting its claims of burden. LC now asserts that it will take approximately 8,700 hours for LC and 19,742 hours for its mortgage subsidiary to comply with the CID. Howard Decl. ¶ 13; Moore Supp. Decl. ¶ 39. The Rules do not address the possibility of filing supplemental materials. Nor did LC file a Motion with the Secretary seeking leave to file these supplemental materials. As a matter of discretion, the Commission will accept this new evidence into the record for what it is worth.

In this instance, the new evidence possesses very little probative value. First, LC does not and cannot reconcile its new assertion that its over 20-times increase in the expected hours of compliance is due to a "more complete understanding of the scope and breadth" of the CID, LC Supp. Petition at 1, with the fact that its original estimate was already based on its overbroad reading of the CID as requiring review of "every document it has produced in the last four years." LC Petition at 6. Accordingly, LC has not adequately explained how any information newly available to it justifies its revised

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estimates, and instead repeats in its Supplemental Petition many of the same objections from its original Petition. *Compare, e.g.*, LC Petition at 17 (objecting to Specification R-11 because of purported difficulty in obtaining information on the “[t]housands of [LC’s] employees . . . involved in marketing and sales”), *with* Howard Decl. ¶ 17 (basing estimated time required for compliance on purported difficulty in obtaining information on the “more than two thousand employees who were in direct contact with customers or potential customers”). Additionally, similar to LC’s initial estimate, its revised estimate continues to be based on misreadings of the scope of the CID’s specifications, duplicate compliance efforts, questionable search methodologies, LC’s own decentralized organization, and overstatements of the likely time required for compliance. Thus, particularly in view of the size of LC and the resources available to it, LC has still failed to meet its burden of demonstrating that the CID would “unduly disrupt or seriously hinder [its] normal operations.”

Second, each of these new declarations has internal inconsistencies and redundancies that deprive it of substantial reliability. For instance, Moore’s supplemental declaration claims that the subsidiary will need 19,742 hours, exclusive of redactions, to comply; however, an itemized listing of the hours claimed paragraph-by-paragraph for compliance with those specifications actually adds up to 21,194 hours. The discrepancy between claimed total hours and actual total hours is less striking in the declaration from Howard; that declaration claims 8,700 hours, but the actual total is 8,580. The itemizations in each of these declarations claim that LC will make redundant, seriatim, separate requests for information from each relevant employee in order to comply with the various specifications of the CID. LC’s Petition makes no showing that such redundancy is required.

Third, all of the numbers in the Howard declaration appear to be the product of some type of reverse engineering. Each estimate of the hours to comply with a specification is a multiple of 130 hours. Comparing the hours claimed for compliance with the number of LC’s proposed calendar days for that compliance indicates that it would take a single employee working 5 hours each week on compliance exactly 6 months in order to devote 130 hours to compliance. *See* Howard Decl. ¶ 14. This relationship appears to be constant for the Howard declaration, except for the compliance estimates found in paragraph 22—those employees appear to be twice as productive as other employees since those two employees will complete 1040 hours of work in one year (not two). Fourth, LC has provided no explanation of the time estimating methodology being used to generate these estimates; nor has it provided any evidence demonstrating the reasonableness of these estimates. That said, however, neither these declarations nor the Petition, as supplemented, clearly demonstrate any understanding by LC that a CID recipient is required to comply in a timely manner. *Texaco*, 555 F.2d at 882 (“Some burden on

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IV. The CIDs Do Not Require the Production of Privileged Materials.

The CIDs expressly do not require the production of privileged materials. The instructions contained within each CID direct that any material responsive to the CID which is being withheld based on a claim of privilege shall be described in a privilege log that must be served on the Commission in compliance with Commission Rule 2.8A, 16 C.F.R. § 2.8A. It should also be noted that each Petition recites some dubious claims of “privilege.” For example, DRH’s Petition at page 33 (LC’s Petition at page 29) asserts a claim of privilege regarding the production of information “relating to any non-public investigations or ‘proceedings’ by any other ‘governmental and/or law enforcement [entity].” The Commission is familiar with rules of law that prohibit a public agency conducting a law enforcement investigation from publicly disclosing details of the investigation—the rule protecting the secrecy of grand jury proceedings is one such rule. The Commission is not, however, familiar with rules of law that prohibit the recipient of FTC process from disclosing the fact that such process has been received or the nature of his/her/its responses thereto.

Additionally, both Petitions claim protection from disclosure of confidential business and proprietary information, trade secrets, and the privacy rights of third parties (including the Petitioners’ own current and former employees). DRH Petition at 13; CL Petition at 12, n.4. Petitioners have provided no legal authority that supports either claims of privilege for any such materials or

subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.”).

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the standing of the companies to raise such claims on behalf of third parties. Indeed, the putative assertion of the privacy rights of third parties, especially those of their own employees, could easily be supposed to be little more than a thinly-veiled pretext for the corporations to seek to obtain privacy rights to which they were not otherwise entitled. Further, Petitioners have made no showing that the confidentiality provisions of 15 U.S.C. § 57b-2 and Commission Rule 4.10, 16 C.F.R. § 4.10, would be inadequate to protect anyone's legitimate interests in avoiding public disclosure of confidential or sensitive information.

Finally, Petitioners claim that the records of their voluntary compliance programs are protected from disclosure by the "self-evaluative reports privilege" (DRH Petition at 44, LC Petition at 42); however, those claims are not even supported by their own cited authority. 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5431 (General Rule—Other Novel Privileges) at 716 (Supp. 2009):

In recent years there has been some recognition by federal courts of a privilege for certain corporate records under the rubric of 'self-evaluative reports.' . . . [It] is generally used to refer to records required to be kept by some administrative regulation and that may contain admissions or statistics of use to an opposing litigant in a suit arising under the regulatory scheme of which the report is a part. The decisions are divided, and there seems little justification for creating a new privilege if the matter sought to be protected falls outside of the required reports privilege. (footnotes omitted).

Id. The Petitioners offer no facts or law that would support the conclusion that their voluntary monitoring of compliance with their own sales and marketing policies would, or should, be entitled to protection under the required records privilege.²⁰

²⁰ These Petitions contain a substantial number of other objections that are wholly without merit. Many of those claims turn upon unreasonable

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V. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** DRH's and LC's Petitions be, and they hereby are, **DENIED**.

IT IS FURTHER ORDERED THAT DRH and LC shall comply with the CIDs at issue on March 24, 2010.

By direction of the Commission.

constructions of the specifications or instructions of the CIDs, including various definitions. For instance, there is an instruction advising DRH and LC to consult with staff prior to compliance, if their responses were likely to contain sensitive, personal information. That instruction was not a direction to redact information. Presumably, during that consultation, there would have been a discussion of whether redaction or encryption would be the appropriate manner of dealing with the problem.

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**MAINEHEALTH / MAINE CARDIOLOGY
ASSOCIATES / CARDIOVASCULAR
CONSULTANTS OF MAINE, P.A.***FTC File No. 101 0010 Decision, March 10, 2010***RESPONSE TO MAINEHEALTH'S PETITION TO LIMIT COMPULSORY
PROCESS; AND CARDIOVASCULAR CONSULTANTS OF MAINE, P.A.
AND MAINE CARDIOLOGY ASSOCIATES' JOINT PETITION TO LIMIT
COMPULSORY PROCESS**

Dear Mr. Kopit:

On January 25, 2010, subpoenas duces tecum ("SDTs") and civil investigative demands ("CIDs") were separately served on MaineHealth ("MH"), Cardiovascular Consultants of Maine, PA ("CC"), and Maine Cardiology Associates ("MC")⁷⁹ as part of the Commission's investigation to "determine whether the proposed acquisition by [MH] of [MC] and [CC] violates Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as amended, or Section 7 of the Clayton Act, 15 U.S.C. § 18, as amended; and to determine whether the requirements of Section 7A of the Clayton Act, 15 U.S.C. § 18a, have been or will be fulfilled with respect to said transaction."⁸⁰ On February 17, 2010, MH's Petition and the Joint Petition of CC and MC ("Joint Petition") were accepted for filing by the Secretary.⁸¹

⁷⁹ MH Petition at 1; Joint Petition at 1. MH, CC, and MC are collectively referred to herein as "Petitioners."

⁸⁰ FTC Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation (Jan. 25, 2010).

⁸¹ MH, CC, and MC were granted extensions to file petitions to limit or quash until Friday, February 12, 2010. MH Petition, Attch. C at 1; Joint Petition, Attch. B at 1. On February 12, 2010, the Petitioners attempted to file confidential petitions to limit that did not comply with Rule 4.2(d)(4), 16 C.F.R. § 4.2(d)(4). The FTC Secretary's office refused to accept the confidential petitions for filing because they were accompanied by neither public versions nor express requests for confidential treatment in accordance with Rule 4.2(d)(4). The Secretary advised Petitioners' counsel that the Commission would deem the Petitions to have been timely filed if Petitioners waived the confidential designation and tendered only public versions of the Petitions for filing within a reasonable time. Alternatively, Petitioners could file a motion for leave to file compliant, confidential Petitions out of time. On

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MH petitions to limit the SDT and CID served upon it on the grounds that (1) they are overly burdensome, MH Petition at 3, (2) the demands are unreasonable because the merger will not significantly reduce competition, MH Petition at 8, (3) the FTC has no jurisdiction over either employment contracts or asset acquisitions by non-profit entities such as MH, MH Petition at 10, and (4) state approval of the transaction through the grant of a Certificate of Public Advantage (“COPA”) would immunize the transaction from federal antitrust challenge “by virtue of the State Action Exception.”⁸² MH Petition at 9. The Joint Petition seeks to limit the SDTs and CIDs served on CC and MC on the grounds that (1) they are overly burdensome, Joint Petition at 3, (2) the demands are unreasonable because the merger will not significantly reduce competition, Joint Petition at 4, and (3) state approval of the transaction through the grant of a COPA would immunize the transaction from federal antitrust challenge “by virtue of the State Action Exception.” Joint Petition at 6. As discussed below, Petitioners have failed to demonstrate that the SDTs and CIDs are unreasonable, and the Petitions must therefore be denied.

Commissioner Pamela Jones Harbour, acting as the Commission’s delegate, *see* 16 C.F.R. § 2.7(d)(4), has determined, in her sole discretion, to refer these Petitions to the full Commission for disposition. This Letter Ruling advises you of the Commission’s ruling on your Petitions to Limit Compulsory Process.

February 17, 2010, Petitioners tendered the public versions of the Petitions to the Secretary for filing.

⁸² Presumably, MH is referring to the state action doctrine which owes its genesis to the Supreme Court’s decision in *Parker v. Brown*, 317 U.S. 341 (1943) (holding that Congress did not intend the Sherman Act to apply to state regulation of commerce).

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Petitioners Have Not Demonstrated that the SDTs and CIDs are Unduly Burdensome

“Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest. The burden of showing that the request is unreasonable is on the subpoenaed party.” *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1997); *see also United States v. Powell*, 379 U.S. 48, 58 (1964); *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3rd Cir. 1962) (holding that the subpoena recipient must create a record demonstrating its burden of production rather than merely asking the tribunal to assume it to be so). This burden is not easily met where, as here, the FTC seeks information that is reasonably relevant to its investigation. “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).” *Natl Claims Service, Inc.*, 125 F.T.C. 1325, 1328-29 (Jun. 2, 1998).

As an initial matter, we note that Petitioners have not offered any factual support for their requests for relief in the form of “affidavits and other supporting documentation” as required by Rule 2.7(d)(1), 16 C.F.R. § 2.7(d)(1). Instead of offering evidence or other proofs, the Petitions are advanced only by unsupported assertions and conjecture. In particular, Petitioners have made no reasonable attempt to show that responding to the SDTs and CIDs would “unduly disrupt or seriously hinder normal operations of [their] business.”⁸³ Further, staff’s repeated offers to work with Petitioners to mitigate the burdens of complying with the FTC’s compulsory process have been met with take-or-leave-it proposals and outright refusals to provide staff with a principled basis for evaluating Petitioners’ claims of burden or for devising meaningful counter proposals. This record does not demonstrate any substantial support for Petitioners’ claims that they have

⁸³ *Texaco*, 555 F.2d at 882 (“Thus courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.”).

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negotiated compliance issues with staff in good faith. MH Petition at 3; Joint Petition at 2.

Petitioners assert—again without any supporting documentation—that it is “beyond impossible” to comply with the SDTs and CIDs by the return date even if their proposed limitations were accepted. Joint Petition at 3; MH Petition at 4. They seek an extension for compliance until April 15, 2010, Joint Petition at 4, and June 1, 2010, MH Petition at 2. As Petitioners are aware, however, a state regulatory review process relating to the proposed transactions is already underway, with a public hearing scheduled for April 6, 2010 and a final decision in May. If, as a result of that proceeding, Petitioners’ request for a COPA is granted, Petitioners will be free to consummate their proposed transactions. Thus, the Commission must gather evidence in an expedited fashion to determine whether there is reason to believe the acquisitions substantially lessen competition.

Additionally, the suggestion that the SDTs and CIDs are burdensome because it cannot be demonstrated that competition will be significantly reduced is an inappropriate attempt to conflate the enforcement of investigatory process with the ultimate merits of the merger claims. Boiled down to its essence, Petitioners’ argument creates a logical tautology destructive of most law enforcement investigations: law enforcement subpoenas cannot seek evidence of unlawful conduct unless unlawful conduct can already be demonstrated.⁸⁴

Challenges to the FTC's Jurisdiction Are Premature.

“With rare exceptions . . . , a subpoena enforcement action is not the proper forum in which to litigate disagreements over an agency’s authority to pursue an investigation. Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced.” *FTC v. Ken Roberts Co.*, 276 F. 3d 583, 584 (D.C. Cir. 2001). “[A]t the subpoena

⁸⁴ This claim also implies that the FTC has the burden of demonstrating the likelihood of success on the merits of the ultimate claims before its process can be enforced. Petitioners have not directed to Commission to any supporting authority for this proposition, and the Commission is not independently aware of such authority.

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enforcement stage, courts need not determine whether the subpoenaed party is within the agency's jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party." *United States v. Construction Prods. Research, Inc.* 73 F.3d 464, 470 (2d Cir. 1996). Investigations should not be bogged down prematurely with jurisdictional challenges. *FTC v. Monahan*, 832 F. 2d 688, 690 (1st Cir. 1987) (Breyer); *FTC v. Swanson*, 560 F.2d 1, 2 (1st Cir. 1977) ("An agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction. These subpoenas do not fit within the narrow exception proscribing agency investigations that wander unconscionably far afield; the Commission's regulatory jurisdiction over appellants may be clouded but it is not plainly spurious.").⁸⁵

The Supreme Court determined in *Parker v. Brown*, 317 U.S. 341 (1943), that Congress did not intend by its adoption of the Sherman Act, 15 U.S.C. § 1, to permit the antitrust laws to regulate the sovereign activities of state governments. This so called "state action doctrine" creates a potential affirmative defense to be asserted in litigation – it does not create an immunity from law enforcement proceedings. *South Carolina Bd. of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006).

The fact that Petitioners may have a good faith basis for asserting a state action doctrine defense in response to an FTC law enforcement action against them does not excuse them from responding to the SDTs and CIDs. Excusing Petitioners from compliance at this point in the FTC's investigation would deprive the Commission of the chance to evaluate the facts that might form the basis for such a defense, and to make its own decision of whether challenging this merger would be in the public interest. *Monahan*, 832 F.2d at 689-90 ("We, like the FTC, must wait to see the results of the investigation before we know whether, or the extent to which, the activity falls within the scope of a 'clearly articulated and affirmatively expressed' state policy. . . . Again, we cannot now say, without knowing more facts, whether or not

⁸⁵ The parties in *Swanson* were tour operators who claimed only to be subject to regulation by the Civil Aeronautics Board.

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this additional 'state supervision' condition will apply.”⁸⁶ Accordingly, Petitioners are not entitled to have their CIDs or subpoenas quashed or modified by reason of the state action doctrine.

In addition to being premature, Petitioners' claims that the Commission lacks jurisdiction appear at this early stage to lack merit. Section 7 of the Clayton Act applies to both nonprofit and for-profit entities. *See FTC v. Freeman Hosp.*, 69 F.3d 260, 267 (8th Cir. 1995); *FTC v. Univ. Health*, 938 F.2d 1206, 1224 (11th Cir. 1991). MH's argument that Section 7 does not reach the acquisition of employment agreements, in addition to lacking any supporting legal authority, ignores that MH would obtain control of substantially all of the assets of CC and MC, including existing contracts, facilities, and equipment—all of which fall squarely within Section 7's ambit.

CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** the Petitions be, and they hereby are, **DENIED**.

IT IS FURTHER ORDERED THAT Petitioners shall comply with the SDTs and CIDs on March 26, 2010.

By direction of the Commission.

⁸⁶ *FTC v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979) (“But where, as here, the FTC does not plainly lack jurisdiction, and the jurisdictional question turns on issues of fact, the agency is not obliged to prove its jurisdiction in a subpoena enforcement proceeding prior to the conclusion of the agency’s adjudication.”); *South Carolina Bd. of Dentistry*, 455 F.3d at 444 (holding that the Board’s state action defense did not qualify for interlocutory appeal because the state action issue would not be “effectively unreviewable” on appeal from the FTC’s final decision).