

FEDERAL TRADE COMMISSION DECISIONS

FINDING, OPINIONS, AND ORDERS

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April J. Tabor, Editor

MEMBERS OF THE FEDERAL TRADE COMMISSION

DURING THE PERIOD JULY 1, 2010 TO DECEMBER 31, 2010

JON LEIBOWITZ, *Chairman*

Took oath of office September 3, 2004.

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
JULY 1, 2010, TO DECEMBER 31, 2010

IN THE MATTER OF

U-HAUL INTERNATIONAL, INC.
AND
AMERCO

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

Docket No. C-4294; File No. 081 0157
Filed July 14, 2010 — Decision, July 14, 2010

The consent order addresses allegations that U-Haul International, Inc. (“U-Haul”) invited its competitor, Avis Budget Group, Inc. to collude on prices on truck rentals. The consent order prohibits U-Haul and its parent company, AMERCO, from colluding with competitors or inviting competitors to divide markets, allocate customers, or fix prices. U-Haul is further prohibited from communicating with competitors regarding rates, though U-Haul is permitted to engage in communications necessary to perform legitimate market research. During the compliance period, U-Haul is also required to submit unredacted copies of certain internal documents to the Commission for review.

Participants

For the *Commission*: *Dana Abrahamsen and Phil Bailey.*

For the *Respondents*: *Lawrence G. Scarborough, Bryan Cave;*
and *Geoffrey D. Oliver, Jones Day.*

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 U-Haul International, Inc., and AMERCO (hereinafter sometimes collectively referred to as “Respondents” or “U-Haul”), have

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violated the provisions of 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. U-Haul is the largest consumer truck rental company in the United States. On multiple occasions, U-Haul invited its closest competitor, Avis Budget Group, Inc. (“Budget”), to join with U-Haul in a collusive scheme to raise rates for one-way truck rentals. U-Haul invited collusion employing both private communications and public statements. These actions endanger competition, and violate Section 5 of the FTC Act.

PRELIMINARY ALLEGATIONS

2. Respondent AMERCO is a corporation organized, existing, and doing business under and by virtue of the laws of Nevada, with its corporate headquarters located at 1325 Airmotive Way, Ste. 100, Reno, Nevada 89502.

3. Respondent U-Haul International, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Nevada, with its corporate headquarters located at 2727 North Central Avenue, Phoenix, Arizona 85004. U-Haul International, Inc. is a direct subsidiary of AMERCO.

4. Edward J. Shoen serves as Chairman, President, and Director of AMERCO, and as Chief Executive Officer and Chairman of U-Haul International, Inc.

5. The primary business of U-Haul is renting trucks to consumers for use in “do-it-yourself” moves, typically of household goods. U-Haul has a fleet of over 100,000 trucks, and operates a network of approximately 1,450 company-operated moving centers and 14,000 independent U-Haul dealerships located throughout the United States.

6. U-Haul offers customers the option of a “one-way move,” meaning that the customer may pick up a truck at one U-Haul

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location and drop the truck off at a different U-Haul location. Any person may visit the U-Haul web-site, input a town of origin and town of destination, and secure a computer-generated rate quote.

7. AMERCO is a publicly traded corporation, and holds conference calls with securities analysts on a quarterly basis. Any person may listen to the call live over the internet, or obtain a transcript of the call. During these “earnings conference calls,” U-Haul executives provide information and answer questions about recent business developments.

JURISDICTION

8. At all times relevant herein, respondents U-Haul International, Inc. and AMERCO, have been, and are now, corporations as “corporation” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

9. The acts and practices of Respondents, including the acts and practices alleged herein, are in commerce or affect commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

LINE OF COMMERCE

10. U-Haul is the largest competitor in the one-way truck rental business in the United States – the company with the most trucks, the most truck rental locations, the greatest revenues, and the highest market share. U-Haul’s closest competitor, and the principal competitive constraint upon U-Haul’s pricing power, is the next largest truck rental company, Budget. U-Haul and Budget together account for 70 percent of one-way truck rental transactions in the United States. Acting together, U-Haul and Budget could profitably impose higher prices upon consumers.

PRIVATELY COMMUNICATED ATTEMPTS TO COLLUDE

11. Edward J. Shoen is the Chairman of both AMERCO and U-Haul International, Inc. Over several years up to and including 2006, Shoen was aware that price competition from Budget was forcing U-Haul to lower its rates for one-way truck rentals.

Complaint

12. In 2006, Shoen developed two complementary strategies to eliminate this competition and thereby to secure higher rates. U-Haul regional managers and dealers were instructed by Shoen to implement these strategies.

- a. The U-Haul regional manager should raise one-way rates. Then, the regional manager should contact Budget, inform Budget of U-Haul's conditional rate increase, and encourage Budget to follow - lest U-Haul's rates be reduced to the original level.
- b. An alternative, pre-collusion strategy was available if the U-Haul regional manager judged that Budget would not presently follow a U-Haul rate increase. In this circumstance, the U-Haul regional manager should lower his one-way rates – below those of Budget. Then, the regional manager should contact Budget and inform Budget of this rate reduction. In this way, U-Haul would teach Budget that its low-price policy was fated to be ineffective. This would prepare the ground for the future implementation by U-Haul of the basic, collusive strategy.

13. In October 2006 and November 2006, U-Haul instructed its regional managers to implement one or the other of the above-described strategies. This plan was described in memoranda authored by Shoen and distributed to the regional managers:

Budget continues in some markets to undercut us on One-Way rates. Either get below them or go up to a fair rate. Whatever you do, LET BUDGET KNOW. Contact a large Budget Dealer and tell them. Contact their company store and let the manager know. Rates of 20¢ a mile One-Way, do not even cover the cost of the truck, let alone, repair, maintenance, license, insurance and Dealer commissions. Either get under their BS rate or get up in a cents per mile range where you might make a profit. . . .

We have been up on transactions and down on gross two months in a row. We are either matching stupid rates or we are above them, but not enough to make a profit.

Complaint

My direction is either get up to a fair rate or get down below the competitor. EITHER WAY, LET THEM KNOW.

(Emphasis in original).

14. In addition, in October 2006, November 2006, and December 2006, Shoen instructed local U-Haul dealers to communicate with their counterparts at Budget and Penske, re-enforcing the message that: (i) U-Haul has raised its rates, and (ii) competitors' rates should now be raised to match the U-Haul rates. Shoen's memoranda offer U-Haul dealers a script for these inter-firm conversations:

We are successfully meeting or beating our Budget and Penske competitors. However, their rates are WAY TOO LOW. When you and your MCP [regional manager] decide it is time to bring some One-Way rates back up above a money loosing [sic] 35¢ mile, have your Dealers let the Budget and Penske Dealers know. Try "Are you tired of renting 500 miles for \$149 and a \$28 commission? Then, tell your Budget/Penske rep that U-Haul is up and they should be too." Dealers know how to have this conversation and who to call to have it . . . [W]e should be able to exercise some price leadership and get a rate that better reflects our costs.

(Emphasis in original).

15. In late 2006 and thereafter, U-Haul representatives contacted Budget and invited price collusion as instructed by Shoen.

16. Robert Magyar is U-Haul's regional manager for the Tampa, Florida area. In October 2006, Magyar received from Shoen, his boss, the instructions described in Paragraphs 13 and 14, above.

17. In response to Shoen's directive, in October 2006, Magyar increased U-Haul's rates for one-way truck rentals commencing

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in the Tampa area. Next, Magyar telephoned Budget and communicated to Budget representatives that U-Haul had raised its rates in Tampa and that the new rates could be viewed on the U-Haul web-site. Implicit in the conversation, and intended by Shoen and Magyar, was the message that if Budget did not raise its rates, then U-Haul would lower its rates to their original level.

18. Later that month, Magyar sent an email to Shoen describing his communication with Budget representatives. Shoen responded by instructing Magyar to contact Budget again before lowering rates.

19. One year later, in October 2007, Magyar again contacted local Budget locations. Magyar communicated to Budget that U-Haul had increased its one-way truck rental rates, and that Budget should increase its rates as well. In an e-mail message addressed to U-Haul's most senior executives, Magyar related the conversations:

I have also called 3 major Budget locations in Tampa and told them who I am, I spoke about the .40 per mile rates to SE Florida and told them I was killing them on rentals to that area and I am setting new rates to the area to increase revenue per rental. I encouraged them to monitor my rates and to move their rates up. And they did.

PUBLICLY COMMUNICATED ATTEMPT TO COLLUDE

20. In late 2007, Shoen determined that U-Haul should attempt to lead an increase in rates for one-way truck rentals across the United States. Shoen understood that this rate increase could be sustained only if Budget followed.

21. On November 19, 2007, Shoen instructed U-Haul regional managers to raise prices:

Stop setting MCO [regional] rates based on Budget's rate.
Set the correct rate Budget will come up. Let them.

(Emphasis in original).

Complaint

22. Budget did not immediately match U-Haul's higher rates. U-Haul instructed its regional managers to maintain the new, higher rates for a while longer – in case Budget should take note and decide to follow.

23. U-Haul held its third quarter fiscal year 2008 earnings conference call on February 7, 2008. Shoen was aware that Budget representatives would monitor the call. (A complete transcript of the earnings conference call is annexed hereto as Exhibit A.)

24. Shoen opened the earnings conference call with a short statement noting, inter alia, U-Haul's efforts "to show price leadership." When asked for additional information on industry pricing, Shoen made the following points:

- a. U-Haul is acting as the industry price leader. The company has recently raised its rates, and competitors should do the same.

[W]e're very, very much trying to function a price leader and not give away share And even in several corridor markets that are highly competitive, I'm trying to exhibit some price leadership because, as I think you have found on your own, there are markets that are being priced well below the cost of providing the service. And I don't really believe the customer wants us to do that on any consistent basis So we've been trying to force prices

So we're pushing for it we're going to continue to push for it. I believe the customer wants us to push for it.

And so by, as I talked about earlier, me trying to get us to exercise price leadership every time we get what we consider to be an opportunity, it's another indicator to them [Budget] as to, hey, don't throw the money away. Price at cost at least.

Complaint

- b. To date, Budget has not taken notice of, and has not matched, U-Haul's higher rates. This is unfortunate for the entire industry.

I think our competitors have a hard time seeing what we do just because the pricing matrix is so vast and any one decision-maker who does some pricing analysis has a hard time really saying in a way that they could fairly represent to their company the trend is up or the trend is down or more likely U-Haul is holding the line, we don't need to just cut, cut, cut. As a strategy I believe the Budget Truck Rental Company is trying to take U-Haul's price in every single corridor and drop it 1 or 2 or 3 or 4, whatever number they can, percent so that they can just price off of us but down.

Budget appears to be continuing as undercut as their sole pricing strategy

And of course classically this is an industry with three major competitors, the one-way truck businesses, Budget, Penske and U-Haul. Classically you get some price leadership and it manages itself okay. It's when somebody decides they have to gain share from somebody that you get this kind of turbulence that results in no economic gain for the group, in fact probably economic loss. So I remain encouraged and the official position of Budget is that they're not doing this. I didn't listen in on their most recent conference calls, but over the last year I'm sure I listened to two or three of them and their official position is they're not doing this. But many a slip between the cup and the lip If they cave on prices the net effect is we got less money.

- c. U-Haul will wait a while longer for Budget to respond appropriately.

[F]or the last 90 days, I've encouraged everybody who has rate setting authority in the Company to give in more time and see if you can't get it to stabilize. In other words, hold the line at a little higher.

Complaint

And if they [Budget] perceive that we'll let them come up a little bit, I remain optimistic they'll come up, and it has a profound effect on us.

- d. In order to keep U-Haul from dropping its rates, Budget does not have to match U-Haul's rates precisely. U-Haul will tolerate a small price differential, but only a small price differential. Specifically, a 3 to 5 percent price difference is acceptable.

I'm focusing my people on the overall customer service issues. Okay, what can we do to justify a price difference given that in many cases we're going to be above them? But it's not that hard in the economy to justify 3 or 5% with service in my belief. Now you have to really do it, but I believe we have it and I believe we can really do it. And so that's where I'm driving my people who are delivering the product. I'm not driving them hard on match, match, match.

- e. For U-Haul, market share is more important than price. U-Haul will not permit Budget to gain market share at U-Haul's expense.

[I]f it starts to affect share I'm going to respond, that's all. If the customer doesn't care -- if it's \$10 and the customer doesn't care. But on the other hand, the only reason they do it is if they thought it affected share. So in a way I'm kind of forced to respond

So if we stand still on that they will make share, Budget is a legitimate company. They own lots of facilities and have lots of employees and I'm sure they're fine people if you knew them. But we're not going to just stand still and let that go through.

25. U-Haul acted with the specific intent to facilitate collusion and to achieve market power.

Complaint

26. Each and all of U-Haul's invitations to collude, if accepted by Budget, would likely result in higher one-way truck rental rates and reduced output.

VIOLATION CHARGED

27. As set forth in Paragraphs 11 through 26 above, U-Haul invited its competitor to collude with U-Haul in violation of Section 5 of the Federal Trade Commission Act, as amended.

28. The acts, policies and practices of Respondents, as alleged herein, constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. Such acts, policies and practices of Respondents will continue or recur in the absence of appropriate relief.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourteenth day of July, 2010, issues its complaint against respondents.

By the Commission.

Complaint

EXHIBIT A



FOCUS - 2 of 2 DOCUMENTS

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FD (Fair Disclosure) Wire

February 7, 2008 Thursday

TRANSCRIPT: 020708a1755391.791

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Final

BODY:

Corporate Participants

* Jennifer Flachman AMERCO - Dir. of IR * Joe Shoen
AMERCO - Chairman, President * Jason Berg AMERCO
- Principal Accounting Officer * Rocky Wardrip AMERCO -
Assistant Treasurer

Conference Call Participants

* Ian Gilson Granite Financial Group - Analyst * Jim Barrett C.L.
King & Assoc. - Analyst * Ross Haberman
Haberman Value Fund - Analyst * Simon Willis NCB
Stockbrokers - Analyst

Complaint

EXHIBIT A

Presentation

OPERATOR: Good morning, my name is Andrea and I will be your conference operator today. At this time I would like to welcome everyone to the AMERCO third-quarter fiscal 2008 investor conference call. All lines have been placed on mute to prevent any background noise. After the speakers' remarks there will be a question-and-answer session. (OPERATOR INSTRUCTIONS). Ms. Flachman, you may begin your conference.

JENNIFER FLACHMAN, DIR. OF IR, AMERCO: Thank you for joining us today and welcome to the AMERCO third-quarter fiscal 2008 investor call. Before we begin I would like to remind everyone that certain of the statements during this call regarding general revenues, income and general growth of our business constitute forward-looking statements contemplated under the Private Securities Litigation Reform Act of 1995.

Certain factors could cause actual results to differ materially from those projected. For a brief discussion of the risks and uncertainties that may affect AMERCO's business and future operating results, please refer to Form 10-Q for the quarter ended December 31, 2007 which is on file with the Securities and Exchange Commission. Participating in the call today will be Joe Shoen, AMERCO's chairman. I will now turn the call over to Mr. Shoen.

JOE SHOEN, CHAIRMAN, PRESIDENT, AMERCO: Good morning, this is Joe Shoen; I'm speaking to you from Phoenix, Arizona. Rocky Wardrip, our Assistant Treasurer, and Jason Berg, our Chief Accounting Officer, are on the call with me today and they will both be available for questions.

U-Haul continued to experience a tough revenue and transaction environment in the just finished third quarter. At the same time we continue to reap the expense line benefits of the heavy investments we have made in truck replacements over the past 30 months. The primary cost reduction was in repair and maintenance expense on trucks that are no longer in our rental

Complaint

EXHIBIT A

fleet, in other words retired vehicles. We will continue to aggressively bring in new truck replacements through at least the next two quarters.

Our new rental truck ratemaking system we introduced late last spring is starting to show some results. It allows us to manage with more precision in many small markets we serve and U-Haul's distinguished from its competitors in that we are in many small markets. We continue to show rate leadership where we can do so without adversely affecting market share. I intend for us to continue to do this, however overall rates remain depressed. As I mentioned, repair and maintenance was a bright spot in the quarter and it was largely a result of decisions made a year or more ago.

At the point of sale my current efforts are focused on improving the rental experience of our existing customer base. Working on the fundamentals of blocking and tackling in our business will clearly deliver improved results over the long term. I'm watching the macroenvironment in terms of fuel issues and sustainability issues. I don't believe they are presently impacting on results, but I think they are capable of doing so. My intent is to have U-Haul positioned a little bit ahead of problems should they arise.

Overall U-Haul equipment rentals will likely be very tight in the fourth quarter. As I have indicated before, U-Haul is vulnerable to bad winter weather as this late in the year a loss of gross revenue flows disproportionately to the bottom line. On the other hand, our U-Haul self-storage product does not have this same issue and is more predictable.

On the insurance company front, both insurance companies continue to deliver results at planned levels. You should expect them to continue to do so over the near-term. We'll now go to the questions and answers.

Questions and Answers

OPERATOR: (OPERATOR INSTRUCTIONS). Ian Gilson.

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EXHIBIT A

IAN GILSON, ANALYST, GRANITE FINANCIAL GROUP: Good morning, good results, very good results. I do have a question regarding the operating segment results, and I noticed that SAC Holding revenue dropped from \$10.8 million to \$3.55 million and the earnings from operations dropped from 3.01 to \$0.85 million. Did they sell properties or what happened here?

JASON BERG, PRINCIPAL ACCOUNTING OFFICER, AMERCO: Ian, this is Jason. During the quarter SAC Holding II was deconsolidated from our financial statements. SAC Holding II's parent company, Blackwater, made a contribution to SAC Holding II that triggered a reevaluation of its consolidated status with us. We made that evaluation and, based upon our accounting analysis of the facts and circumstances, they were deconsolidated effective October 31st. So the results shown in the financial statements you're looking at for fiscal 2008, the third quarter includes only one month of activity for SAC Holding II. In future periods we will not be consolidating any new activity from SAC Holding II.

JOE SHOEN: I would add to that that I consider this a blessing. The last four years we've been stuck in an accounting convention that caused us to consolidate certain of the income and expenses of that company, although that didn't reflect any of the actual economic benefit either way. Going ahead you'll see the SAC relationship in management fee income and interest income and that will be more predictable and it also indicates true economic affect.

IAN GILSON: Okay. So there is an impact on the overall income statement, but it's like a minority ownership?

JASON BERG: No, not exactly. We won't be showing any of their future income. Now we still have to consolidate their activity through October 31st, so you're going to see those numbers remain in the financial statements as long as those historical periods are shown. But going forward any new activity will not be consolidated.

Complaint

EXHIBIT A

IAN GILSON: You have no financial interest in SAC II?

JASON BERG: No, we no longer consolidate SAC II. We still have junior notes with them, interest income and we also manage their storage properties for them. We will receive management fees from them which will show up in the U-Haul financial statements as management fee income.

JOE SHOEN: Which is precisely what the economic relationship has been, but the accounting presentation has been subject to certain accounting conventions that aren't always dead on what the economic relation should be. And now these two are going to mirror each other more closely and so the -- including them in our gross revenue is confusing, but including them in our interest income which we do get actual interest income, management fee income. And of course to the extent they're U-Haul dealers or they do U-Haul revenue of course we see all that revenue. So there's still a lot of flows, but the flows are presented on an income statement basis which is really where the economic interest is.

IAN GILSON: Okay. Since you do get the benefit of the U-Haul dealer on the storage side, is SAC II growing, stable, declining? Can you give us an idea of what that U-Haul revenue stream might look like?

JASON BERG: The U-Haul revenue stream that we receive from them as management fees --.

JOE SHOEN: No, he means the truck --.

IAN GILSON: The truck rental from the sites they're in, the SAC II and other SAC profitters.

JOE SHOEN: They very much mirror the entire company. So I can't give you -- I don't have it in my command, their actual quarter results. They're going to be very much -- mirror the whole company, so in other words they were flat for the quarter or maybe up a tiny percent or something. There's no prospect of

Complaint

EXHIBIT A

them diminishing, Ian. But I would expect them to grow at or below the company's overall because SAC is not adding locations in the -- going ahead as we add a location, the intent is to add it at the U-Haul level and not at the SAC level. So you would see hopefully more growth at the U-Haul level.

IAN GILSON: Okay, great. Thanks very much.

OPERATOR: Jim Barrett.

JIM BARRETT, ANALYST, C.L. KING & ASSOC.: Good morning, everyone. Joe, you talked about that in a couple of quarters you see the above average investment in trucks coming down. Can you give us any sense as to what the -- first of all, what the order of magnitude, what that might represent?

JOE SHOEN: If I said that I misspoke a little bit. For the next two quarters I expect it to continue to be aggressive, which is about what you've seen going on. I think -- Jason, you might correct me. We have something like 7,000 to 10,000 trucks we're committed to right now. And that's a strong replacement.

I'm hedging my bets as to what I'll do midsummer, in other words going into the second quarter of the new year which will be more than 180 days from now. Because we're kind of getting somewheres near the tipping point where we've done enough replacement and if we're not going to see increased revenue, which we haven't seen as you know, Jim, over the last 16 months -- if we're not going to see increased revenue then we shouldn't increase the truck fleet.

I wish I could -- it may sound very crude to you that this could be a 5,000 or 7,000 truck window, but that's really about as precise as it can be. Somewheres in there, so I think we've replaced trucks that we needed to do aggressively and we would go into a more normal cycle which very likely would be this August or September. And that would be a reduction, a guess at that, Jim, would be to take and put it at 10,000 trucks annually.

Complaint

EXHIBIT A

JIM BARRETT: On a going forward basis that's sort of -- beyond this summer that would be sort of a broad run rate?

JOE SHOEN: I think that would be. With the exception if we saw some big market opportunity. But there has been no big market opportunity we've identified over the last 16 months. So I'm the eternal optimist, I'm always looking for it, but we're not going to spend money based on optimism. We're going to have a definite plan and see something that we can pro forma out over a period of years or we won't --

JIM BARRETT: If it comes to that, Joe, doesn't that mean your capital expenditures do come down markedly?

JOE SHOEN: They come down. I would defer to Rocky as to exactly how that trickles through the whole financial statement because it's never as direct. But ordinarily my experience is when those come down you pick up a little bit of an income. Rocky, you might comment on that.

ROCKY WARDRIP, ASSISTANT TREASURER, AMERCO: My guess, Jim, and depending on the mix of what we were putting in, is that would probably bring annual truck expenditures down on a net basis to somewhere between \$200 million and \$225 million.

JIM BARRETT: And then I would add to that whatever investments you're making in sell storage to get an idea what your gross CapEx is?

JOE SHOEN: That's correct.

IAN GILSON: Okay.

JIM BARRETT: Okay. Joe, if the firm does (technical difficulty)

OPERATOR: (OPERATOR INSTRUCTIONS). Ross Haberman.

Complaint

EXHIBIT A

ROSS HABERMAN, ANALYST, HABERMAN VALUE FUND: I think you might have cut Barrett off, but I'm sure he'll come back on. Joe, a follow-up to his question -- what is the capital -- have you said what the capital expenditures are going to be for calendar '08 in total?

JOE SHOEN: No, we haven't. We actually do that calculation based on the fiscal year which is a, as you know, March 31st anniversary. So no, we haven't. Rocky may have -- and of course he's constantly projecting it on a rolling basis. But I don't know, Rocky, what we --?

ROSS HABERMAN: What have you spend to date, Rocky, if I may ask?

ROCKY WARDRIP: Beg your pardon?

ROSS HABERMAN: What we have we spent for the nine months for CapEx?

ROCKY WARDRIP: Jason, do you have that number handy? I don't have it at my fingertips.

JASON BERG: Including everything for the nine months it was \$440 million of which truck purchases are the largest portion of that. That also includes all other CapEx too which would include storage.

JOE SHOEN: Does that have -- is that a net or is that a gross number?

JASON BERG: That's a gross number.

ROCKY WARDRIP: Because this gets very confusing.

ROSS HABERMAN: The net would be less the trucks you've sold?

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JASON BERG: Our sales of property, plant and equipment during the period were \$134 million.

ROSS HABERMAN: So roughly about \$300 million net is what you're saying?

ROCKY WARDRIP: Maybe \$310 million and so far for next fiscal year I believe we have orders in on approximately about \$157 million of equipment plus -- that would be on van trucks, plus roughly replacement of cargo vans and pickups that would maybe equate to somewhere around \$105 million on a gross basis.

ROSS HABERMAN: So that would be you're saying about 260 gross?

ROCKY WARDRIP: Yes, that's a gross basis. Keep in mind we'll be selling 9,000 pickups and cargo vans which will probably bring proceeds somewhere close to roughly about \$10 million less than we are investing in the next year.

ROSS HABERMAN: So you think you're going to get back as much as 250, is that correct?

ROCKY WARDRIP: No, no. I'm saying on the cargoes and vans which are roughly about -- say roughly \$100 million, that we'll probably have sales proceeds of somewhere north of \$90 million.

ROSS HABERMAN: I got you. Okay, all right. Just two other questions, if I may. Going back to the deconsolidation of SAC, you showed 850,000 and I guess of income for the quarter there. You said that number was a three-month or a two-month number? And is that number a combination of the interest as well as the management fee?

JASON BERG: That is a one-month number and that is SAC Holding II's income statement; that isn't our interest in SAC Holding II, that's their whole financial statement.

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ROSS HABERMAN: That's their whole financial statement. So you're saying you have earned a piece of that, is that what you're saying? Both interest and management fee for the quarter?

ROCKY WARDRIP: I think I'll start from the beginning on this. What we consolidate into our financial statements is the SAC Holding II entire financial statement -- so it's their entire income statement and balance sheet which would include all of their revenues and all of their expenses. Some portion of their expenses is revenue on U-Haul's books because they pay us for management fees and they also pay us interest expense. So in the consolidated financial statements you'll see some elimination columns that seek to eliminate those items.

As of October 31st their entire income statement and balance sheet will be removed going forward. What will remain is that we will continue to record management fees and interest income from them that will show up on the U-Haul income statement.

ROSS HABERMAN: Do you have an estimate of what those numbers are on a monthly or quarterly basis?

ROCKY WARDRIP: What I can tell you is -- I don't have that at my fingertips how much we get from them in fees. But what I can say is the net income after tax from SAC Holding II that combines up to AMERCO has been on the order of \$300,000 to \$500,000 a year. So it's a very inconsequential number in the past.

JOE SHOEN: We may be getting two different questions here. This is Joe again. There's an accounting convention called FIN 46 that we had been required to follow through October, and it required us to consolidate something that, in my opinion and I'm not a CPA, we had no economic interest in. At the same time we have always been booking into both the interest line and in a line of management fee which I'm not sure if that's consolidated with general storage -- it's called out, it's a separate item called management fees. That's money we've -- real money we've been getting from SAC and we will continue to get it and it would be our intent that it would continue to grow modestly.

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ROSS HABERMAN: That's the \$300,000 to \$500,000?

JOE SHOEN: No, no. The \$300,000 to \$500,000 was the -- I'll call it phantom income at the risk of being chastised by the accountants. But it was their income that accounting conventions required us to books. Okay? And even in some past years it was a loss and we still had to book it. This new set of facts on SAC that allows us to not show that should simply clarify our books and remove an item from going ahead. But nobody including myself can very easily predict.

And instead we'll see management fee income which we get, depending on the properties, we get a sliding scale that kind of roughly averages 6% but it could be I think 4 to 10% depending on the contracts. Jason, 4 to 8, or do you know? 4 to 10%. But since it's based on their gross revenues that's a little bit predictable. And that shows up as management fee. At the same time we have various loans to various SAC entities lumped together for this discussion purpose and those all have a current interest pay. So that comes through on the interest line for us -- income. Then of course should they reduce principal then it would come through obviously on the balance sheet.

So going ahead you're going to see the two line items, management fees and interest income, and they're going to largely define our relationship with the SAC entity. Now additionally those locations, I believe in 100% of the cases, also function as U-Haul dealers, they rent U-Haul trucks and trailers and a substantial amount of them. So that income will, as I said when I talked with Ian, that will continue to behave very much like our total gross income, although probably lagging a little bit behind over a five-year basis because it's unlikely that SAC will increase its total number of outlets over that time and it's likely U-Haul will.

ROSS HABERMAN: Those two numbers, the fee income as well as the interest income for the nine months, do you have that, Jason, what that cash number to you was?

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JASON BERG: I'll give you the last quarter (multiple speakers) September which was the full three months that we had. That number was \$750,000 of management fees and \$1.7 million of interest income.

ROSS HABERMAN: Those were quarterly cash numbers to you for the three months?

JASON BERG: Correct, and those numbers remained fairly steady throughout the year. They're in (multiple speakers)

ROSS HABERMAN: Just one final question. I saw you didn't buy any shares back, I was wondering why. And I guess a question I had brought up for Jason in the past -- would it pay for you at some point to include the preferred shares as part of your buyback plan?

JASON BERG: The common stock -- our window is opening up here a couple days after the call. On the preferred stock we've received that question and I believe that that is going to be an item that's going to be presented to the AMERCO Board for discussion. It's a good point and as far as trading that it deserves a discussion at the Board level.

JOE SHOEN: this is Joe speaking. I'm phenomenally risk averse and we had a terrible experience about four years ago and we're now maintaining cash and availability if you looked at this company over a 20- or 30-year timeline that's unprecedented for us, but we had a real bad experience. And we're going into and in fact may well be a pretty hard economy right now. While we remain -- we still have reasonable access to credit both for purchase and lease of trucks. We're a fly in that whole stew.

So if that market deteriorates for everybody it's likely going to deteriorate for us. It's not deteriorated, I'm not implying that it's likely to deteriorate, but we're keeping our powder dry or at least that's been my recommendation. This is a bit of a Board level decision, the preferred, but it's been our overall plan to keep a lot of dry powder just because I think we're risk averse and it's really

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hard to evaluate are you too risk averse or is it prudent. Right now I kind of feel it's prudent although it's costing us money because you can obviously take on average cost of debt or incremental cost of debt and put it up against the preferred and it's having a negative income statement effect every quarter.

ROSS HABERMAN: I greatly appreciate your conservatism. I guess I'm just asking if you do decide to buy back whatever you do, at some point does the preferred become a better, more compelling buy than the common and that's what I'm trying to get a feel for?

JOE SHOEN: I think that's a real issue and we don't have a -- right now the buyback is only on the common, but I think you're addressing a real issue and it has its proponent by the Company, but we don't have -- there's nothing I have to announce or I don't want to imply an announcement is coming tomorrow or something. But you're hitting the nail on the head.

ROSS HABERMAN: Okay, guys. Thanks a lot. The best of luck.

OPERATOR: Jim Barrett.

JIM BARRETT: Joe, can you give us an update on the pricing in the industry? Any changes there, any color you can add on that?

JOE SHOEN: Jim, us we are very, very much trying to function as a price leader and not give away share and those are kind of contradictory strategies. So what that means is in a market where I don't see competition, and that's a lot of sorting, but a market where I don't see a lot of competition I'm trying to exhibit some price leadership. And even in several corridor markets that are highly competitive I'm trying to exhibit some price leadership because, as I think you have found on your own, there are markets that are being priced well below the cost of providing the service. And I don't really believe the customer wants us to do that on any consistent basis. And as a shareholder and an employee here I don't want us to do it on any consistent basis.

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So we've been trying to force prices and we did a good enough job of it in the last quarter that it didn't hurt us, although we didn't get up. I think from a macro view we had increased transactions and revenue up a percent or something, but our increased transactions were significantly above our revenue increase which not exactly, but very loosely indicates at least it's a tough market. Inside of that, as you know, Jim, there are a lot of model mix issues, size of trucks, length of rental issues. But I remain very hopeful.

I think our competitors have a hard time seeing what we do just because the pricing matrix is so vast and any one decision-maker who does some pricing analysis has a hard time really saying in a way that they could fairly represent to their company the trend is up or the trend is down or more likely U-Haul is holding the line, we don't need to just cut, cut, cut. As a strategy I believe the Budget Truck Rental Company is trying to take U-Haul's price in every single corridor and drop it 1 or 2 or 3 or 4, whatever number they can, percent so that they can just price off of us but down. Does that make sense?

JIM BARRETT: Yes.

JOE SHOEN: And that's very -- if it starts to affect share I'm going to respond, that's all. If the customer doesn't care -- if it's \$10 and the customer doesn't care. But on the other hand, the only reason they do it is if they thought it affected share. So in a way I'm kind of forced to respond, although for the last 90 days I've encouraged everybody who has rate setting authority in the Company to give in more time and see if you can't get it to stabilize. In other words, hold the line at a little higher.

You touched on that in the update I saw that came across my desk recently from you that showed us at a higher tier. We're not that much higher in every price, let me assure you, or we would see share go away. But on the other hand, the relationship which is Budget appears to be continuing to undercut as their sole pricing strategy, but I think that's still out there.

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So we have to go and every market where they're really not competing with us or every size of truck where they're really not competing we need to try to get a fair price and which I think we did an okay job of that in the third quarter and so we got a little teeny bit of revenue, but overall pricing is probably still down year-to-year all in, but I couldn't tell you it's 3% or 7%. We are sensitive to 1%, as you know. So if I got a 1% price increase it would be let's rent a ballroom and have a party at this end. It would be a big deal.

So we're pushing for it we're going to continue to push for it. I believe the customer wants us to push for it. In the near-term however my focus is on we're going to be competitive on price. We'll match at the counter in all cases. So if you come to the counter and you say I just quoted Budget and he was whatever -- ex dollars less, my guy at the counter has full authority to say we're in and get the rental but we're not publishing at that rate. I think that's a reasonable thing.

And then I'm focusing my people on the overall customer service issues. Okay, what can we do to justify a price difference given that in many cases we're going to be above them? But it's not that hard in the economy to justify 3 or 5% with service in my believe. Now you have to really do it, but I believe we have it and I believe we can really do it. And so that's where I'm driving my people who are delivering the product.

I'm not driving them hard on match, match, match. Okay? They have the power to do it and they're doing it based on their discretion. If they think that they're going to lose the rental at the counter I'm fairly confident they're going to match a rate if they think the rate is at all real. And sometimes that will be below our cost of providing the service and that's just how the cookie is going to crumble.

But I think we -- I'm sure that we have room to do a better job with our customer in the overall customer service experience. I believe if we tomorrow could patch that we'd see overall increase.

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And of course I see very detailed data -- every day I see locations that are up solidly in both transactions and revenue and these are just simply people who are managing better, Jim.

So that becomes my challenge is to get the whole group to manage better. Because we're competing for the customer's dollar in the economy and you know as much about that as anybody -- the customer has choices, but still people still put a premium on service. And if they come away -- it's small things; did you help carry the boxes to the car for the customer? Well, that's a pain but over time that means something to people.

We're doing a lot on the sustainability front trying to help the customer with fuel economy given that you can only do a -- it's a finite amount of help you can give them, but we're trying to help them on fuel economy. We're working with them on things like our cardboard -- I believe that the customer responds to that and is willing to overlook \$15 or \$20 on the price in many instances if they just see that the whole thing is just -- they're winning in so many other ways that they don't have to just beat us to death on price.

But when the price is \$200 different or \$300 different, well that's a tougher deal for my guy or gal at the counter to say our products are all biodegradable; therefore, you should pay \$200 more. I don't think that goes down so easy. So that is causing issues inside of length of rental and size of truck issues. And it makes their strategy more viable on a \$1300 rental than it is on a \$150 rental.

JIM BARRETT: How would you characterize Penske's behavior in all of this?

JOE SHOEN: Penske's behavior is that they are doing Penske's game, which is typically what they have always done. And they have always priced off a different rationale than we have; closer to a yield management or a -- I'd say closer to a yield management type thing. So their price could vary 100% in a two-week period.

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We have for more than 20 years stayed off of those kind of swings, believing that in the long run they alienate the customer. However, Penske has picked share up off of budget more than likely with that strategy. Now we have picked share up off of budget with our strategy. Penske is a little different, and they often will do a rate -- and I can't quote you a rate that is current out of Florida -- but they often done a rate which is \$175 out of Northern Florida to any location in Long Island.

A fair cost of that rental, your real cost is \$400 or \$500 at least. So they are doing that -- they are losing \$300 every time they rent a truck, and we ordinarily will not follow that rate. But Penske does that, and they are very much -- I think have the belief that if they can move the truck immediately, and of course, I don't see their books, so I don't see what really happens; but if they can move the truck immediately, they will rent it for \$300 less than their true cost, believing they are going to pick it up on the return.

Our experience is on the return, we never get the full \$300 back, and it is not a zero sum game, it is a declining sum game. And we as a general rule do not do those wide fluctuations in pricing.

JIM BARRETT: Actually, to touch upon what you just said, considering that Florida, Southern Cal, Arizona and Nevada are ground zero for what is happening, at least in new housing, are you seeing any change in rental behavior in those markets?

JOE SHOEN: Well, California has been a lot of spikes and valleys for us. The North and the South are totally different characteristics, and I don't think the housing market explains that, Jim. But they have been very volatile markets for us, and I don't think we have got any kind of balance.

Arizona, I would say, is going ahead very much like it has in the past. It is just hard to get an increase. Florida, we are down in revenue in Florida, and I have some information that indicates to me our competitors may be down on revenue in Florida. And I

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don't have a good explanation for it. So, unfortunately, I come back with I don't have a clear macro to communicate to you that is consistent between those three markets.

I think you picked three that are fairly representative, that if there was a common driving force you would expect to see it between those three markets. Always it is confused by the quality of our individual management, obscured. I don't know what the right word is; maybe confused isn't the right word. But always, of course, if we are managing to a higher level, we do better in any given market.

Like any company, a given zone manager does a better or worse job. But overall in California we shouldn't be doing that much difference a management job than we're doing overall in Florida. They're big enough markets that a lot of that should normalize out. I can't see the housing market has a direct impact on it, although we continue to probe to try to do the analysis to see if we can pull it out and find a good indicator.

And overall would I wish housing was booming? Oh, God, I wish housing was booming. I do for sure. I guarantee you we're losing something over it, but I can't correlate it to is that a 1% or a 3% or something like that? I just can't -- I can't pull that out of the numbers.

JIM BARRETT: Okay. And then last, you've broken in detail about truck maintenance spending before and I know it's a bit of a step function, but what's your broad outlook on that number going forward over the next couple years?

JOE SHOEN: Well, we're getting a decline this year. Rocky or Jason, jump in if you disagree. We'll hopefully have a decline the following year, but it's going to kind of level out because now we have some trucks that two years ago were brand new and now they're 30 months old and so now they're starting interim maintenance cycles. So this think will kind of level out here at a point. There's a little bit of lag in what we call the betterments account where some certain large repairs are capitalized and then

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they're redepiciated over a period of months. There's a little lag there, but we're starting -- that account is starting to normalize out.

So I'm looking for continued declines, but I think the decline that we're seeing out of the fleet decisions are going to level off and further declines are going to have to be through some sort of improved management, whether it's -- improved management. And we have stuff cooking on that, but trying to get a 5% change on improved management in that is a very tall order. So I would expect them to probably next year level out compared to this year.

JIM BARRETT: Thank you very much. That helps.

OPERATOR: (OPERATOR INSTRUCTIONS). Simon Willis, NCB Stockbrokers.

SIMON WILLIS, ANALYST, NCB STOCKBROKERS: Before you mentioned that the U-Haul environment is currently tough and you also said though that transactions year-over-year are up about 1%. Just in general, when you think about a tough environment, what type of range would you put on for transactions in terms of growth year-over-year?

JOE SHOEN: I'd say somewheres plus or minus 1.5%. Right now I think we're running a little bit on the plus side. There are a lot of components inside that number and I seldom see it in the aggregate, but that's kind of where you're stuck with having to deal with it. So plus or minus 1.5%.

Then the question is immediately what impact does that have on revenue? If pricing was stable you'd see 1.5% at least change there, but pricing has not been as stable. Now I'm continuing to work that and we've invested a lot of energy and time and expensed all that energy and time by the way. but that could reap a reward and I fully intend for it to and I have some pretty

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talented people who think we're going to see it. But I'm not going to the bank on it.

SIMON WILLIS: Okay. How would you think of a normal environment versus a tough environment, what type of range in terms of year-over-year transactions?

JOE SHOEN: I think you're going to see that transactions are going to reflect overall demographics and not so much share movement, assuming we don't see a competitor either exit or enter the marketplace. And so what's overall demographics for moving a 5% range I would say. Now inside of that we do other things. As you know, we sell products which when we're doing a good job we've outpaced that on the sale of products, although we didn't this year or haven't so far. We also rent self-storage and we've outpaced that on the self-storage front consistently. And so that takes the whole top-line number and moves it ahead of the demographic number. But I think that's somewhat correct what I'm saying.

SIMON WILLIS: Okay. Would you describe the current pricing environment as more competitive than usual or kind of within line of the natural competitiveness of the market?

JOE SHOEN: I think it's silly because -- we're running below cost in lots of markets. And I didn't bring a bunch of quotes to me, but I think two or three calls ago we quoted like 20 prices and by just -- without having any inside information at all you could deduce they were below the cost of this vehicle ownership. And we haven't for long said you can't lose money here and count on making it there. We don't believe that that's a fundamental good approach because you may have a competitor who's only really active in the market where you think you're going to make the money and they're going to force prices to a normal level.

So when you do something like rent a truck from Florida to Long Island for \$129 or \$159, you just threw \$300 at least right down the gutter. And to say you're going to get that \$300 premium for every rental going the other way I think is a very short sighted

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view. I don't think that that's proven itself to be a fact. Now everybody is entitled to their strategies, but that's our position is that's not a fact. You rent that thing for that low price, it does a lot of (technical difficulty) one of the biggest things is it confuses the customers to what is a fair price. Because the -- let's say \$159 is a fair price or is your normal price of \$700 or \$800 a fair price? And so they don't know if they're getting a good deal or getting gouged.

So when they then encounter this \$700 price going the other way our experience is they just scream bloody murder. And statistically the person most likely to go from point A to point B is the person who just went from point B to point A. So they actually do know those prices. You wouldn't think they would, but enough of the customer base knows it, maybe 20% or so, but, boy, they scream bloody murder and that's demoralizing even at the point of sale because our people at the point of sale are human beings and they're not rip-off artists. And if they think we're trying to rip the

customer off they're more likely to concede on pricing and then you don't make your money back on the second leg, you see?

SIMON WILLIS: IS that pricing dynamic something new that has come into the market, or has that been active for the last couple years?

JOE SHOEN: The budget organization went through a whole metamorphosis over the last five years and its present iteration is maybe 36 months or newer. And in its present iteration it's been I think just simply disorganized. But the net effect is that the consumer believes, and you would probably too if you called 10 random A/B destinations and quoted, you would probably believe they're cutting prices.

So if we stand still on that they will make share, Budget is a legitimate company. They own lots of facilities and have lots of employees and I'm sure they're fine people if you knew them. But

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we're not going to just stand still and let that go through. But again, if they cut a dollar we cut the dollar but we do three times the transactions roughly, it's no fun.

SIMON WILLIS: Right. Is there any hope or are you optimistic in any way over the next year or two that this can get resolved?

JOE SHOEN: Absolutely. And of course classically this is an industry with three major competitors, the one-way truck businesses, Budget, Penske and U-Haul. Classically you get some price leadership and it manages itself okay. It's when somebody decides they have to gain share from somebody that you get this kind of turbulence that results in no economic gain for the group, in fact probably an economic loss. So I remain encouraged and the official position of Budget is that they're not doing this.

I didn't listen in on their most recent conference calls, but over the last year I'm sure I listened to two or three of them and their official position is they're not doing this. But many a slip between the cup and the lip. As I indicated even with us, if our point of sale thinks we're ripping the customer off they're much more likely to concede and they have that authority. If they cave on prices the net effect is we got less money. And Budget I think is having its own issues implementing and knowing exactly what it did and why it did it, and I think that's as much at fault.

But this is a guess, I don't think these people would fib on a conference call. I think on a conference call they're telling you pretty closely what they really believe is occurring. But yet when you go out and do pricing in the marketplace, there seems to be a gap between those two views of the world, they're two slices of reality. I think it's that they have so many new people, the whole thing has been so much in -- I don't know what you would call it, but turmoil or whatever. And I think it's very difficult to say I know exactly what's happening in Kansas City today because maybe you don't.

My hope is that that's largely it. And so by, as I talked about earlier, me trying to get us to exercise price leadership every time

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we get what we consider to be an opportunity, it's another indicator to them as to, hey, don't throw the money away. Price at cost at least. If you feel a need to discount then price to cost, not below your cost. And their costs aren't -- I mean they're buying trucks, the trucks are made by a small group of people, the boxes are made by a small group of people, we're all competing for a labor force, there's no way they have a cost advantage over us, but argue it's the other way around. But they certainly don't have a cost advantage over us.

So they can't sustain doing that. And they've posted results -- or what they've shared anyway has been halfway grim, which I'm sure they're being held accountable by their management and Board and shareholders to not have that sort of result. And if they perceive that we'll let them come up a little bit, I remain optimistic they'll come up, and it has a profound effect on us.

SIMON WILLIS: My last question is outside the steps that you've taken on the repair and maintenance line item, are there other things that you can be doing to mitigate the challenging or tough environment on the revenue side?

JOE SHOEN: I think the biggest thing is trying to knock people's socks off with improved service. And like a lot of people at the home office, I see lots and lots of the complaints. And every time I see a complaint -- the standard one is that person tells 10 people and you wish to God you'd never made them mad. So I'm focusing on that saying if we could.

We're bringing customers in at some kind of a steady rate I believe. I believe the differential is how many we're retaining if that makes sense. And if we up the retention we'll up the gross. And so I'm focusing on that and, again, I don't have a simple table that will show me arithmetically that I've achieved it. But I see a tremendous level of detail and I can see in the same market a location up 10 and one down 10 and it's not the market. They're identical markets. I mean, these are locations within 10 miles of each other in the same basic demos.

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So it has to do with fundamental management like in every business and so I'm focusing on that. I don't see a magic wand or a campaign I can just produce and that's going to give me ex percent. So right now I'm focused very hard and have been for some period on, okay, let's simply make the existing customer happier and statistically we're going to do better. How to do that is a whole bunch of very minor moves, there's no magic wand but it's are your trucks cleaner. I believe our trucks are cleaner than they were last year at this time. And that's a big part of the experience, honest to God, is was the truck clean. And they're getting made filthy every day and there's a whole bunch of macro issues.

Truck washing, which is a mundane subject, becomes much less mundane if you're in my job because there are all kinds of market that won't even let you wash the truck in. You can't turn the hose on and run the water, they won't let you do it. But the customer still has the expectation, and you'd darn well better meet their expectation, so let's learn how to do it. I was alluding to some of that; in my prepared remarks I talked about these macro issues like sustainability. This is only getting -- it's bearing down worse.

I got an estimate from somebody the other day and in their estimate they gave me at least 10 lines on what they're doing for sustainability. That's how much they perceive -- it was a small business -- it's how much they perceive it's influencing people's decision-making. Well, I can tell you this, on that front U-Haul is far ahead of either the Penske or the Budget organization. And I think our customer expects us to and the better we do it and the better we communicate it the more likely we're going to get their repeat -- earn their repeat business.

And we're doing a far better job relative than our competitor, but at the same time the essence of our business is that we burn fossil fuel and engage in the mayhem on the roadways. So always going to have somebody who gets in some sort of a tragic accident and I'm always burning fuel just as fast as it can be pumped in these trucks. So that kind of puts us on the wrong end of this deal from

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a macro point of view. We're doing a lot of things to make us be -- I don't know what you want to say -- the least worse or really better than that.

I think we have -- we have evidence that indicates we can have a significant positive effect if we implement our business plan exactly like we know how to do it. And I won't bore you all with that here today, but selling that at the municipal and state level will engender us to the people who are going to make decisions that could adversely impact us that basically relate to greenhouse gases and community relations or land use planning and those are big issues for us in almost every market in North America.

SIMON WILLIS: Thank you very much.

OPERATOR: This concludes our Q&A session. I will now turn the call over to Mr. Shoen.

JOE SHOEN: I want to thank you all for your continued support. I don't -- I wish I had a rosier prediction for the fourth quarter, but I don't. We're going to continue ahead, I believe we have a pretty motivated work group and I look forward to talking to you when we have our year-end results.

OPERATOR: This concludes today's conference call. You may now disconnect.

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in the companies' most recent SEC filings. Although the companies may indicate and believe that the assumptions underlying the forward-looking statements are reasonable, any of the assumptions could prove inaccurate or incorrect and, therefore, there can be no assurance that the results contemplated in the forward-looking statements will be realized.

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LOAD-DATE: February 12, 2008

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of U-Haul International, Inc., and AMERCO, (hereinafter referred to as “Respondents”), and Respondents having been furnished thereafter with a copy of the draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“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 Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent AMERCO is a corporation organized, existing, and doing business under and by virtue of the laws of Nevada, with its principal address at 1325 Airmotive Way, Ste. 100, Reno, Nevada 89502.
2. Respondent U-Haul International, Inc., is a corporation organized, existing, and doing business under and by

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virtue of the laws of Nevada, with its principal address at 2727 North Central Avenue, Phoenix, Arizona 85004. U-Haul International, Inc., is a wholly-owned subsidiary of AMERCO.

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

ORDER**I.**

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

- A. “U-Haul” means Respondent U-Haul International, Inc., its directors, officers, employees, agents, attorneys, representatives, successors, and assigns; its subsidiaries, the divisions, groups, and affiliates controlled, by U-Haul International, Inc., (including, as applicable, state operating companies such as U-Haul Co. of Florida, Inc., and marketing companies such as U-Haul Company of Tampa); and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “AMERCO” means Respondent AMERCO, its directors, officers, employees, agents, attorneys, representatives, successors, and assigns; its subsidiaries, the divisions, groups, and affiliates controlled, by AMERCO; and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- C. Respondents means Respondent U-Haul and Respondent AMERCO.
- D. “Budget” means Avis Budget Group, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of

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Delaware, with its principal address at 6 Sylvan Way, Persippany, New Jersey 07054.

- E. “Penske” means Penske Truck Leasing Co., L.P., a limited partnership organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal address at Route 10 Green Hills, Reading, Pennsylvania 19603.
- F. “Commission” means the Federal Trade Commission.
- G. “Communicating” means any transfer or dissemination of information, regardless of the means by which it is accomplished, including orally, by letter, e-mail, notice, or memorandum.
- H. “Competitor” means any Person engaged in the business of leasing or renting trucks for use by individuals.
- I. “Designated Employees” means all United States Traffic Control Managers, Area Field Managers, General Managers, and Executive Assistants employed by Respondents’ marketing companies. “Designated Employees” does not include U-Haul Dealers.
- J. “Designated Managers” means each officer and director of Respondent U-Haul and each officer and director of Respondent AMERCO, Respondents’ Executive Vice Presidents, Area District Vice Presidents, Vice President of Rates and Distribution, Rate Analysts, and United States Marketing Company Presidents. Designated Managers also includes any employee of a Respondent with direct or supervisory responsibility for investor relations. *Provided, however,* Designated Managers does not include: (1) officers and directors of AMERCO’s subsidiaries not engaged in truck rentals; and (2) U-Haul Dealers.
- K. “Federal Securities Laws” means the securities laws as that term is defined in § 3(a)(47) of the Securities

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Exchange Act of 1934, 15 U.S.C. § 78c(a)(47), and any regulation or order of the Securities and Exchange Commission issued under such laws.

- L. “Insider” means a Consultant, officer, director, employee, agent, or attorney of U-Haul. *Provided, however,* that a Competitor shall not be considered to be an “Insider.”
- M. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, partnerships, and unincorporated entities.
- N. “U-Haul Dealer(s)” means any United States Person not owned or controlled by U-Haul that has entered into a contract with a U-Haul state operating company or a U-Haul marketing company to rent trucks to customers in return for commissions.

II.

IT IS FURTHER ORDERED that in connection with the rental of trucks in or affecting commerce, as “commerce” is defined by the Federal Trade Commission Act, Respondents shall cease and desist from, either directly or indirectly, or through any corporate or other device:

- A. Communicating, publicly or privately, to any Person who is not an Insider, that Respondents are ready or willing:
 - 1. To raise, fix, maintain, or stabilize prices or price levels, rates or rate levels, conditional upon a Competitor also raising, fixing, maintaining, or stabilizing prices or price levels, rates or rate levels; or
 - 2. To forbear from competing for any customer, contract, transaction, or business opportunity, conditional upon a Competitor also forbearing from competing for any customer, contract, transaction, or business opportunity;

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- B. Communicating with Budget or Penske regarding Respondents' prices or rates; *provided, however*, that for purposes of this Paragraph II.B Communicating does not include the transfer or dissemination of information through Web sites or other widely accessible methods of advertising such as newspapers, television, or signage;
- C. Entering into, attempting to enter into, adhering to, participating in, maintaining, organizing, implementing, enforcing, inviting, offering or soliciting any combination, conspiracy, agreement, or understanding between or among U-Haul and any Competitor:
1. To raise, fix, maintain, or stabilize prices or price levels, rates or rate levels, or to engage in any other pricing action; or
 2. To allocate or divide markets, customers, contracts, transactions, business opportunities, lines of commerce, or territories.

Provided, however, it shall not, of itself, constitute a violation of Paragraph II.C of this Order for Respondents to engage in any of the conduct described in this paragraph with a Competitor (other than Budget or Penske) where such conduct is reasonably related to a lawful joint venture or dealer relationship and reasonably necessary to achieve the procompetitive benefits of the joint venture or dealer relationship; and

- D. Instructing or otherwise encouraging any U-Haul Dealer to engage in any conduct that Respondents are prohibited from engaging in under Paragraphs II.A, II.B, or II.C of this Order.

Provided, however, that it shall not, of itself, constitute a violation of Paragraph II of this Order for Respondents: (1) to Communicate to any Person reasonably believed to be an actual

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or prospective truck rental customer, Respondents' rental rate and/or that Respondents are ready or willing to lower that rental rate in response to a Competitor's rental rate; (2) to Communicate to any Person reasonably believed to be with a market research firm Respondents' rental rates; (3) without knowingly disclosing his/her affiliation with U-Haul, and while taking steps reasonably calculated to conceal his/her affiliation with U-Haul, and for the purpose of legitimate market research (i) to request from a Competitor information regarding its rental rate; or (ii) to communicate to a Competitor U-Haul's rental rate for a proposed transaction; or (4) publicly to disclose any information where and at such time as the public disclosure of this information by Respondents is required by the Federal Securities Laws.

III.

IT IS FURTHER ORDERED that Respondent U-Haul shall:

- A. Within thirty (30) days after the date on which this Order becomes final:
 1. Send to each Designated Manager a copy of this Order and the Complaint by first-class mail with delivery confirmation or by electronic mail with return confirmation; and
 2. Send or distribute to each Designated Employee by hand delivery, first-class mail, electronic mail or electronic distribution, a notice stating that U-Haul employees shall not invite any competitor to fix or raise prices or allocate customers or communicate with a competitor that U-Haul is willing to fix or raise prices or forbear from competing for customers if the competitor agrees to do the same.
- B. Within six (6) months after the date on which this Order becomes final, send or distribute to each U-Haul Dealer by hand delivery, first-class mail, electronic mail or electronic distribution, a notice stating that U-Haul Dealers shall not invite any competitor to fix or raise prices or allocate customers or communicate with a competitor that U-Haul is willing to fix or raise

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prices or forbear from competing for customers if the competitor agrees to do the same.

- C. For four (4) years from the date this Order becomes final send a copy of this Order by first class mail with delivery confirmation or electronic mail with return confirmation to each person who becomes a director, officer, or Designated Manager, no later than (30) days after the commencement of such person's employment or affiliation with Respondents.
- D. Require each person to whom a copy of this Order is furnished pursuant to Paragraphs III.A.1 and III.C of this Order to sign and submit to Respondent U-Haul International within thirty (30) days of the receipt thereof a statement that: (1) represents that the undersigned has read and understands the Order; and (2) acknowledges that the undersigned had been advised and understands that non-compliance with the Order may subject Respondents to penalties for violation of the Order.

IV.

IT IS FURTHER ORDERED that Respondent U-Haul shall file verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for four (4) 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. An unredacted (except for claims of a recognized privilege) copy of each U-Haul memorandum described in the appendix to this Order;
- B. Copies of the delivery confirmations or electronic mail with return confirmations required by Paragraph III.A.1 and III.C of this Order;

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- C. A Copy of the notice(s) required by III.A.2 and III.B of the Order; and
- D. A detailed description of the manner and form in which Respondents have complied and are complying with this Order.

V.

IT IS FURTHER ORDERED that each 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: (1) dissolution of such Respondent; (2) acquisition, merger, or consolidation of such Respondent; or (3) 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.

VI.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, upon written request, each 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 obtain copies of relevant books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Decision and Order; and
- B. Upon five (5) days' notice to a Respondent and without restraint or interference from it, to interview officers, directors, or employees of such Respondent.

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VII.

IT IS FURTHER ORDERED that this Decision and Order shall terminate twenty (20) years from the date the Decision and Order is issued.

By the Commission.

Decision and Order

CONFIDENTIAL APPENDIX

**[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**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with U-Haul International, Inc. and its parent company AMERCO (collectively referred to as “U-Haul” or “Respondents”). The agreement settles charges that U-Haul violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by inviting its closest competitor in the consumer truck rental industry to join with U-Haul in a collusive scheme to raise rates. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed order. The analysis does not constitute an official interpretation of the agreement and proposed order, and does not 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 Respondents that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The allegations of the complaint are summarized below:

U-Haul is the largest consumer truck rental company in the United States. Edward J. Shoen is the Chairman, President and Director of AMERCO, and the Chief Executive Officer and Chairman of U-Haul International, Inc. U-Haul’s primary competitors in the truck rental industry are Avis Budget Group, Inc. (“Budget”) and Penske Truck Leasing Co., L.P. (“Penske”).

Analysis to Aid Public Comment

A. Private Communications

For several years leading up to 2006, Mr. Shoen was aware that price competition from Budget was forcing U-Haul to lower its rates for one-way truck rentals. In 2006, Mr. Shoen developed a strategy in an attempt to eliminate this competition and thereby secure higher rates. Mr. Shoen instructed U-Haul regional managers to raise rates for truck rentals, and then contact Budget to inform Budget of U-Haul's conditional rate increase and encourage Budget to follow, or U-Haul's rates would be reduced to the original level.

At about the same time, Mr. Shoen also instructed local U-Haul dealers to communicate with their counterparts at Budget and Penske, with the purpose of re-enforcing the message that U-Haul had raised its rates, and competitors' rates should be raised to match the increased U-Haul rates.

In late 2006 and thereafter, U-Haul representatives contacted Budget and invited price collusion as instructed by Mr. Shoen. The complaint includes specific allegations regarding the U-Haul operation in Tampa, Florida.

U-Haul's regional manager for the Tampa area is Robert Magyar. In October 2006, Mr. Magyar received from Mr. Shoen the instructions described above. In response to Mr. Shoen's directive, Mr. Magyar increased U-Haul's rates for one-way truck rentals commencing in the Tampa area. Next, Mr. Magyar telephoned Budget and communicated to Budget representatives that U-Haul had raised its rates in Tampa, and that the new rates could be viewed on the U-Haul web-site.

One year later, in October 2007, Mr. Magyar again contacted several local Budget locations. Mr. Magyar communicated to Budget that U-Haul had increased its one-way truck rental rates, and that Budget should increase its rates as well. In an e-mail message addressed to U-Haul's most senior executives, Mr. Magyar related the conversations, as follows:

I have also called 3 major Budget locations in Tampa and told them who I am, I spoke about the .40 per mile rates to SE Florida and told them I

Analysis to Aid Public Comment

was killing them on rentals to that area and I am setting new rates to the area to increase revenue per rental. I encouraged them to monitor my rates and to move their rates up. And they did.

B. Public Communications

In late 2007, Mr. Shoen decided that U-Haul should attempt to lead an increase in rates for one-way truck rentals across the United States. Mr. Shoen understood that this rate increase could be sustained only if Budget followed. On November 19, 2007, Mr. Shoen instructed U-Haul regional managers to raise prices. His expectation was that Budget would follow this rate increase.

However, Budget did not immediately match U-Haul's higher rates. U-Haul instructed its regional managers to maintain the new, higher rates for a while longer, in case Budget should take note and decide to follow.

U-Haul held an earnings conference call on February 7, 2008. Mr. Shoen was aware that Budget representatives would monitor the call. Mr. Shoen opened the earnings conference call with a short statement, noting U-Haul's efforts "to show price leadership."¹ When asked for additional information on industry pricing, Mr. Shoen made the following points:

1. U-Haul is acting as the industry price leader. The company has recently raised its rates, and competitors should do the same.
2. To date, Budget has not matched U-Haul's higher rates. This is unfortunate for the entire industry.
3. U-Haul will wait a while longer for Budget to respond appropriately, otherwise it will drop its rates.
4. In order to keep U-Haul from dropping its rates, Budget does not have to match U-Haul's rates

¹ A complete transcript of the earnings conference call is annexed to the complaint as Exhibit A.

Analysis to Aid Public Comment

precisely. U-Haul will tolerate a small price differential, but only a small price differential. Specifically, a 3 to 5 percent price difference is acceptable.

5. For U-Haul, market share is more important than price. U-Haul will not permit Budget to gain market share at U-Haul's expense.

With regard to both the private and public communications, U-Haul acted with the specific intent to facilitate collusion and increase the prices it could charge for truck rentals.

II. Analysis

The term "invitation to collude" describes an improper communication from a firm to an actual or potential competitor that the firm is ready and willing to coordinate on price or output. Such invitations to collude increase the risk of anticompetitive harm to consumers, and as such, can violate Section 5 of the FTC Act.²

If the invitation is accepted and the two firms reach an agreement, the Commission will allege collusion and refer the matter to the Department of Justice for a criminal investigation. In this case, the complaint does not allege that U-Haul and Budget reached an agreement, despite Mr. Magyar's report to his bosses that he privately encouraged Budget to raise its rates "and they did." See Complaint Paragraph 19.

² *In the Matter of Valassis Communications, Inc.*, 141 F.T.C. ___ (C-4160) (2006); *In the Matter of MacDermid, Inc.*, 129 F.T.C. ___ (C-3911) (2000); *In the Matter of Stone Container Corp.*, 125 F.T.C. 853 (1998); *In the Matter of Precision Moulding Co.*, 122 F.T.C. 104 (1996); *In the Matter of YKK (USA) Inc.*, 116 F.T.C. 628 (1993); *In the Matter of A.E. Clevite, Inc.*, 116 F.T.C. 389 (1993); *In the Matter of Quality Trailer Products Corp.*, 115 F.T.C. 944 (1992). In addition, invitations to collude may be violations of Section 2 of the Sherman Act as acts of attempted monopolization (*United States v. American Airlines*, 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985)); as well as violations under the federal wire and mail fraud statutes, (*United States v. Ames Sintering Co.*, 927 F.2d 232 (6th Cir. 1990)).

Analysis to Aid Public Comment

Even if no agreement was reached it does not necessarily mean that no competitive harm was done.³ An unaccepted invitation to collude may facilitate coordinated interaction by disclosing the solicitor's intentions and preferences. For example, in this case Budget learned from Mr. Magyar that if Budget raised its rates U-Haul would not undercut Budget. Thus, the improper communication from U-Haul could have encouraged Budget to raise rates. Similarly, the public statements made by the CEO of U-Haul could have encouraged competitors to raise rates.

Although this case involves particularly egregious conduct, it is possible that less egregious conduct may result in Section 5 liability. It is not essential that the Commission find repeated misconduct attributable to senior executives, or define a market, or show market power, or establish substantial competitive harm, or even find that the terms of the desired agreement have been communicated with precision.

III. The Proposed Consent Order

U-Haul has signed a consent agreement containing the proposed consent order. The proposed consent order consists of seven sections that work together to enjoin U-Haul from inviting collusion and from entering into or implementing a collusive scheme.

Section II, Paragraph A of the proposed consent order enjoins U-Haul from inviting a competitor to divide markets, to allocate customers, or to fix prices. Section II, Paragraph C prohibits U-Haul from entering into, participating in, maintaining, organizing, implementing, enforcing, inviting, offering or soliciting an agreement with any competitor to divide markets, to allocate

³ The Commission has previously explained that there are several legal and economic reasons to punish firms that invite collusion even when acceptance cannot be proven. First, it may be difficult to determine whether a particular solicitation has or has not been accepted. Second, the conduct may be harmful and serves no legitimate business purpose. Third, even an unaccepted solicitation may facilitate coordinated interaction by disclosing the intentions or preferences of the party issuing the invitation. *In the Matter of Valassis Communications, Inc.*, Analysis of Agreement Containing Consent Order To Aid Public Comment, 71 Fed. Reg. 13976, 13978-79 (Mar. 20, 2006). See generally P. Areeda & H. Hovenkamp, VI ANTITRUST LAW ¶1419 (2003).

Analysis to Aid Public Comment

customers, or to fix prices. Section II, Paragraph B bars U-Haul from discussing rates with its competitors, with a proviso permitting legitimate market research.

The proviso in Section II, Paragraph D prevents the proposed order from interfering with U-Haul's efforts to negotiate prices with prospective customers, and it would permit U-Haul to provide investors with considerable information about company strategy. This proviso also permits U-Haul to communicate publicly any information required by the federal securities laws.

Sections III, IV, V, and VI of the proposed order include several terms that are common to many Commission orders, facilitating the Commission's efforts to monitor respondents' compliance with the order. Section IV, Paragraph A requires a periodic submission to the Commission of unredacted copies of certain internal U-Haul documents. This provision is necessary because U-Haul impeded the Federal Trade Commission's investigation of this matter. Specifically, U-Haul submitted to the Commission, in response to a *subpoena duces tecum*, documents authored by Mr. Shoen, from which were redacted many of the sentences quoted in the complaint. In the Commission's view, there was no justification for the redaction. The proposed order should deter repetition of this conduct.

Finally, Section VII provides that the proposed order will expire in 20 years.

Concurring Statement

**STATEMENT OF CHAIRMAN LEIBOWITZ,
COMMISSIONER KOVACIC, AND
COMMISSIONER ROSCH**

The Commission today has entered into a consent agreement with U-Haul and its parent company, AMERCO, resolving the Commission's allegation that they attempted to collude on truck rental prices. The parties have settled an invitation-to-collude case and not a Sherman Antitrust Act Section 1 conspiracy case. Put differently, the complaint in this case alleges an unfair method of competition in violation of Section 5 of the FTC Act that does not also constitute an antitrust violation.

Invitations to collude are the quintessential example of the kind of conduct that should be – and has been – challenged as a violation of Section 5 of the Federal Trade Commission Act,¹ which may limit follow-on private treble damage litigation from Commission action while still stopping inappropriate conduct. In contrast to conspiracy claims that would violate Section 1, invitations to collude do not require proof of an agreement; nor do they require proof of an anticompetitive effect. The Commission has not alleged that Respondents entered into an agreement with Budget or any other competitors in violation of Section 1. Today's Commission action is instead based on evidence that Respondents unilaterally attempted to enter into such an agreement. The Commission therefore has reason to believe that Respondents engaged in conduct that is within Section 5's reach.

¹ *In re Valassis Commc'ns, Inc.*, F.T.C. File No. 051-008, 2006 FTC LEXIS 25 (April 19, 2006) (Complaint); *In re MacDermid, Inc.*, F.T.C. File No. 991-0167, 1999 FTC LEXIS 191 (Feb. 4, 2000) (Complaint, Decision and Order); *In re Stone Container Corp.*, 125 F.T.C. 853 (1998) (June 3, 1998) (Complaint, Decision and Order); *In re Precision Moulding Co.*, 122 F.T.C. 104 (Sept. 3, 1996) (Complaint, Decision and Order); *In re YKK (USA) Inc.*, 116 F.T.C. 628 (July 1, 1993) (Complaint); *In re A.E. Clevite, Inc.*, 116 F.T.C. 389 (June 8, 1993) (Complaint); *In re Quality Trailer Products Corp.*, 115 F.T.C. 944 (Nov. 5, 1992) (Complaint).

Complaint

IN THE MATTER OF

**AEA INVESTORS 2006 FUND, L.P.,
HHI HOLDING CORPORATION,
AND
HOUGHTON INTERNATIONAL, INC.**

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

*Docket No. C-4297; File No. 081 0245
Filed August 26, 2010 — Decision, August 26, 2010*

The consent order addresses allegations that the proposed acquisition of S.A. Stuart GmbH (“Stuart”) by Houghton International, Inc. (“Houghton”) would result in decreased innovation in the market for aluminum hot rolling oil (“AHRO”) in North America and higher prices for AHRO to U.S. consumers. Under the consent order, Houghton is required to divest Stuart’s AHRO business to Quaker Chemical Corporation and provide transitional services to ensure a smooth transfer of AHRO assets. Under the consent order, the Commission will appoint a trustee to oversee the divestiture and a trustee to monitor compliance with the terms of the order.

Participants

For the *Commission*: Anna Chehtova, Mike Clark, Rebecca Dick, Robert E. Friedman, James Frost, Amanda Hamilton, Mark D. Seidman, Justin Stewart-Teitelbaum, and Jodie Williams.

For the *Respondents*: Charles F. (Rick) Rule, Cadwalader, Wickersham & Taft LLP; and Peter Guryan, Fried, Frank, Harris, Shriver & Jacobson LLP.

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 AEA Investors 2006 Fund, L.P., Respondent HII Holding Corporation and Respondent Houghton International, Inc. (“Houghton”), violated 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

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U.S.C. § 45, by purchasing D.A. Stuart Holding GmbH (“Stuart”) from Wilh. Werhahn KG (“Werhahn”), 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

A. AEA

1. Respondent AEA is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 55 East 52nd Street, New York, New York 10055.

2. Respondent AEA is a person subject to the jurisdiction of the Commission.

3. Respondent AEA 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.

4. Respondent AEA is a person 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.

B. HII Holding Corporation

5. Respondent HII Holding Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Madison and Van Buren Avenues, Valley Forge, Pennsylvania 19482-0930.

6. HII Holding Corporation is a subsidiary of Respondent AEA.

7. HII Holding Corporation now owns all outstanding voting securities of Stuart.

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8. HII Holding Corporation is a corporation subject to the jurisdiction of the Commission.

9. HII Holding Corporation 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.

10. HII Holding Corporation 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.

C. Houghton International, Inc.

11. Houghton is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at Madison and Van Buren Avenues, Valley Forge, Pennsylvania 19482-0930.

12. Houghton is a wholly-owned subsidiary of HII Holding Corporation.

13. Houghton is an international manufacturer of specialty chemicals and a provider of chemical management services for the metalworking industry. Houghton’s major product lines include fluids used in metal cutting, fluid power (hydraulics) and metal rolling. Houghton is engaged in the sale of aluminum hot rolling oil (“AHRO”) and associated technical support services.

14. Houghton 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.

15. Houghton 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.

16. Respondents AEA, HII Holding Corporation, and Houghton International, Inc. hereinafter are collectively referred to as “Respondents.”

Complaint

II. THE ACQUISITION

17. On July 3, 2008, Respondents entered into a Share Purchase Agreement (“Agreement”) with Werhahn and Stuart VV to acquire all of the outstanding voting securities of Stuart (“Acquisition”).

18. The Acquisition combined the two largest producers of AHRO.

III. THE RELEVANT MARKET

A. Product Market

19. The relevant product market in which to analyze the competitive effects of the Acquisition is the production and sale of AHRO and associated technical support services. AHRO is an indispensable element in the production of hot rolled aluminum plate and hot rolled aluminum sheet.

20. There are no products or services that are reasonably interchangeable with or viable substitutes for AHRO and its associated technical support services.

B. Geographic Market

21. The relevant geographic market for analyzing the effects of the Acquisition is North America. North American customers are unlikely to purchase AHRO and associated technical support services from suppliers located overseas due to the high cost of transporting these products by marine vessel and the long lead times associated with the marine transport of AHRO.

IV. MARKET PARTICIPANTS AND CONCENTRATION

22. Five firms produce AHRO in North America. Two large aluminum hot mill customers partially supply their own AHRO needs and three firms produce AHRO commercially. The Acquisition reduces the total number of producers from five to four.

Complaint

23. The Acquisition greatly increases concentration in the relevant market. Stuart and Houghton together control approximately 75% of the North American market for AHRO.

V. ANTICOMPETITIVE EFFECTS

24. The proposed acquisition may substantially lessen competition in the following ways, among others:

- a. by eliminating actual, direct and substantial competition between Houghton and Stuart in the sale of AHRO and associated technical support services in the relevant market;
- b. by combining the two dominant suppliers of AHRO and associated technical support services in the United States, thereby substantially increasing concentration in the already concentrated market for the sale of AHRO and associated technical support services in North America;
- c. by eliminating Stuart as the closest substitute to Houghton for AHRO and associated technical support services in North America;
- d. by increasing the likelihood that a combined Houghton and Stuart will unilaterally exercise market power in the sale and distribution of AHRO and associated technical support services;

each of which increases the likelihood that prices for AHRO and associated technical support services will increase above competitive levels, and that competition for the sale of AHRO and associated technical support services is likely to decrease in the relevant market.

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VI. ENTRY CONDITIONS

25. Entry into the relevant markets is difficult and would not be likely, timely or sufficient to remedy the anticompetitive effects of the proposed acquisition.

VII. VIOLATIONS

26. The allegations contained in paragraphs 1-25 are repeated and realleged as though fully set forth here.

27. Respondents' acquisition of Stuart substantially lessened competition 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.

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

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by the Secretary and its official seal to be affixed hereto, at Washington, D.C., this twenty-sixth day of August, 2010.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the consummated acquisition of D.A. Stuart Holding GmbH ("D.A. Stuart") by Respondent AEA Investors 2006 Fund, L.P. ("AEA"), the parent of Respondent HII Holding Corporation ("HII"), which in turn is the parent of Respondent Houghton International, Inc. (collectively referred to as "Respondents"), from Wilh. Werhahn KG ("Werhahn"), and

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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 Order (“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 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 AEA Investors 2006 Fund, L.P., is a limited partnership 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 located at 55 East 52nd Street, New York, New York 10055. AEA is the parent of Respondent HII Holding Corporation and the ultimate parent entity of Houghton International, Inc.
2. Respondent HII Holding Corporation is a corporation organized, existing, and doing business under and by

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virtue of the laws of the State of Delaware, with its offices and principal place of business located at Madison and Van Buren Avenues, Valley Forge, Pennsylvania 19482-0930. Houghton International, Inc., is a wholly-owned subsidiary of HII Holding Corporation.

3. Respondent Houghton International, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its offices and principal place of business located at Madison and Van Buren Avenues, Valley Forge, Pennsylvania 19482-0930.
4. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and this proceeding is in the public interest.

ORDER**I.**

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

- A. “AEA” means AEA Investors 2006 Fund, L.P., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by AEA (including, but not limited to, HII and Houghton), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “HII” means HII Holding Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by HII (including, but not limited to, Houghton), and the respective directors, officers,

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employees, agents, representatives, successors, and assigns of each.

- C. “Houghton” means Houghton International, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Houghton, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Respondents” means AEA, HII, and Houghton.
- E. “Acquisition” means the acquisition accomplished pursuant to the July 3, 2008, Share Purchase Agreement between Stuart VV GmbH and Wilh. Werhahn KG, on the one hand, and Houghton International Inc. and HII Holding Corp, on the other hand, whereby AEA acquired D.A. Stuart.
- F. “Actual Cost” means a cost not to exceed the cost of direct labor, direct material used, travel, and other expenditures to the extent the costs are directly incurred to provide the Products; *provided, however*, that in each instance where (1) an agreement to divest assets is specifically referenced and attached to this Order, and (2) such agreement becomes a Remedial Agreement, “Actual Cost” means such cost as is provided in such Remedial Agreement.
- G. “Agreement to Hold Separate” means the agreement executed by and between Respondents and the Commission’s staff on September 8, 2008, requiring Respondents to hold “D.A. Stuart’s Aluminum Business,” as that term is defined in the Agreement to Hold Separate, separate and apart from and independent of Respondent’s business and to maintain the viability, marketability, and competitiveness of “D.A. Stuart’s Aluminum Business” until the Agreement terminates pursuant to the agreed-upon conditions. As used in this Order, the term “Held Separate Business” means “D.A. Stuart’s Aluminum

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Business” as defined in the Agreement to Hold Separate. The Agreement to Hold Separate is attached hereto as Non-Public Appendix A.

- H. “Books and Records” means all originals and all copies of any operating, financial or other books, records, documents, data and files relating to the D.A. Stuart AHRO Business, 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 Relevant Employees who accept employment with the Commission-approved 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, however, that where documents or other materials included in the Books and Records to be divested with the D.A. Stuart AHRO Business contain information: (1) that relates both to the D.A. Stuart AHRO Business and to Respondents’ retained assets, products or businesses and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the D.A. Stuart AHRO Business; 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 Commission-approved

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Acquirer, the relevant party shall provide the Commission-approved 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 Respondents provide the Commission-approved Acquirer with the above-described information without requiring Respondents to completely divest information that, in content, also relates to retained assets, products or businesses.

- I. “Closing Date” means the date on which Respondents (or a Divestiture Trustee) and a Commission-approved Acquirer consummate a transaction to comply with Paragraph II. (or Paragraph VI.) of this Order.
- J. “Commission” means the Federal Trade Commission.
- K. “Commission-approved Acquirer” means the following:
 - 1. Quaker, if Quaker has been approved by the Commission to acquire the Divestiture Assets pursuant to Paragraph II. of this Order in connection with the Commission’s determination to make this Order final; or
 - 2. a Person that receives the prior approval of the Commission to acquire the Divestiture Assets pursuant to Paragraph II. or Paragraph VI. of this Order.
- L. “Confidential Business Information” means any non-public, competitively sensitive, or proprietary marketing and sales information relating to the D.A. Stuart AHRO Business that is not independently known to a Person from sources other than the Person to which the information pertains, and includes, but is not limited to, pricing information, marketing methods, market intelligence, competitor product information, commercial information, management system information, business processes and practices,

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customer communications, bidding practices and information, procurement practices and information, supplier qualification and approval practices and information, and training practices; *provided, however*, that where documents or other materials included in the Confidential Business Information to be divested with the Divestiture Assets contain information: (1) that relates both to the D.A. Stuart AHRO Business and to Respondents' retained assets, products or businesses and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the D.A. Stuart AHRO Business; 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; *provided further, however*, that Confidential Business Information does not include any information that (i) was or becomes generally available to the public other than as a result of disclosure by such Person, (ii) was available, or becomes available, to such Person on a non-confidential basis, but only if, to the knowledge of such Person, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information, (iii) is required by Law to be publicly disclosed, or (iv) 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. Confidential Business Information includes information regardless of the form in which it is conveyed, including written and electronic versions. The purpose of this proviso is to ensure that Respondents provide the Commission-approved Acquirer with the above-described information without requiring Respondents to completely divest information that, in content, also relates to retained assets, products or businesses. For the avoidance of doubt and notwithstanding the foregoing, "Confidential Business Information" shall

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not include any information that is related to the research, development, design, formulation, manufacturing, or technical service or support of the Products, including but not limited to information relating to trials conducted anywhere in the world; such information shall be subject to the requirements and obligations of this Order relating to “Intellectual Property.”

- M. “Consent Agreement” means the Agreement Containing Consent Order executed by Respondents on May 28, 2010.
- N. “Customer” means any Person that is a direct or indirect purchaser of any D.A. Stuart AHRO Business Product(s) in the United States (including all U.S. territories and possessions).
- O. “Customer Approvals and Information” means, with respect to any D.A. Stuart AHRO Business Product(s):
1. all consents, authorizations and other approvals, and pending applications and requests therefore, required by any Customer applicable or related to the research, development, manufacture, finishing, packaging, distribution, marketing or sale of any D. A. Stuart AHRO Business Product(s); 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.
- P. “DAS AHRO Intellectual Property” means all rights, title and interest, worldwide, without limitation, in and to all Intellectual Property relating to the D.A. Stuart AHRO Business Product(s) or otherwise relating to or used in connection with the research, development, design, formulation, manufacturing, or technical service or support for, all D.A. Stuart AHRO Business

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Products by D.A. Stuart prior to the Acquisition and any improvements or additions thereto designed, developed, formulated or tested after the Acquisition by Respondents, including, but not limited to, all DAS AHRO Intermediate Component IP; *provided, however,* that Houghton shall have a right to obtain a license from the Commission-approved Acquirer to use the Licensor Intellectual Property to manufacture aluminum hot rolling oils for sale and use solely outside the United States (and its territories and possessions), pursuant to a Remedial Agreement; *provided further, however,* that notwithstanding the foregoing, and for the avoidance of doubt, Respondents shall not manufacture, use or sell or attempt to replicate, reverse engineer or otherwise produce any Intermediate Components, or any Products containing or using any Intermediate Components or any DAS AHRO Intermediate Component IP, except insofar as such Intermediate Components or Products containing or using Intermediate Components or DAS AHRO Intermediate Component IP are either: (i) produced by Respondents solely to be supplied to the Commission-approved Acquirer or to the Respondents pursuant to a Remedial Agreement for a limited transitional period after the Closing Date; and/or (ii) supplied to Respondents by the Commission-approved Acquirer pursuant to a Remedial Agreement;

- Q. “DAS AHRO Intermediate Component IP” means all Intellectual Property and Confidential Business Information relating to the Intermediate Components owned or used by D.A. Stuart prior to the Acquisition, and any improvements or additions thereto designed, developed, formulated or tested after the Acquisition.
- R. “D.A. Stuart” means D.A. Stuart Holding GmbH, a limited liability company incorporated under the laws of Germany with its offices and principal place of business located at Königsstrasse 1, 41460 Neuss, Germany.

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- S. “D.A. Stuart AHRO Business” means all of Respondents’ rights, title and interest in and to all of the following business, property and assets, tangible and intangible, relating to or used in the aluminum hot rolling oil business of D.A. Stuart in the United States (including all U.S. territories and possessions) as it existed prior to the Acquisition, together with any improvements or additions thereto after the Acquisition, including, but modifying in specified respects, “D.A. Stuart’s Aluminum Business” as held separate and apart from and independent of Houghton pursuant to the terms of the Agreement to Hold Separate, and also including, but not limited to:
1. the Held Separate Business;
 2. contracts, including Customer contracts in the United States (including all U.S. territories and possessions) to the extent related to the D.A. Stuart AHRO Business Products, and all of the former D.A. Stuart’s rights, titles, and interests in and to the contracts entered into in the ordinary course of business with suppliers, sales representatives, distributors, and agents (all in the United States) to the extent related to the D.A. Stuart AHRO Business Products;
 3. at the Commission-approved Acquirer’s option, all tangible personal property used in or relating solely to the D.A. Stuart AHRO Business, or otherwise provided for in a Remedial Agreement, including, but not limited to field and laboratory equipment;
 4. all Books and Records;
 5. all Confidential Business Information; and
 6. all consents, licenses, certificates, registrations or permits issued, granted, given or otherwise made available by or under the authority of any Governmental Entity or pursuant to any legal

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requirement, and all pending applications therefore or renewals thereof;

Provided, however, that the D.A. Stuart AHRO Business shall not include:

1. any real property interests (including fee simple and leasehold interests), except as provided for in the Quaker Lease Agreement;
2. any tangible personal property not used in or relating solely to the D.A. Stuart AHRO Business;
3. any right to use any name or logo of Houghton or of its predecessors or affiliates or its business, or any variant or derivative thereof, including but not limited to “Houghton International Inc.,” “Houghton International,” “Houghton,” “Houghton Intl,” “D.A. Stuart Company,” “D.A. Stuart,” “Stuart,” “Rolkleen,” or “Rollshield”;
4. the Products: Alushield 150-IBC and Alushield 150-SW;
5. any tangible or intangible property or assets owned or controlled by Respondents or in which Respondents had any right, title, or interest in prior to the Acquisition, except Confidential Business Information or DAS AHRO Intellectual Property;
6. Intellectual Property, except DAS AHRO Intellectual Property;
7. any assets used to provide administrative or support services, including accounting, finance, accounts payable, accounts receivable, credit, human resources, purchasing, shipping, and information technology, relating to retained assets, products or businesses, except as provided for in any Transition Services Agreement;

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8. field and laboratory, testing, or test evaluation equipment relating to retained assets, products or businesses, except those identified in Section 2.2(d) of the Quaker Asset Purchase Agreement;
9. any manufacturing or production facilities or plants, including the former D.A. Stuart's manufacturing facility located in Detroit, Michigan, and any related assets physically located or used at such facilities, except any such assets identified in the Quaker Asset Purchase Agreement;
10. any raw materials or inventories of work in process;
11. any cash and cash equivalents (including marketable securities and short term investments), securities, negotiable instruments and deposits held by Respondents or relating to the D.A. Stuart AHRO Business, in lock boxes, in financial institutions or elsewhere; or
12. any current and prior insurance policies of Respondents or rights of any nature with respect thereto, including all insurance recoveries thereunder and rights to assert claims with respect to any such insurance recoveries.

For the avoidance of doubt and notwithstanding the foregoing: (i) D.A. Stuart AHRO Business shall include Confidential Business Information, and (ii) DAS AHRO Intellectual Property shall be included within the Divestiture Assets, which Respondents shall divest in accordance with the terms of this Order.

- T. "D.A. Stuart AHRO Business Product(s)" means all Products with respect to which D.A. Stuart was engaged in the research, development, design, formulation, manufacture, distribution, marketing or sale prior to the Acquisition, and includes all Products researched, developed, designed, formulated,

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manufactured, distributed, marketed, or sold after the Acquisition.

- U. “D.A. Stuart Dedicated Aluminum Employees” means the individuals identified and described in the Agreement to Hold Separate with responsibilities for Product Management/Marketing, R&D, and Sales/Technical Support, and any persons who replace or have replaced those individuals consistent with the terms of the Agreement to Hold Separate who are identified in Non-Public Appendix B to this Order.
- V. “Designee(s)” means any Person other than a Respondent that has been designated by a Commission-approved Acquirer to manufacture a Product for that Commission-approved Acquirer.
- W. “Divestiture Assets” means D.A. Stuart AHRO Business and DAS AHRO Intellectual Property.
- X. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to Paragraph VI.A. of this Order.
- Y. “Governmental Entity(ies)” means any federal, state, local, or non-U.S. government; any court, legislature, governmental agency or governmental commission; or any judicial or regulatory authority of any government.
- Z. “Held Separate Business” means D.A. Stuart’s Aluminum Business as defined in the Agreement to Hold Separate to mean, inter alia, the business of D.A. Stuart in the United States as it existed prior to the Acquisition, of designing, formulating, manufacturing and selling hot rolling lubricants, coolants, and additives, or components thereof, used in the process of flat hot rolling of aluminum or any aluminum alloy in the United States, and as held separate and apart from and independent of Houghton, with maintained viability, marketability, and competitiveness, pursuant to the terms of the Agreement to Hold Separate.

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- AA. “Intellectual Property” means, without limitation: (1) Know-How; (2) Patents; (3) Trade Names and Marks; (4) all copyrights, copyright registrations and applications, in both published works and unpublished works, including domain names, the content of website(s) located at the domain names, and all copyrights in such website(s); and (5) 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.
- BB. “Interim Monitor” means a monitor appointed by the Commission pursuant to Paragraph V. of this Order.
- CC. “Intermediate Components” means chemical compositions of esters and emulsifiers designated: Code 556A, Code 566A and Code 18-16.
- DD. “Know-How” means all know-how, technology, technical information, data, trade secrets, proprietary information and knowledge, recipes, formulas, formulations, blend specifications, processes, procedures, practices, standards, methods, techniques, specifications, manuals, protocols, engineering, data, raw material specifications, product development records, customer specifications, equipment (including repair and maintenance information), tooling, spare parts, processes, procedures, product development records, quality assurance and quality-control practices and information and documentation, competitor information, inventions, research and test procedures and information, regulatory communications, and all other information relating to or used in connection with the research, development, design, formulation, manufacturing, or technical service or support for, Products, and all rights in any jurisdiction to limit the use or disclosure thereof, anywhere in the world.

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- EE. “Law(s)” means all laws, statutes, rules, regulations, ordinances, and other pronouncements having the effect of law.
- FF. “Licensor Intellectual Property” means (1) the formulations, research, development, and related manufacturing information for the aluminum hot rolling products listed in Non-Public Appendix C, (2) U.S. Patent No. 6,060,438, and (3) any Know-How owned by D.A. Stuart as of September 8, 2008, and any improvements thereon as of the Closing Date, relating to the design, research, development, formulation, and manufacture of hot rolling lubricants, coolants, and additives, or components thereof used in the process of flat hot rolling of aluminum or any aluminum alloy for use solely outside the United States (and its territories and possessions); *provided, however*, and for the avoidance of doubt, “Licensor Intellectual Property” does not include (1) any rights within the United States (including all U.S. territories and possessions) except those rights to use to manufacture as provided for in Section 3.1 of the Quaker License agreement, or (2) any rights to DAS AHRO Intermediate Component IP anywhere in the world.
- GG. “Order” means the Decision and Order.
- HH. “Patent(s)” means all patents, patents pending, patent applications and statutory invention registrations, including reissues, divisions, continuations, continuations-in-part, substitutions, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, all rights therein provided by international treaties and conventions, and all rights to obtain and file for patents and registrations thereto, anywhere in the world.
- II. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business entity,

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and any subsidiaries, divisions, groups or affiliates thereof.

- JJ. “Product(s)” means lubricants, coolants, and additives or components thereof used in the hot rolling of aluminum plates or sheets of any alloy.
- KK. “Quaker” means Quaker Chemical Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at One Quaker Park, 901 Hector Street, Conshohocken, Pennsylvania 19428-0809.
- LL. “Quaker Divestiture Agreements” means the following, which are referenced in and attached to this Order as Non-Public Appendix D:
1. Asset Purchase and Sale Agreement by and among Quaker Chemical Corporation and Houghton International, Inc., dated May 28, 2010, and all amendments, exhibits, attachments, agreements and schedules thereto (“Quaker Asset Purchase Agreement”);
 2. Transition Services Agreement by and among Quaker Chemical Corporation and Houghton International, Inc., dated May 28, 2010, which is attached as Exhibit A to the Quaker Asset Purchase Agreement, and all amendments, exhibits, attachments, agreements and schedules thereto (“Quaker Transition Services Agreement”);
 3. License Agreement by and among Quaker Chemical Corporation and Houghton International, Inc., dated May 28, 2010, which is attached as Exhibit B to the Quaker Asset Purchase Agreement, and all amendments, exhibits, attachments, agreements and schedules thereto (“Quaker License Agreement”);

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4. Supply Agreement by and among Quaker Chemical Corporation and Houghton International, Inc., dated May 28, 2010, and all amendments, exhibits, attachments, agreements and schedules thereto (“Quaker Supply Agreement”);
5. Quaker Lease Agreement; and
6. all other agreements by and among Quaker and Houghton, including all amendments, exhibits, attachments, agreements and schedules thereto, related to the divestiture of the Divestiture Assets.

MM. “Quaker Lease Agreement” means

NN. “Relevant Employees” means the Manager and D.A. Stuart Dedicated Aluminum Employees.

OO. “Remedial Agreement(s)” means the following:

1. Quaker Divestiture Agreements that have been approved by the Commission to accomplish the requirements of this Order in connection with the Commission’s determination to make this Order final; and/or
2. any agreement(s) between Respondents and a Commission-approved Acquirer (or between a Divestiture Trustee and a Commission-approved Acquirer), and all amendments, exhibits, attachments, agreements, and schedules thereto, related to divestiture of the Divestiture Assets that have been approved by the Commission to accomplish the requirements of this Order.

PP. “Technical Support” means, without limitation, all capabilities to provide customer-specific technical expertise, Product modification, Product tailoring, Product tweaking, Product performance advice, equipment assessment, on-site Product assistance, off-

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site Product assistance, and general Product issue-solving and trouble-shooting.

- QQ. “Termination Date” means the date on which Respondents’ provision of Transition Services to the Commission-approved Acquirer (including Quaker) pursuant to a Transition Services Agreement (including, but not limited to, the Quaker Transition Services Agreement if it is approved by the Commission in connection with the Commission’s determination to make this Order final) terminates or has terminated.
- RR. “Third Party(ies)” means any Person other than the following: (1) the Respondents, or (2) the Commission-approved Acquirer.
- SS. “Trade Names and Marks” means all trade names, commercial names and brand names, all registered and unregistered trademarks, service marks, including registrations and applications for registration thereof (and all renewals, modifications, and extensions thereof), trade dress, logos, and appellations, geographical indications or designations, domain name(s), universal resource locators (“URL”), and registrations thereof issued by any Person, Governmental Entity(ies) or authority that issues and maintains the domain name registration, and all rights related thereto under common law and otherwise, and the goodwill symbolized by and associated therewith, anywhere in the world.
- TT. “Transition Services” means any transitional manufacturing, supply, Technical Support, or other services necessary for the continued manufacture, development, use, import, distribution, marketing, or sale of the D.A. Stuart AHRO Business Products by the Commission-approved Acquirer
- UU. “Transition Services Agreement(s)” means any transitional agreement or arrangement entered into by and between the Respondents and a Commission-

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approved Acquirer to provide Transition Services that receives the prior approval of the Commission and thereby becomes a Remedial Agreement, or that is otherwise approved by the Commission in connection with the Commission's determination to make this Order final, including, but not limited to, the Quaker Transition Services Agreement included as part of the Quaker Divestiture Agreements if it is approved by the Commission in connection with the Commission's determination to make this Order final and thereby becomes a Remedial Agreement.

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

- A. Not later than ten (10) days after the date this Order becomes final, Respondents shall divest the Divestiture Assets, absolutely and in good faith to Quaker, pursuant to and in accordance with the Quaker 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 Quaker or to reduce any obligations of Respondents under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the divestiture of the D.A. Stuart AHRO Business to Quaker, is incorporated by reference into this Order and made a part hereof; *Provided, however*, that:
1. if Respondents have divested the Divestiture Assets to Quaker 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 Quaker is not an acceptable acquirer of the Divestiture Assets, then Respondents shall immediately rescind the transaction with Quaker and shall divest the Divestiture Assets to a Commission-

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approved Acquirer no later than six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, and only in a manner that receives the prior approval of the Commission; or

2. if the Respondents have divested the Divestiture Assets to Quaker 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, pursuant to Paragraph VI. of this Order, to effect such modifications to the manner of divesting Divestiture Asset to Quaker (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.
- B. Notwithstanding the timing requirement in Paragraph II.A., above, Respondents shall submit all Confidential Business Information relating to the D.A. Stuart AHRO Business to Quaker in good faith, in a timely manner (i.e., as soon as practicable, avoiding any delays in transmission of the respective information); and in a manner that ensures its completeness and accuracy and that fully preserves its usefulness.
- C. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary for Respondents to divest the Divestiture Assets and/or to grant any license(s) to a Commission-approved Acquirer to assure the continued use, research, development, manufacture, marketing, distribution, sale, or import of the D.A. Stuart AHRO Business Products by the Commission-approved Acquirer (or the Designee(s) of the Commission-approved Acquirer); *provided, however,* that Respondents may satisfy this requirement by certifying that such Commission-approved Acquirer has executed

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all such agreements directly with each of the relevant Third Parties.

- D. Until the divestiture of the Divestiture Assets and pursuant to the Agreement to Hold Separate, Respondents shall continue to hold D.A. Stuart's AHRO Business separate, apart, and independent of Houghton and take all steps necessary to ensure that D.A. Stuart's AHRO Business is maintained and operated as a separate and independent competitor in the business of designing, formulating, and selling lubricants, coolants, and additives, or components thereof used in the process of hot rolling aluminum sheet and aluminum plate; and Respondents shall continue to take such steps as are necessary to maintain, and assure the continued maintenance of, the viability, marketability, and competitiveness of D.A. Stuart's AHRO Business and the DAS AHRO Intellectual Property, including without limitation, DAS AHRO Intermediate Component IP, and to prevent the destruction, removal, wasting, deterioration, or impairment of D.A. Stuart's AHRO Business and the DAS AHRO Intellectual Property, except for ordinary wear and tear, and the disposition of inventory and other assets in the ordinary course of business and shall not sell, transfer, encumber, or otherwise impair D.A. Stuart's AHRO Business, the DAS AHRO Intellectual Property, including, without limitation, the DAS AHRO Intermediate Component IP; *provided, however*, that if Respondents have divested the Divestiture Assets to Quaker, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Quaker is not an acceptable acquirer of the Divestiture Assets and Respondents are required to rescind the transaction with Quaker pursuant to Paragraph II.A.1. of this Order, Respondents shall comply with the terms of this Paragraph II.D. and with paragraphs 1-11 of the Agreement to Hold Separate until divestiture of the Divestiture Assets to a Commission-approved Acquirer.

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- E. In the event that the Quaker Transition Services Agreement becomes a Remedial Agreement:
1. any extensions of the Transition Period (as defined in such agreement) during which Respondent shall provide Transition Services to Quaker shall be at the sole option of Quaker; *provided, however*, that any manufacturing, supply or other services provided by Respondents to Quaker pursuant to the Quaker Transition Services Agreement shall not be extended and shall not otherwise continue beyond a total period of two (2) years after the Closing Date without the prior approval of the Commission;
 2. Respondents shall notify the Commission in writing of the Termination Date with respect to the provision of Transition Services to Quaker pursuant to the Quaker Transition Services Agreement; and,
 3. as a limited exception to the prohibitions and requirements of Paragraph IV. of this Order, Respondents shall be permitted to use DAS AHRO Intellectual Property and the Confidential Business Information, and have continued access to copies of Books and Records only pursuant to, and subject to the approval of the Commission, a restricted and limited license to use only as necessary to perform Respondents' obligations pursuant to the Quaker Transition Services Agreement, and then only during the term of the Quaker Transition Services Agreement and only for the limited purposes of complying with the Quaker Transition Services Agreement; *Provided, however*, that Respondents shall:
 - a. immediately following the Termination Date, transfer and deliver expeditiously all DAS AHRO Intellectual Property, Confidential Business Information, and Books and Records

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(and all copies thereof) to Quaker, in a manner that ensures the completeness and accuracy of such documents, information, materials and Intellectual Property and that fully preserves their usefulness, and remove completely all DAS AHRO Intellectual Property and Confidential Business Information, including without limitation all DAS AHRO Intermediate Component IP, from Respondents' possession, custody and control;

- b. complete such transfer and delivery to Quaker and removal from Respondents' possession, custody and control within thirty (30) days of the Termination Date; and
 - c. no later than ten (10) days after completing such transfer, delivery, and removal, submit a report to the Commission describing how Respondents have complied with the requirements of this Paragraph II.E.3., and certifying under oath to the Commission that all such documents, information, materials and Intellectual Property have been transferred, delivered, and removed, as required, and that none is in the possession, custody or control of or retained by Respondents.
- F. If the Commission-approved Acquirer is not Quaker, at the option of the Commission-approved Acquirer Respondents shall enter into appropriate Transition Services Agreement(s) to provide Transition Services to the Commission-approved Acquirer, subject to the approval of the Commission, for a period not to exceed two (2) years after the Closing Date, at no more than Respondents' Actual Cost; *provided, however*, that Respondents shall not modify or amend such Transition Services Agreement(s), and shall not continue to provide manufacturing, supply or other services to the Commission-approved Acquirer beyond the two (2) year period provided by this Paragraph

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without the prior approval of the Commission; *provided further*, that as a limited exception to the prohibitions and requirements of Paragraph IV. of this Order, Respondents shall:

1. be permitted to use DAS AHRO Intellectual Property and Confidential Business Information and have access to copies of Books and Records only pursuant to, and subject to the approval of the Commission, a restricted and limited license to use only as necessary to perform Respondents' obligations pursuant to the Transition Services Agreement(s), and then only during the term of the Transition Services Agreement(s) and only for the limited purposes of the Transition Services Agreement(s); and
 2. following the Termination Date, shall fully comply with the requirements of Paragraph II.E.3. of this Order regarding, *inter alia*, the expeditious transfer and delivery to the Commission-approved Acquirer of all DAS AHRO Intellectual Property, Confidential Business Information, and Books and Records (and all copies thereof), the submission of a report to the Commission, and the certification under oath to the Commission that all documents, materials, information and Intellectual Property have been transferred, delivered, and removed, as required, and that none is in the possession, custody or control of or retained by Respondents.
- G. The purpose of the divestiture of the Divestiture Assets and the additional requirements in this Order is to ensure the continuation of D.A. Stuart's AHRO Business as a viable, on-going, independent and competitive business, in the same line of commerce in which D.A. Stuart's AHRO Business was engaged at the time of the Acquisition, including, but not limited to, worldwide rights to and the ability to enforce worldwide all DAS AHRO Intellectual Property, by a firm with sufficient ability and an equivalent incentive to invest and compete in that line of commerce that

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D.A. Stuart's AHRO Business had before the Acquisition, in order to remedy the lessening of competition alleged in the Commission's Complaint.

III.

IT IS FURTHER ORDERED that Respondents shall:

- A. Not later than fifteen (15) days after signing the Remedial Agreement, provide an opportunity for the Commission-approved Acquirer:
 1. to meet personally, and outside the presence or hearing of any employee or agent of any Respondent, with any one or more of the Relevant Employees; and
 2. to make offers of employment to any one or more of the Relevant Employees;
- B. Not interfere, directly or indirectly, with the hiring or employing by the Commission-approved Acquirer of Relevant Employees;
- C. Remove any impediments or incentives within the control of Respondents that may deter Relevant Employees from accepting employment with the Commission-approved Acquirer, including, but not limited to, any non-compete provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by the Commission-approved Acquirer, and shall not make any counteroffer to a Relevant Employee who receives a written offer of employment from the Commission-approved Acquirer; *provided, however*, that nothing in this Order shall be construed to require Respondents to terminate the employment of any employee or prevent Respondents from continuing the employment of any employee;

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- D. Provide all Relevant Employees with reasonable financial incentives to continue in their positions until the Closing Date. Such incentives shall include, but are not limited to, a continuation, until the Closing Date, of all employee benefits, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law and for those Relevant Employees covered by a pension plan), offered by Respondents; and
- E. Not, for a period of one (1) year following the Closing Date, directly or indirectly, solicit or otherwise attempt to induce any of the Relevant Employees to terminate his or her employment with the Commission-approved Acquirer; *provided, however*, that Respondents may:
1. advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in either case not targeted specifically at Relevant Employees; or
 2. hire Relevant Employees who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph III.E.; *provided further, however*, that this Paragraph III.E. shall not prohibit Respondents from making offers of employment to or employing any Relevant Employee if the Commission-approved Acquirer has notified Respondents in writing that the Commission-approved Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer.

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

- A. Respondents shall not use, solicit, or access, directly or indirectly, any DAS AHRO Intellectual Property or

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Confidential Business Information, and shall not disclose, provide, discuss, exchange, circulate, convey, or otherwise furnish such DAS AHRO Intellectual Property or Confidential Business Information, directly or indirectly, to or with any Person other than:

1. as necessary to comply with the requirements of this Order, or
 2. consistent with the limited exception permitted by Paragraph II.E.3. of this Order and pursuant to a Remedial Agreement, including without limitation the Quaker Transition Services Agreement (or any other Transition Services Agreement(s) with a Commission-approved Acquirer other than Quaker); *provided, however*, that Respondents shall be permitted to use the Licensor Intellectual Property but only in a manner that is consistent with the requirements of this Order.
- B. Respondents shall not, directly or indirectly, attempt to replicate, reverse engineer or otherwise produce any Intermediate Components; *provided, however*, that Respondents may continue to produce Intermediate Components for a limited transitional period after the Closing Date consistent with the Transition Services Agreement or the Supply Agreement.
- C. Prior to the Closing Date, Respondents shall provide written notification of the restrictions, prohibitions and requirements of Paragraphs IV.A. and B. of this Order to all of Respondents' personnel (i) who are or were involved in the provision of Transition Services to a Commission-approved Acquirer (including Quaker) pursuant to a Transition Services Agreement, or (ii) who otherwise had access to or possession, custody or control of any DAS AHRO Intellectual Property or Confidential Business Information prior to the Termination Date. Respondents may provide such notification by e-mail with return receipt requested or similar transmission, and must keep a file of any

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receipts or acknowledgments for one (1) year after the Closing Date. Respondents shall provide a copy of such notification to the Commission-approved Acquirer. Respondents shall maintain complete records of all such notifications at Respondents' corporate headquarters 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 Commission-approved Acquirer with copies of all certifications, notifications and reminders sent to Respondents' personnel.

- D. Within thirty (30) days after the Termination Date, Respondents shall:
1. require, as a condition of continued employment post-divestiture, that each of Respondents' employees who had access to or possession, custody or control of any DAS AHRO Intellectual Property or Confidential Business Information sign a confidentiality agreement that complies with the restrictions, prohibitions and requirements of this Order and prohibits Respondents' employees from using or disclosing DAS AHRO Intellectual Property or Confidential Business Information in connection with Respondents' Products or businesses; and
 2. institute procedures and requirements and take such actions as are necessary to ensure that Respondents' personnel comply with the restrictions, prohibitions and requirements of this Paragraph IV. , including all actions that Respondents would take to protect their own trade secrets and confidential information.

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V.**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 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 this Order in a manner consistent with the purposes of this 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 this Order, and shall exercise such power and authority and carry out

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the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of this Order 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 later of:
 - a. the completion by Respondents of the divestiture of the Divestiture Assets and the termination of the Quaker Transition Services Agreement (or any other Transition Services Agreement with a Commission-approved Acquirer), pursuant to this Order in a manner that fully satisfies the requirements of this Order and notification by the Commission-approved Acquirer to the Interim Monitor that it (or its Designee(s)) is fully capable of producing the D.A. Stuart AHRO Business Products acquired pursuant to a Remedial Agreement independently of Respondents; or
 - b. the completion by Respondents of their obligation to provide Transition Services to the Commission-approved Acquirer;

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

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 this Order, including, but not limited to, its obligations related to the relevant assets.

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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 this Order.

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 the Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry 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 misfeasance, 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 the Commission-approved Acquirer with respect to the performance of Respondents' obligations under this Order or the Remedial Agreement. Within thirty (30) days from the date

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the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under this Order.

- E. 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.
- 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. 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 V.
- 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 a Divestiture Trustee pursuant to the relevant provisions of this Order.

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

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

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agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.

- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestiture required by, and satisfy the additional obligations imposed by, this Order.
 2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to 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 to satisfy the obligations of Paragraph II. or believes that such can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however,* that the Commission may extend the period only two (2) times.
 3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the

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Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays caused by Respondents shall extend the time under this Paragraph VI.D. 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; *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

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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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
8. The Divestiture Trustee shall 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*, such agreement

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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 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 divestiture required by this Order.
- G. The Divestiture Trustee appointed pursuant to this Paragraph VI. may be the same person appointed as Interim Monitor pursuant to the relevant provisions of this Order.

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

- A. Any Remedial 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 Respondents under such agreements.
- B. Each Remedial Agreement, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof.
- C. Respondents shall comply with all terms of each Remedial Agreement, and any breach by Respondents of any term of the Remedial Agreement shall constitute a failure to comply with this Order. If any term of the Remedial Agreement varies from the terms

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of this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents’ obligations under this Order.

- D. Respondents shall not modify or amend any material term of any Remedial Agreement without the prior approval of the Commission. Any material modification of the Remedial Agreement between the date the Commission approves the Remedial 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 Remedial Agreement, for a period of five (5) years after the Closing Date, any modification of a Remedial 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 Remedial Agreement, or after any failure to meet any condition precedent (material or otherwise) to closing (whether waived or not).

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

- A. Within thirty (30) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondents have divested the Divestiture Assets and the Quaker Transition Services Agreement (or any other Transition Services Agreement with a Commission-approved Acquirer) has terminated, 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 its report concerning compliance with this Order to the Interim Monitor, if

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any Interim Monitor has been appointed. Respondents shall include in its reports, among other things that are required from time to time:

1. a full description of the efforts being made to comply with the relevant Paragraphs of this Order;
2. if Quaker is not approved by the Commission pursuant to Paragraph II.A., a description of all substantive contacts or negotiations related to the divestiture of the Divestiture Assets and the identity of all parties contacted and copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing their obligations pursuant to Paragraph II. of this Order;
3. a description of all DAS AHRO Intellectual Property and Confidential Business Information required to be delivered to the Commission-approved Acquirer;
4. a detailed plan to deliver all DAS AHRO Intellectual Property and Confidential Business Information required to be delivered to the Commission-approved Acquirer and any updates or changes to such plan;
5. a description of all DAS AHRO Intellectual Property and Confidential Business Information delivered to the Commission-approved Acquirer, including the type of information delivered, method of delivery, and date(s) of delivery, and updates as to what has been delivered;
6. a description of the DAS AHRO Intellectual Property and Confidential Business Information retained, if any, the reasons why it was retained, and a projected date(s) of delivery;

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7. a description of all assistance provided to the Commission-approved Acquirer during the reporting period; and,
 8. the Termination Date, including the required certification under oath regarding Respondents' compliance with the requirements of Paragraph II.E.3. (or Paragraph II.F.2., as applicable).
- B. One (1) year after the Order becomes final, 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 any proposed (1) dissolution of the Respondents, (2) acquisition, merger or consolidation of Respondents, or (3) any other change in the Respondents that may affect compliance obligations arising out of this Order, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondents.

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 Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

- A. Access, during business office hours of the 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 the Respondents related to

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compliance with this Order, which copying services shall be provided by the Respondents at their expense; and

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

XI.

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

By the Commission.

**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 Order (“Consent Agreement”) from AEA Investors 2006 Fund, L.P., HII Holding Corporation, and Houghton International, Inc. (“Houghton”), (collectively “Respondents”). The purpose of the proposed Consent Agreement is to remedy the anticompetitive effects that would otherwise result from Respondents’ acquisition of the Aluminum Hot Rolling Oil (“AHRO”) business of D.A. Stuart GmbH (“Stuart”). Under the terms of the agreement, Respondents will divest the U.S. AHRO business of Stuart to Quaker Chemical Corporation (“Quaker”). The proposed consent also requires Respondents to divest related intellectual property rights necessary to ensure that Quaker will be able to quickly and fully

Analysis to Aid Public Comment

replicate the competition that would have been eliminated by the acquisition.

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 review the proposed Consent Agreement again, and will decide whether it should withdraw from the proposed Consent Agreement or make the accompanying Decision and Order (“Order”) final.

On July 3, 2008, Respondents proposed to acquire all outstanding Stuart voting securities. The Commission’s complaint alleges that the acquisition by Respondents of Stuart’s AHRO business violates 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 eliminating an actual, direct and substantial competitor from the market for AHRO in North America. The proposed Consent Agreement would remedy the alleged violations by requiring a divestiture that will replace the competition that otherwise would be lost in this market as a result of the acquisition.

II. The Parties

AEA Investors 2006 Fund, L.P., controls HII Holding Corporation, which in turn owns 100 percent of Houghton. Houghton is a specialty chemicals manufacturer and management services provider headquartered in Valley Forge, Pennsylvania. Houghton produces a variety of specialty chemicals in its three United States production facilities, including fluids for metal cutting, fluid power (hydraulics), and metal rolling, including AHRO. Houghton is the largest seller of AHRO in North America.

Stuart was a wholly-owned subsidiary of Wilh. Werhahn KG, a German holding company. Stuart was a metalworking fluids manufacturer and management service provider headquartered in Warrenville, Illinois. Stuart manufactured metalworking fluids, including AHROs, in its Warrenville, Illinois, and Detroit, Michigan, facilities. Prior to the merger, Stuart was the second largest seller of AHRO in North America.

Analysis to Aid Public Comment

Quaker, the proposed buyer of Stuart's AHRO assets, is a leading global provider of process and specialty chemicals. It also offers chemical management services. Based in Conshohocken, Pennsylvania, Quaker reported total 2007 worldwide revenues of \$546 million. Quaker currently holds a very small share of the North American AHRO market.

III. Aluminum Hot Rolling Oil

AHRO is a critical input to an industrial process known as the "hot rolling" of aluminum alloy. Hot rolling creates large coils or plates of flat rolled aluminum stock, which are production inputs for a diverse variety of products such as beverage cans, automobile parts, building products like window frames and rain gutters, as well as a variety of aerospace and defense products.

As the mill operates, AHRO provides both cooling and lubrication to the metal stock. A modern aluminum hot mill must maintain extremely narrow manufacturing tolerances, and the correct AHRO formulation is critical to both the quality of the finished product and the efficient operation of the mill.

The relevant product market is AHRO and associated technical support services. AHRO customers require custom-formulated AHRO designed to reflect the unique specifications of their particular facility and also require their AHRO supplier to provide on-going, high-level technical support. AHRO customers would not switch to lubricants used to roll other metals or to other, unrelated lubricants in the event of a small but significant price increase.

The relevant geographic market is limited to North America. Customers in the U.S. are unlikely to utilize an AHRO supplier without domestic manufacturing and support capabilities. Both Houghton and Stuart maintained separate manufacturing facilities in Europe and Asia as well as in North America and very little product is shipped overseas due to high transportation costs and the long lead times required to transport these products by marine vessel.

Analysis to Aid Public Comment

The relevant market is highly concentrated, and the acquisition increased market concentration significantly, eliminating substantial and direct competition between the two most significant AHRO producers. The acquisition also resulted in Houghton controlling roughly 75% of the North American market for AHRO.

Evidence of head-to-head competition eliminated by the acquisition supports the anticompetitive implications of such dramatic increases in concentration. Customers benefitted from the rivalry between Houghton and Stuart in the form of lower prices, improved products and better service. Left unremedied, the acquisition likely would cause anticompetitive harm by enabling Houghton to profit by unilaterally raising the prices of AHRO, as well as reducing its incentive to improve quality and provide better service.

New suppliers are unlikely to enter this market to deter or counteract the anticompetitive effects of the acquisition. Quaker tried without much success to enter the North American market for AHRO in the late 1990s, but largely abandoned those efforts. Technological requirements, high customer switching costs and reputation pose substantial barriers to entrants attempting to sell AHRO to North American customers. 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 Consent Agreement remedies the anticompetitive effects of the acquisition by requiring the divestiture of Stuart's U.S. AHRO Business to a Commission-Approved Acquirer. Quaker has agreed to purchase this business. Specifically, the proposed Consent Agreement requires divestiture of Stuart's AHRO customer contracts, business information and all of Stuart's AHRO-related intellectual property, including all the formulations and technical information that are necessary to compete independently and effectively. Quaker has also reached employment agreements with all the key Stuart AHRO employees, ensuring that Stuart's existing AHRO capabilities are transferred to Quaker.

Analysis to Aid Public Comment

The proposed Consent Agreement contains several provisions designed to ensure that the divestiture is successful. First, it requires Houghton to provide transitional services to Quaker or another Commission-approved buyer. These transition services will facilitate a smooth transition of Stuart's U.S. AHRO business to the acquirer, and ensure continued and uninterrupted competition during the transition. Second, if Respondents fail to divest Stuart's U.S. AHRO business to a Commission-approved buyer, the proposed Consent Agreement permits the Commission to appoint a trustee to divest the assets. Third, the proposed Consent agreement requires Respondents to remove any contractual impediments that may deter the former Stuart AHRO employees from accepting employment with the Commission-approved buyer. Fourth, the proposed Consent Agreement permits the Commission to appoint an interim monitor to oversee compliance with the Agreement's provisions. Quaker and Houghton have also entered into a short-term non-compete agreement. This agreement protects Quaker from losing its U.S. AHRO customers to Houghton until after Houghton completes its obligations to provide transitional services to Quaker.

Respondents are required to hold the Stuart U.S. AHRO business separate and apart from Houghton's AHRO business and maintain that business until it can be divested to a Commission-approved acquirer.

V. Opportunity for Public Comment

The Proposed Order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will review the Proposed Order again and the comments received and will decide whether it should withdraw from the Proposed Order or make it final. By accepting the Proposed Order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to inform and invite public comment on the Proposed Order, including the proposed divestitures, and to aid the Commission in its determination of whether to make the Proposed Order final.

Analysis to Aid Public Comment

This analysis is not intended to constitute an official interpretation of the Proposed Order, nor is it intended to modify the terms of the Proposed Order in any way.

Complaint

IN THE MATTER OF

NUFARM LIMITEDCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket No. C-4298; File No. 081 0130
Filed September 7, 2010 — Decision, September 7, 2010

The complaint alleges that Nufarm Limited's 2008 acquisition of A.H. Marks Holding Limited injured competition in the U.S. market for three types of phenoxy herbicides, MCPA, MCPP-p, and 2,4DB, which are widely used on grass, and wheat, barley, peanut, and alfalfa crops. The complaint alleges that the acquisition created a monopoly in the markets for MCPA and MCPP-p markets and substantially increased concentration in the 2,4DB market. The consent order requires Nufarm to divest A.H. Marks' MCPA rights and assets to a new competitor, Albaugh, Inc.; and to divest A.H. Marks' MCPP-p rights and assets to a second new competitor, PBI Gordon Co. The consent order also requires Nufarm to modify certain agreements related to MCPA and 2,4DB, in order to facilitate Albaugh and PBI Gordon's transition into the U.S. market. The consent order permits the Commission to appoint a trustee to ensure the assets are divested.

Participants

For the *Commission*: Jonathan Platt and Nancy Turnblacer.

For the *Respondent*: Steve Kowal, K&L Gates LLP; and David Stetler, Stetler and Duffy, Ltd.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Nufarm Limited ("Nufarm"), a corporation subject to the jurisdiction of the Commission, 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 Nufarm acquired all the shares of A.H. Marks Holding Limited ("A. H. Marks") 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,

Complaint

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. SUMMARY

1. In March 2008, Nufarm acquired A.H. Marks in a transaction combining two leading manufacturers of phenoxy herbicides. The acquisition resulted in Nufarm obtaining monopoly positions in two phenoxy herbicide markets (MCPA and MCPP-p) and reduced a third market (2,4DB) to a duopoly. The merger is likely to result in higher prices and other anticompetitive effects.

II. THE RESPONDENT

2. Respondent Nufarm is a corporation organized and existing under the laws of Australia, with its office and principal place of business located at 103-105 Pipe Road, Laverton North, Victoria 3026. Nufarm has two subsidiaries in the United States, Nufarm Americas and Nufarm Turf and Specialty, both located at 150 Harvester Drive, Suite 200, Burr Ridge, IL 60527.

3. Nufarm manufactures, markets, and distributes crop protection products, including herbicides, fungicides and insecticides in the United States. It is one of the world's leading producers and distributors of phenoxy herbicides such as MCPA, MCPP-p, and 2,4DB.

III. THE ACQUIRED COMPANY

4. Prior to the acquisition, A. H. Marks was a corporation organized and existing under the laws of the United Kingdom, with its office and principal place of business located at Wyke, Bradford, West Yorkshire, BD 12 9EJ, England, United Kingdom.

5. A.H. Marks produced and exported phenoxy herbicides to the United States.

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IV. THE ACQUISITION

6. On or about March 4, 2008, Nufarm, pursuant to an agreement with A.H. Mark's shareholders ("the Acquisition Agreement"), acquired all the issued shares of A. H. Marks ("the Acquisition").

V. JURISDICTION

7. At all times relevant herein, Nufarm has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44; and at all times relevant herein, Nufarm has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

8. At all times relevant herein, A.H. Marks was a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44; and at all times relevant herein, A.H. Marks was engaged in commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

VI. RELEVANT PRODUCT MARKET

9. Phenoxy herbicides, which include MCPA, MCPP-p, and 2,4DB, are widely used to eliminate broadleaf weeds from lawns, fields and crops. Specifically, MCPA, or products containing MCPA, are used frequently on wheat and barley crops, as well as on grass. MCPP-p, or products containing MCPP-p, are frequently used on grass. 2,4DB, or products containing 2,4DB, are used on peanut and alfalfa crops.

10. The relevant product markets in which to analyze the Acquisition include the manufacture and sale of these three phenoxy herbicides:

- a. MCPA or 2-methyl-4-chlorophenoxyacetic acid.

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- b. MCPP-p or 2-(4-chloro-2-methylphenoxy) propanoic acid.
- c. 2,4DB or 4-(2,4-dichlorophenoxy) butyric acid, 4-(2,4-dichlorophenoxy) butanoic acid.

VII. RELEVANT GEOGRAPHIC MARKET

11. The relevant geographic area within which to analyze the effects of the Acquisition is the United States.

VIII. STRUCTURE OF THE MARKET

12. The Acquisition merged the only competitors in the markets for MCPA and MCPP-p and two of only three competitors in the 2,4DB market.

13. The Acquisition substantially increased concentration in the already highly concentrated MCPA, MCPP-p, and 2,4DB markets.

IX. COMPETITIVE EFFECTS

14. The Acquisition may have substantially lessened competition in the relevant markets by, among other things:

- a. Eliminating actual, direct, and substantial, competition between Nufarm and A.H. Marks;
- b. Reducing the number of competitors in the MCPA and MCPP-p markets from two to one, creating monopolies in the markets for both products, and giving Nufarm substantial market power;
- c. Reducing the number of competitors in the 2,4DB market from three to two and giving Nufarm substantial market power;
- d. Facilitating the ability of Nufarm to exercise unilateral market power in the markets for MCPA, MCPP-p and 2,4DB;

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- e. Reducing Nufarm's incentives to improve service or product quality or to pursue further innovation; and
- f. Allowing Nufarm, unconstrained by effective competition, to increase prices.

X. ENTRY CONDITIONS

15. Entry into the MCPA, MCPP-p and 2,4DB markets would not be timely, likely, or sufficient to prevent or defeat the anticompetitive effects of the Acquisition.

16. In order to enter the MCPA, MCPP-p or 2,4DB markets, a new entrant would need, among other things, access to supply of the herbicides and the requisite regulatory approvals from federal and state agencies to market the products in the United States. To obtain the necessary regulatory approvals, the entrant would have to submit and periodically update extensive environmental and toxicological testing data. The costs of entering the relevant markets for MCPA, MCPP-p, and 2,4DB are high compared to the limited potential sales revenues available to an entrant. As a result, entry into each of the relevant markets would require substantial sunk costs that would likely make entry unprofitable. New entry into the relevant markets sufficient to achieve significant market impact within two years is therefore unlikely to occur.

17. In addition, Nufarm's contracts with The Dow Chemical Company and joint venture with Aceto Corp. restricted these firms' competitive activities in the markets for MCPA and 2,4-DB and posed additional barriers to entry.

XI. VIOLATIONS CHARGED

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

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WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this seventh day of September, 2010, issues its complaint against said respondent.

By the Commission.

DECISION AND ORDER

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

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“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 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

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the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint and makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Nufarm is a corporation organized, existing and doing business under and by virtue of the laws of Australia, with its offices and principal place of business located at 103-105 Pipe Road, Laverton North, Victoria 3026, Australia, with the offices and principal place of business of its United States’ subsidiary, Nufarm Americas, Inc., located at 150 Harvester Drive, Suite 200, Burr Ridge, IL 60527.
2. The Federal Trade Commission has jurisdiction over 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. “Nufarm” means Nufarm Limited, its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Nufarm, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Aceto” means Aceto Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the state of New York, with its office and principal place of business located at One Hollow Lane, Lake Success, NY, 11042.
- C. “Aceto Contracts” means all contracts entered into

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between Nufarm and Aceto relating to 2,4DB, including but not limited to the following: Operating Agreement of S.R.F.A. LLC; License Agreement for Technical Registrations; Sales Agent Agreement for the Sale of Formulated Products by Aceto Agricultural Chemicals Corporation; Sales Agent Agreement for the Sale of Formulated Products by Nufarm Americas, Inc.; Collateral Agreement (January 22, 2004); License Agreement for Additional Formulated Labels; License Agreement for Trademarks and Formulations; and Agreement for the Manufacture and Supply of Formulated Products. “Aceto Contracts” includes any subsequent contracts modifying, amending, or omitting any term(s) within these contracts.

- D. “Aceto/Nufarm Joint Venture” means the joint venture between Aceto and Respondent relating to 2,4DB, formed by and operated pursuant to the Aceto Contracts.
- E. “AHM” means A.H. Marks Holding Limited, a corporation organized, existing, and doing business, prior to March 5, 2008, under and by virtue of the laws of the United Kingdom, with its office and principal place of business located at Wyke, Bradford, West Yorkshire, BD12 9EJ, England, United Kingdom.
- F. “Albaugh” means Albaugh, Inc., a privately held corporation with its offices and principal place of business at 1525 NE 36th Street, Ankeny, IA, 50021.
- G. “Albaugh Divestiture Agreement” means the Sale and Purchase Agreement between AHM and Albaugh relating to MCPA.
- H. “Closing Date” means the date on which Respondent (or a Divestiture Trustee) divests the Divestiture Assets as required by Paragraph II. and Paragraph III. (or Paragraph VIII.) of this Order.
- I. “Commission” means the Federal Trade Commission.

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- J. “Commission-approved Acquirer” means each acquirer that receives the prior approval of the Commission pursuant to Paragraph II. and Paragraph III. (or Paragraph VIII.) of this Order.
- K. “Direct Cost” means a cost not to exceed the cost of direct labor, direct overhead, materials, travel and other expenditures to the extent the costs are directly incurred to provide the product, and shall not include corporate overhead, fines, penalties, or other liabilities.
- L. “Divestiture Agreement” means the agreements, licenses, assignments, and all other agreements entered into by the Commission-approved Acquirers and Respondent and approved by the Commission pursuant to this Order, including the Albaugh Divestiture Agreement, or any other applicable MCPA Divestiture Agreement, the PBI Gordon Divestiture Agreement, or any other applicable MCPP-p Divestiture Agreement.
- M. “Divestiture Assets” means the MCPA Divestiture Assets and the MCPP-p Divestiture Assets.
- N. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to Paragraph VIII. of this Order.
- O. “Dow” means Dow AgroSciences LLC, a Delaware limited liability company and wholly-owned subsidiary of The Dow Chemical Company, with its offices and principal place of business at 9330 Zionsville Road, Indianapolis, IN 46268, and further expressly includes Sanachem Ltd., Kempton Park, South Africa.
- P. “Dow Contracts” means the following contracts entered into by Dow and Nufarm: (a) 2009 Commercial Agreement, (b) 2009 MCPA Supply Agreement (MCPA Straight Products), and (c) 2009 MCPA Supply Agreement (Mixtures); “Dow Contracts” includes any subsequent contracts

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modifying, amending, or omitting any term(s) within these contracts.

- Q. “EPA” means the United States Environmental Protection Agency.
- R. “Intellectual Property” means patents; copyrights; trademarks, trade dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, development and other information; and rights to obtain and file for patents and copyrights and registrations thereof, including but not limited to the confidential statements of formula for the Products.
- S. “LCPA” means the chiral intermediate, L-chloropropionic acid.
- T. “LCib” means L-(2)-Chloropropionic acid isobutyl ester.
- U. “MCPA” means 2-methyl-4-chlorophenoxyacetic acid.
- V. “MCP-p” means 2-(4-chloro-2-methylphenoxy) propanoic acid.
- W. “2,4DB” means 4-(2,4-dichlorophenoxy) butyric acid.
- X. “2,4DB Task Force” means the current (as of the date this Order becomes final) Task Force relating to 2,4DB and, if applicable, its successors
- Y. “2,4DB Task Force Seat” means membership in the 2,4DB Task Force, with all attendant rights and privileges at least equivalent to those owned or enjoyed by any and all other members, including but not limited to ownership interests in, and access to, all data generated or owned by the 2,4DB Task Force or jointly-owned by its members, and all data otherwise accessible to 2,4DB Task Force members as a function or benefit of their membership in the Task Force for use in obtaining regulatory approvals or any other

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purpose, and further including all costs of transferring membership to the Commission-approved Acquirer, including contributions to the 2,4DB Task Force or its members for data generated prior to the transfer, which shall be the responsibility of Respondent.

- Z. “MCPA Divestiture Agreement” means the Divestiture Agreement approved by the Commission pursuant to Paragraph II. (or Paragraph VIII.) of this Order relating to the divestiture of the MCPA Divestiture Assets; the “MCPA Divestiture Agreement” includes, as appropriate, the Albaugh Divestiture Agreement.
- AA. “MCPA Divestiture Assets” means (1) the MCPA Task Force Seat and (2) all AHM Registrations relating to MCPA.
- BB. “MCPA Task Force” means the current (as of the date this Order becomes final, at that time known as 1994 MCPA Task Force III) Task Force relating to MCPA and, if applicable, its successors.
- CC. “MCPA Task Force Seat” means AHM’s membership in the MCPA Task Force, with all attendant rights and privileges at least equivalent to those owned or enjoyed by any and all other members, including but not limited to ownership interests in, and access to, all data generated or owned by the MCPA Task Force or jointly-owned by its members, and all data otherwise accessible to MCPA Task Force members as a function or benefit of their membership in the Task Force for use in obtaining regulatory approvals or any other purpose, and further including all costs of transferring membership to the Commission-approved Acquirer, including contributions to the MCPA Task Force or its members for data generated prior to the transfer, which shall be the responsibility of Respondent. “MCPA Task Force Seat” means AHM’s membership in the MCPA Task Force as held by AHM prior to its acquisition by Nufarm; *provided, however*, that should there be any disparity between the rights or

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privileges between the MCPA Task Force Seat held by Nufarm prior to the AHM acquisition and the MCPA Task Force seat held by AHM at the time of its acquisition by Nufarm, “MCPA Task Force Seat” shall mean the MCPA Task Force seat with the greater or more extensive rights or privileges.

- DD. “MCPP-p Divestiture Agreement means the Divestiture Agreement approved by the Commission pursuant to Paragraph III. (or Paragraph VIII.) of this Order relating to the divestiture of the MCPP-p Divestiture Assets; the “MCPP-p Divestiture Agreement” includes, as appropriate, the PBI Gordon Divestiture Agreement.
- EE. “MCPP-p Divestiture Assets” means (1) the MCPP-p Task Force Seat and (2) all AHM Registrations relating to MCPP-p.
- FF. “MCPP-p Task Force” means the current (as of the date this Order becomes final) Task Force relating to MCPP-p and, if applicable, its successors.
- GG. “MCPP-p Task Force Seat” means AHM’s membership in the MCPP-p Task Force, with all attendant rights and privileges at least equivalent to those owned or enjoyed by any and all other members, including but not limited to ownership interests in, and access to, all data generated or owned by the MCPP-p Task Force or jointly-owned by its members, and all data otherwise accessible to MCPP-p Task Force members as a function or benefit of their membership in the Task Force for use in obtaining regulatory approvals or any other purpose, and further including all costs of transferring membership to the Commission-approved Acquirer, including contributions to the MCPP-p Task Force of its members for data generated prior to the transfer, which shall be the responsibility of Respondent. “MCPP-p Task Force Seat” means AHM’s membership in the MCPP-p Task Force as held by AHM prior to its acquisition by Nufarm; *provided, however*, that should

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there be any disparity between the rights or privileges between the MCPP-p Task Force Seat held by Nufarm prior to the AHM acquisition and the MCPP-p Task Force seat formerly held by AHM, “MCPP-p Task Force Seat” shall mean the MCPP-p Task Force seat with the greater or more extensive rights or privileges.

- HH. “Nufarm Customer” means any company or person that purchased or purchases MCPA, MCPP-p, or 2,4DB from Nufarm or AHM.
- II. “Nufarm Customer Contract” means any agreement entered into by Nufarm or AHM with a Nufarm Customer with respect to the purchase, supply, or sale of MCPA, MCPP-p or 2,4DB, with the exception of (1) the Dow Contracts, (2) the Aceto Contracts, (3) any Divestiture Agreements, or (4) agreements to the extent such agreements relate solely to the purchase, supply, or sale of blended products in which the Product(s) are not the sole active ingredients. “Nufarm Customer Contract” includes (1) Nufarm Customer Contracts in effect as of the date Respondent executed the Agreement Containing Consent Order, and (2) Nufarm Customer Contracts entered into by Respondent with a Nufarm Customer any time from the date Respondent executed the Agreement Containing Consent Order until six (6) months after the latest of the Closing Dates.
- JJ. “PBI Gordon” means PBI Gordon Corporation, a corporation organized and existing under the laws of Missouri, U.S.A., with offices at 1217 W. 12th Street, Kansas City, Missouri 64101.
- KK. “PBI Gordon Divestiture Agreement” means the Sale and Purchase Agreement between Respondent and PBI Gordon relating to MCPP-p.
- LL. “Products” means MCPA; MCPP-p; and/or 2,4DB.
- MM. “Registration” means existing registrations and approvals, including those granted or issued by any

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and all local, state, provincial, and federal entities (including but not limited to the EPA, the California Environmental Protection Agency, and the Canadian Pest Management Regulatory Agency of Health Canada), permitting, necessary or required for, or relating to the manufacture, sale, or use of the Products in the United States or Canada as technical products or the manufacture, sale, or use of the Products in formulations or end-use products in which one of the Products is the sole active ingredient in the formulation or end-use product. "Registration" also includes supplemental registration or repack registration approvals granted to customers, alternative sources, suppliers, or other third parties that have qualified a Product for manufacture, sale, or use in the United States or Canada by the customer, alternative source, supplier, or other third party; "Registration" also includes licensing of or access to data, including but not limited to Respondent's confidential statements of formula, that are required for the completion of any necessary Registrations or approvals required by any governmental entity and for the addition of new sources for the Products.

- NN. "Respondent" means Nufarm.
- OO. "Task Force" means any group of industry participants formed to generate data, including environmental and toxicology data, for specific active ingredients or for industry-wide issues such as spray drift or worker exposure, and expressly includes, though is not limited to: the MCPA Task Force Three; 2,4DB Task Force; MCPP-p Task Force.

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

- A. By no later than five (5) days after the date on which this Order is accepted for public comment, Respondent shall divest the MCPA Divestiture Assets to Albaugh pursuant to and in accordance with the Albaugh

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Divestiture Agreement, absolutely and in good faith; *provided, however*, that if Respondent has divested the MCPA Divestiture Assets to Albaugh prior to the date this Order becomes final and if, at the time the Commission determines to make this Order final:

1. The Commission determines and notifies Respondent that Albaugh is not an acceptable acquirer of the MCPA Divestiture Assets, then Respondent shall immediately rescind the transaction with Albaugh and shall divest the MCPA Divestiture Assets no later than six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission; or
 2. The Commission determines and notifies Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondent, or appoint a Divestiture Trustee, pursuant to Paragraph IV of this Order, to effect such modifications to the manner of divesting the MCPA Divestiture Assets to Albaugh (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.
- B. Prior to completing the divestiture required by this Paragraph, Respondent shall obtain all third-party consents and satisfy all other conditions, to the extent necessary, required to facilitate the divestitures, or as otherwise required by Paragraph II., including obtaining any consents or waivers of, or payments to, third parties required to access data or transfer assets.
- C. Respondent shall (and the Divestiture Agreements shall include provisions that, subject to the prior approval of the Commission, satisfy the following):

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1. Ensure that the Commission-approved Acquirer is not liable to the MCPA Task Force or to individual members of the MCPA Task Force for any past costs or expenses of the MCPA Task Force (including but not limited to data compensation, initiation fees, and other costs);
 2. Use best efforts to ensure that the Commission-approved Acquirer retains rights equivalent to the rights of the other members of the MCPA Task Force and that the Commission-approved Acquirer's rights cannot be reduced or restricted by future actions of the other members of the MCPA Task Force; and
 3. In order to enable the Commission-approved Acquirer of the MCPA Divestiture Assets to supply customers with MCPA at a similar quantity, in a similar manner, and of similar quality as Respondent was supplying customers with MCPA, provide supply of MCPA to the Commission-approved Acquirer of the MCPA Divestiture Assets, at the option of the Commission-approved Acquirer, pursuant to terms and conditions subject to the prior approval of the Commission; *provided, however,* that Nufarm shall use best efforts to minimize its costs and to use its manufacturing plants in connection with the supply of MCPA in a manner that is intended to result in the greatest cost savings to the Commission-approved Acquirer.
- D. The Divestiture Agreements 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 any Commission-approved Acquirer or to reduce any obligations of Respondent 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 shall comply with all terms of

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the Divestiture Agreements, and any breach by Respondent of any term of the Divestiture Agreements shall constitute a violation of this Order. If any term of the Divestiture Agreements varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Any material modification of any Divestiture Agreement between the date the Commission approves the 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 three (3) years after the relevant Closing Date, any modification of a Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondent shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Divestiture Agreement, or after any failure to meet any condition precedent (material or otherwise) to closing (whether waived or not).

- E. Until Respondent complies with Paragraph II. (or Paragraph VIII.) of this Order, Respondent shall continue to comply with the obligations of the July 15, 2009, asset maintenance agreement between counsel for Respondent and Commission staff, and Respondent shall take such actions as are necessary to maintain the viability, marketability, validity, and good-standing of Nufarm’s and AHM’s Task Force Seats and Registrations and to prevent the dissolution, revocation, withdrawal, impairment, or restriction of Nufarm’s and AHM’s MCPA Task Force Seats and Registrations.
- F. The purpose of the divestiture of the Divestiture Assets and the additional requirements in Paragraph II. is to

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remedy the lessening of competition in the manufacture and sale of each Product as alleged in the Commission's complaint and to ensure that divestiture of the Divestiture Assets: (a) vests an entrant with market access and regulatory positions at least identical to AHM; (b) includes the enumerated obligations (Paragraph II.C.); and (c) provides such additional accommodations reasonably required by the entrant to expeditiously enter and commence viable and sustainable participation in the markets as alleged in the Commission's complaint.

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

- A. By no later than five (5) days after the date on which this Order is accepted for public comment, Respondent shall divest the MCPP-p Divestiture Assets to PBI Gordon pursuant to and in accordance with the PBI Gordon Divestiture Agreement, absolutely and in good faith; *provided, however*, that if Respondent has divested the MCPP-p Divestiture Assets to PBI Gordon prior to the date this Order becomes final and if, at the time the Commission determines to make this Order final:
1. The Commission determines and notifies Respondent that PBI Gordon is not an acceptable acquirer of the MCPP-p Divestiture Assets, then Respondent shall immediately rescind the transaction with PBI Gordon and shall divest the MCPP-p Divestiture Assets no later than six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission; or
 2. The Commission determines and notifies Respondent that the manner in which the divestiture was accomplished is not acceptable, the

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Commission may direct the Respondent, or appoint a Divestiture Trustee, pursuant to Paragraph IV of this Order, to effect such modifications to the manner of divesting the MCPP-p Divestiture Assets to PBI Gordon (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.

- B. Prior to completing the divestiture required by this Paragraph, Respondent shall obtain all third-party consents and satisfy all other conditions, to the extent necessary, required to facilitate the divestitures, or as otherwise required by Paragraph III. of this Order, including obtaining any consents or waivers of, or payments to, third parties required to access data or transfer assets.
- C. Respondent shall (and the Divestiture Agreements shall include provisions that, subject to the prior approval of the Commission, satisfy the following):
 1. Ensure that the Commission-approved Acquirer is not liable to the MCPP-p Task Force or to individual members of the MCPP-p Task Force for any past costs or expenses of the MCPP-p Task Force (including but not limited to data compensation, initiation fees, and other costs);
 2. Use best efforts to ensure that the Commission-approved Acquirer retains rights equivalent to the rights of the other members of the MCPP-p Task Force and that the Commission-approved Acquirer's rights cannot be reduced or restricted by future actions of the other members of the MCPP-p Task Force; and
 3. In order to enable the Commission-approved Acquirer of the MCPP-p Divestiture Assets to supply customers with MCPP-p at a similar quantity, in a similar manner, and of similar quality

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as Respondent was supplying customers with MCPP-p, provide MCPP-p to the Commission-approved Acquirer of the MCPP-p Divestiture Assets, at the option of the Commission-approved Acquirer, pursuant to terms and conditions subject to the prior approval of the Commission; *provided, however,* that Nufarm shall use best efforts to minimize its costs and to use its manufacturing plants in connection with the supply of MCPP-p in a manner that is intended to result in the greatest cost savings to the Commission-approved Acquirer.

- D. In connection with divestiture of the MCPP-p Divestiture Assets, subject to the approval of the Commission, Respondent shall provide to the Commission-approved Acquirer of the MCPP-p Divestiture Assets, at the Acquirer's option, for a period of up to three (3) years, a quantity of LCPA up to one-half of Respondent's annual capacity for the production of LCPA, for use only in the manufacture of MCPP-p, at no more than Respondent's Direct Cost, and for delivery on a schedule and terms that are consistent with usual and customary business practice; Respondent shall use best efforts to minimize its costs of providing LCPA and to use its manufacturing plants in connection with the supply of Product in a manner that is intended to result in the greatest cost savings to the Commission-approved Acquirer.
- E. Respondent shall:
1. waive all provisions in all contracts and agreements to which Respondent is a party that:
 - a. grant Respondent exclusive use of or access to LCib or LCib capacity, or
 - b. restrict the ability of the other parties to the contracts or agreements to supply the Commission-approved Acquirer of the MCPP-

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p Divestiture Assets with LCib for the manufacture or sale of MCPP-p; and

2. shall take no action to restrict the ability of purchasers of LCib to use LCib to produce MCPP-p or to have a third party use the LCib to produce MCPP-p on behalf of the purchaser.
- F. The Divestiture Agreements 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 any Commission-approved Acquirer or to reduce any obligations of Respondent 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 shall comply with all terms of the Divestiture Agreements, and any breach by Respondent of any term of the Divestiture Agreements shall constitute a violation of this Order. If any term of the Divestiture Agreements varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Any material modification of any Divestiture Agreement between the date the Commission approves the 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 three (3) years after the relevant Closing Date, any modification of a Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondent shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Divestiture Agreement, or after any failure to

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meet any condition precedent (material or otherwise) to closing (whether waived or not).

- G. Until Respondent complies with Paragraph III. (or Paragraph VIII.) of this Order, Respondent shall continue to comply with the obligations of the July 15, 2009, asset maintenance agreement between counsel for Respondent and Commission staff, and Respondent shall take such actions as are necessary to maintain the viability, marketability, validity, and good-standing of Nufarm's and AHM's Task Force Seats and Registrations and to prevent the dissolution, revocation, withdrawal, impairment, or restriction of Nufarm' and AHM's MCPP-p Task Force Seats and Registrations.
- H. The purpose of the divestiture of the Divestiture Assets and the additional requirements in Paragraph III. is to remedy the lessening of competition in the manufacture and sale of each Product as alleged in the Commission's complaint and to ensure that divestiture of the Divestiture Assets: (a) vests an entrant with market access and regulatory positions at least identical to AHM; (b) includes the enumerated obligations (Paragraph III.C.); and (c) provides such additional accommodations reasonably required by the entrant to expeditiously enter and commence viable and sustainable participation in the markets as alleged in the Commission's complaint.

IV.

IT IS FURTHER ORDERED that Respondent shall allow each Nufarm Customer to terminate its Nufarm Customer Contract with respect to any or all of the Products, without penalty or charge, immediately upon request of the Nufarm Customer at any time from the date Respondent executes the Agreement Containing Consent Orders until eighteen (18) months after the latest of the Closing Dates:

- A. For Nufarm Customer Contracts with a Nufarm Customer in effect on the date Respondent executes

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the Agreement Containing Consent Orders, Respondent shall notify such Nufarm Customer of this requirement no later than thirty (30) days after execution of the Agreement Containing Consent Orders using the notice attached to this Order as Appendix A; and

- B. For Nufarm Customer Contracts entered into with a Nufarm Customer from the date Respondent executes the Agreement Containing Consent Orders until six (6) months after the latest of the Closing Dates, Respondent shall notify such Nufarm Customer of this requirement prior to execution of the Nufarm Customer Contract using the notice attached to this Order as Appendix A .

V.

IT IS FURTHER ORDERED that Respondent shall waive its rights to enforce, and shall not enforce, any provisions in contracts or agreements with competitors, customers, or other industry participants, and shall otherwise take no future actions, that:

- A. Impose or enforce any non-compete agreements between and among manufacturers of the Products;
- B. Prevent Dow, Aceto, or any other person from purchasing Products from the Commission-approved Acquirer or from entering, or sponsoring another's person's entry into the manufacture and sale of Products, subject to the requirement of V.G., below;
- C. Limit Dow's, Aceto's, or others' ability to resell Products, including placing limitations on the price at which Dow, Aceto, or others can resell the Products;
- D. Impose or enforce any requirement that Dow, Aceto, Albaugh, and/or PBI Gordon acquire all or a majority of its requirements of the Products from Nufarm, subject to the requirement of V.G., below;

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- E. Directly or indirectly result in the dissolution of any Task Force of the Products, or transfer to Respondent any right or interest in any Task Force of the Products or Registration without complying with the prior notice obligations of Paragraph VII. of this Order;
- F. Limit or restrict Aceto's ability to use its 2,4DB Task Force Seat or 2,4DB Registrations to develop alternative sources of 2,4DB and/or purchase 2,4DB for any purpose from these or other sources of 2,4DB; and
- G. Impose or enforce any requirement that Dow purchase more than 75% of its internal MCPA requirements from Respondent.

VI.

IT IS FURTHER ORDERED that Respondent shall:

- A. Fully and irrevocably terminate the Aceto/Nufarm Joint Venture no later than ten (10) days after Respondent executes the Agreement Containing Consent Orders; and
- B. Provide to Aceto, at the option of Aceto, 2,4DB at quantities and prices similar to that provided to Aceto under the Aceto/Nufarm Joint Venture, supply of 2,4DB at a similar quantity, in a similar manner, and of similar quality as Aceto was supplying customers with 2,4DB during the effective period of the Aceto/Nufarm Joint Venture, pursuant to terms and conditions subject to the approval of the Commission.

VII.

IT IS FURTHER ORDERED that, for a period of five (5) years from the date this Order becomes final, Respondent shall not, without providing advance written notification to the Commission in the manner described in this Paragraph:

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- A. Acquire, directly or indirectly, any right or interest in any Registration or any Product's Task Force; or
- B. Enter into any agreements with any
 - 1. member of any Product's Task Force,
 - 2. holder of a Registration, or
 - 3. person that purchases more than 20 percent of Nufarm's U.S. sales of technical grade materials of any Product,

which agreements:

- 4. relate to any Registrations or any Product's Task Force,
- 5. contain non-compete clauses or joint marketing agreements relating to any or all of the Products, or
- 6. otherwise contain provisions that limit competition among manufacturers or sellers of, or restrict the ability of persons to enter into the manufacture or sale of any or all of the Products.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "the Notification"), 16 C.F.R. § 803 App., and shall be prepared and transmitted in accordance with the requirements of that Part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of 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

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the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent shall not consummate the transaction or make the agreement effective, until thirty (30) days after submitting such additional information or documentary material.

In addition to the information required by the Notification, Respondent shall also submit with the Notification complete copies of all agreements and, at the request of Commission staff, all documents relating to the negotiations of such agreements, including, but not limited to, management's assessments and evaluations of the agreements.

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.

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

- A. If Respondent has not fully complied with the obligations to divest the MCPA Divestiture Assets or the MCPP-p Divestiture Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest the MCPA Divestiture Assets (if the MCPA Divestiture Assets have not been divested) or the MCPP-p Divestiture Assets (if the MCPP-p Divestiture Assets have not been divested) pursuant to Paragraph II. or Paragraph III. of this Order, as applicable, and effectuate the other obligations of Paragraph II. or Paragraph III. of this Order, as applicable, in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action

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pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the required 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 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 effectuate the divestitures and satisfy the additional obligations required by Paragraph II. or Paragraph III, as applicable, of 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

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conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures and satisfy the additional obligations required by Paragraph II. or Paragraph III, as applicable, of this Order.
2. The Divestiture Trustee shall have twelve (12) months after the date the Commission approves the trust agreement described herein to accomplish the divestitures, 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 to satisfy the obligations of Paragraph II. or Paragraph III., as applicable, or believes that such can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, the Commission may extend the 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 divestitures. Any delays caused by Respondent shall extend the time under this Paragraph in an amount equal to the delay, as

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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 divestitures 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 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 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 divestitures and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent, and the Divestiture Trustee's power

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shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestitures of all of the relevant assets that are 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 malfeasance, 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 granted, licensed, transferred, delivered or otherwise conveyed by this Order.
 8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestitures.
 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,* 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

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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 divestitures required by this Order.

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

- A. Within thirty (30) days after the date this Order becomes final, and every ninety (90) days thereafter until the last Closing Date for the MCPA Divestiture Assets and the MCPP-p Divestiture Assets, Respondent 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. Respondent shall include in its reports, among other things that are required from time to time:
1. A full description of the efforts being made to divest the assets required to be divested; and
 2. A description of all substantive contacts or negotiations related to the divestitures and the identity of all parties contacted and copies of all written communications to and from such parties, and all reports and recommendations concerning completing its obligations pursuant to Paragraph II. and Paragraph III. of this Order.
- B. 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:

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1. Paragraph II.C.3. and Paragraph III.C.3. of the Order, no later than three (3) months after the Order becomes final, and every six (6) months thereafter for the term of the obligation contained therein; and
2. The remainder of the Order, annually on the anniversary date of the date the Order became final for the term of the Order.

X.

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

- A. Any proposed dissolution of the Respondent;
- B. Any 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 may affect compliance obligations arising out of this Order.

XI.

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(s) 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 non-privileged books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the Respondent related to compliance with this Order, which copying

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services shall be provided by the Respondent at their expense; and

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

XII.

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

By the Commission, Commissioner Ramirez recused.

Decision and Order

APPENDIX A**NOTICE**

To settle concerns arising from Nufarm's acquisition of A. H. Marks, on [insert date of consent agreement] Nufarm agreed with the staff of the Federal Trade to allow those of its customers that purchase MCPA, MCPP-p or 2,4DB ("the Products") from Nufarm to terminate its contracts with respect to any or all of the Products, at the option of the customer, without penalty or charge, immediately upon request of the customer at any time from the [insert date Respondent executes the Agreement Containing Consent Orders] until [insert date eighteen (18) months after the latest of the Closing Dates]. The Commission issued its Order incorporating that settlement on [insert date of final order].

You are being sent this notice because you are a current Nufarm customer that purchases Products from Nufarm. You may read and download a copy of the Order from the FTC at its web site at [web link to Order] as well as other documents relating to the settlement. Nufarm's obligations with respect to contract termination are set out in Paragraph IV. of the Order. Capitalized terms used in the Order are defined in Paragraph I. of the Order, listed in alphabetical order.

If you wish to terminate your contract with respect to any or all of the Products you purchase from Nufarm, please contact Brett Sutherland, Global Phenoxy Product Manager, Nufarm Ltd., 103-105 Pipe Road, Laverton North, Victoria 3026, Australia, Tel: +61-3-9282-1000, Email: brett.sutherland@au.nufarm.com. If you have any questions or concerns about these obligations, you may contact the staff of the Compliance Division, Bureau of Competition, Federal Trade Commission, Washington, D.C., Tel: 202 326 2152.

Analysis to Aid Public Comment

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDER TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Nufarm Limited (“Nufarm” or “Respondent”) to remedy the anticompetitive effects stemming from Nufarm’s acquisition of A.H. Marks Holding Limited (“A. H. Marks”). Under the terms of the Consent Agreement, Nufarm is required to divest to Commission-approved buyers certain A. H. Marks assets, including regulatory permits and intellectual property, and take certain additional measures to restore competition in the markets for three phenoxy herbicide products: MCPA, MCPP-p, and 2,4DB.

On March 5, 2008, Nufarm acquired A. H. Marks. Both parties held, or had access to, regulatory approvals from the United States Environmental Protection Agency (“EPA”) to sell MCPA, MCPP-p, and 2,4DB in the United States. The Commission’s complaint alleges that the acquisition and acquisition agreement violated 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, by lessening competition in the United States markets for the sale of the phenoxy herbicides: MCPA, MCPP-P, and 2,4DB.

The Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the Consent Agreement and comments received and decide whether to withdraw from the proposed Consent Agreement, modify it, or make final the Consent Agreement’s proposed Decision and Order.

Analysis to Aid Public Comment

II. The Products and Structure of the Markets

With its acquisition of A.H. Marks, Nufarm obtained monopoly positions in the United States markets for two phenoxy herbicide markets (MCPA and MCPP-p) and reduced a third phenoxy herbicide market (2,4DB) to a duopoly. Phenoxy herbicides are post-emergent selective broadleaf herbicides which are designed to act on full or partially grown weeds without damaging surrounding plants. They are used widely in the turf, lawn care, and agriculture industries to eliminate existing broadleaf weeds safely and cheaply. Nufarm and A.H. Marks sold these herbicides to agricultural and turf and lawn care formulators in their raw form as “technical” ingredients for their formulated herbicide products. Agricultural formulators generally purchase MCPA for use on cereal crops, such as wheat and barley, and 2,4DB for peanut and alfalfa crops. Turf and lawn care formulators purchase MCPP-p for turf care products used by landscape professionals or consumers. Each of the three herbicides is a highly cost-effective herbicide for its intended use with no equivalent substitutes. More expensive herbicides are generally used as complements and combined with phenoxy herbicides such as MCPA, MCPP-p, or 2,4DB, to increase the effectiveness of formulated herbicide products.

III. Entry

Entry into the markets for MCPA, MCPP-p and 2,4DB would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the acquisition. In order to obtain approval to sell herbicides for use on crops, turf, or lawns in the United States, the Environmental Protection Agency (“EPA”) requires manufacturers to submit extensive environmental and toxicology testing data. Herbicide manufacturers often generate such data by forming industry task forces to share the costs of testing. Later entrants are often required to compensate members of the task force to obtain intellectual property rights to existing testing data by either purchasing the rights to the data or obtaining a seat on the task force. The costs associated with obtaining either the testing data or a task force seat to enter the markets for MCPA, MCPP-p, and 2,4DB are high compared to the limited potential sales revenues available to an entrant in each of these markets. Additionally, obtaining EPA approval for the

Analysis to Aid Public Comment

manufacture and sale of each of the relevant products can take several years due to the presence of regulatory barriers. As a result, entry into each relevant market would require substantial sunk costs that would make entry unattractive. In addition, prior to the acquisition, Nufarm had entered into contracts with several of its task force members which posed barriers to entry by these firms. Therefore, the prospect of entry into the relevant markets is very limited and does not alleviate the concerns about the adverse competitive effects of the acquisition.

IV. Effects of the Acquisition

The acquisition is likely to cause significant competitive harm to consumers in the relevant U.S. markets for MCPA, MCPP-p, and 2,4DB by eliminating the direct and substantial competition between Nufarm and A.H. Marks. There is evidence that Nufarm acquired A.H. Marks with the expectation that it would be able to increase prices as a result of the merger. In addition, the evidence indicated that in some instances Nufarm may have increased its prices for the three herbicides following the merger. As a result, the transaction increased the likelihood that Nufarm could unilaterally exercise market power and raise prices in each of the relevant markets.

V. Terms of the Proposed Decision and Order

The Consent Agreement preserves competition in each of the relevant markets alleged in the complaint by requiring that Nufarm divest certain A.H. Marks assets to new entrants and take additional measures to restore competition in the markets for MCPA, MCPP-p, and 2,4DB. Specifically, Nufarm has agreed to sell A.H. Marks' EPA registration and task force seat for MCPA to Albaugh Inc., and A.H. Marks' EPA registration and task force seat for MCPP-p to PBI Gordon Corp. Nufarm has also agreed to modify its contractual agreements with Dow and Aceto relating to MCPA and 2,4-DB, which restricted these firms' competitive activities in the markets for MCPA and 2,4-DB. Staff has evaluated the proposed divestitures and modifications and concluded that these measures are sufficient to remedy the anticompetitive effects resulting from the transaction.

Analysis to Aid Public Comment

For both MCPA and MCPP-p, the purchase of a task force seat and EPA registration will permit each divestiture purchaser to enter and compete in these markets. By acquiring A.H. Mark's task force seat and EPA registration, the divestiture purchasers will obtain EPA approval to distribute the herbicide in the United States and certify additional manufacturing sources of the herbicides. In addition to the task force seat and EPA registration, Nufarm is required to enter into supply agreements with each divestiture purchaser to permit these purchasers to compete with Nufarm as wholesale suppliers of the herbicides while new manufacturing sources are developed.

With respect to MCPA, Nufarm would divest AH Mark's MCPA Task Force Seat and EPA registrations relating to MCPA to Albaugh. Albaugh is a qualified divestiture candidate that is uniquely situated to use the A.H. Marks assets and supply contract to compete with Nufarm in the market for MCPA. Albaugh is the largest privately-owned formulator of crop protection products. Albaugh is headquartered in Ankeny, Iowa and sells exclusively in the United States. Within the crop protection industry, Albaugh has extensive relationships with firms at every level of distribution. Given Albaugh's position, commitment, and experience in the MCPA market, staff believes that divestiture of A.H. Marks' MCPA assets will enable Albaugh to restore the competition lost as a result of the transaction.

With respect to MCPP-p, Nufarm would divest A.H. Mark's MCPP-p Task Force Seat and EPA registrations relating to MCPP-p to PBI Gordon and enter a three-year supply arrangement. PBI Gordon, headquartered in Kansas City, Missouri, is a privately held company founded in 1947. PBI Gordon is a long-standing player in the turf care industry. Its primary business is the development, manufacture, and marketing of herbicides, pest management, and related products to the lawn, garden, professional turf, and specialty agricultural markets. It has an extensive distribution network and a wide customer base. PBI Gordon's presence in the market, combined with its expertise with herbicides, will ensure it will use the assets to compete with Nufarm in the market for MCPP-p.

The Consent Agreement also addresses concerns regarding Nufarm's agreements with Dow and Aceto by preventing Nufarm

Analysis to Aid Public Comment

from enforcing agreements which may limit or restrict competitive entry in the MCPA and 2,4DB markets. Pursuant to Section V of the proposed Decision and Order, Nufarm agreed not to enforce any provision, or otherwise take any future action, restricting competition in the manufacture or sale of MCPA, 2,4DB or MCPP-p. Nufarm's compliance with these provisions will enable Dow and Aceto to enter these respective markets, as manufacturers and/or wholesalers, and compete with Nufarm for sales. Equally important, Dow and Aceto will be able to use their task force seats and registrations to sponsor new entrants to the United States markets for these herbicides. The resulting entry, or threat of entry, is likely to serve as an additional competitive constraint in both the MCPA and 2,4DB markets. Lastly the Consent Agreement contains several other significant provisions. Section IV of the proposed Order permits Nufarm's customers to terminate their contracts with Nufarm with respect to the products. Section VII requires Nufarm to notify the Commission if it: (a) acquires any task force seat or registration with respect to the products or (b) enters into any agreements with task force members or registrants that contain non-compete, joint-marketing or other provisions restricting competition. Section VIII requires Nufarm to divest the MCPA and MCPP-p assets to a trustee in the event Nufarm fails to comply with the divestiture obligations for these assets in the proposed Order.

The purpose of this analysis is to facilitate public comment on the proposed Decision and Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement and the proposed Decision and Order.

Complaint

IN THE MATTER OF

THE DUN & BRADSTREET CORPORATIONCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

Docket No. D-9342; File No. 091 0081
Filed May 6, 2010 — Decision, September 10, 2010

In May 2010, the Commission issued an administrative complaint, alleging that the acquisition by The Dun & Bradstreet Corporation (“Dun & Bradstreet”) of Quality Education Data (“QED”) would substantially lessen competition in the market for K-12 educational marketing data. The consent order requires Dun & Bradstreet to divest to MCH Inc. an updated K-12 educational marketing database, the QED name, and certain associated intellectual property. The consent order further requires Dun & Bradstreet to provide MCH Inc. with technical assistance for up to one year. The order further permits the Commission to appoint a trustee to monitor compliance with the order’s requirements.

Participants

For the *Commission*: *Joseph S. Brownman, William H. Efron, Alan B. Loughnan, Jonathan W. Platt, and Gerald A. Stein.*

For the *Respondents*: *Darrell Prescott, Baker McKenzie LLP; and Wayne Dale Collins and Lisl Dunlop, Shearman & Sterling LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Respondent The Dun & Bradstreet Corporation’s (“D&B”) acquisition of the assets of Quality Education Data, (“QED”), a division of Scholastic, Inc. (“Scholastic”), violated 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 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:

Complaint

I. SUMMARY

1. Market Data Retrieval (“MDR”), a company of D&B, is the leading provider of data for marketing to kindergarten through twelfth-grade teachers, administrators, schools and school districts (“K-12 data”) in the United States. K-12 data includes but is not limited to contact, demographic and other information relating to K-12 educators. K-12 data is sold or leased to customers that use the data to market products and services to educators. In early 2009, D&B acquired the assets of QED, MDR’s primary competitor. As a result of the acquisition, MDR now holds over 90% of the relevant market, with only a small fringe consisting of two firms accounting for the remainder. This transaction is in practical effect a merger-to-monopoly and, if allowed to remain, would likely allow MDR unilaterally to exercise market power in various ways, including increasing prices and reducing product quality and services to K-12 data customers.

II. RESPONDENT D&B

2. Respondent D&B is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 103 JFK Parkway, Short Hills, New Jersey 07078. D&B is the ultimate parent entity of and includes Dun & Bradstreet, Inc.

3. D&B is the world’s leading supplier of commercial information and insight on businesses. D&B’s global commercial database contains more than 140 million business records. In 2008, D&B’s revenue exceeded \$1.7 billion.

4. MDR, a company of D&B and a division of Dun & Bradstreet, Inc., is the leading United States provider of K-12 data. MDR has its office and principal place of business at 6 Armstrong Road, Suite 301, Shelton, Connecticut 06484. MDR also has offices in Chicago, Illinois, and San Francisco, California.

5. MDR’s products and services include direct mailing lists, e-marketing solutions, sales solutions, and market research.

Complaint

III. QED

6. Up until on or about January 28, 2009, QED was a division of Scholastic, with its office and principal place of business at 1050 17th Street, Suite 1100, Denver, Colorado 80265. Scholastic is a global children's publishing, education and media company, and the world's largest publisher and distributor of children's books as well as a leading developer of educational technology products.

7. QED had supplied K-12 data products and services in competition with MDR.

IV. THE ACQUISITION

8. On or about January 28, 2009, Dun & Bradstreet, Inc. and Scholastic entered into an Asset Purchase Agreement (the "Agreement").

9. Pursuant to the Agreement, Dun & Bradstreet, Inc. acquired substantially all of the assets of QED for approximately \$29 million (the "Acquisition").

V. JURISDICTION

10. D&B and Scholastic are, and at all times relevant herein have been, corporations as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. At all times relevant herein, D&B and Scholastic have been, and are now, 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.

VI. RELEVANT PRODUCT MARKET

11. The relevant product market in which to assess the effects of the Acquisition is kindergarten through twelfth grade educational marketing data, including but not limited to, contact, demographic and other information relating to teachers,

Complaint

administrators, schools, and individual school districts, that is sold or leased to customers. Other relevant markets may also exist that consist of certain categories of customers or categories of K-12 data.

VII. RELEVANT GEOGRAPHIC MARKET

12. The relevant geographic market in which to analyze the effects of the Acquisition is the United States.

VIII. STRUCTURE OF THE MARKET

13. The K-12 data market is highly concentrated.

14. Prior to the Acquisition, MDR and QED were the only two significant competitors in the K-12 data market. MDR was the nation's largest provider and QED was the nation's second largest provider. As a result of the Acquisition, MDR now holds over 90% of the K-12 data market. There is a small and competitively insignificant fringe consisting of two firms, MCH, Inc. ("MCH") and Agile Education Marketing ("Agile").

15. Neither MCH nor Agile possess a database with the size, breadth, and scope of coverage comparable to that held by either MDR or QED prior to the Acquisition.

16. The Acquisition substantially increased concentration in the already highly concentrated K-12 data market.

IX. COMPETITIVE EFFECTS

17. The Acquisition may substantially lessen competition in the relevant market by, among other things:

- a. Eliminating actual, direct, and substantial, competition between MDR and QED;
- b. Reducing the number of significant competitors from two to one, creating a virtual monopoly, and giving MDR substantial market power;

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- c. Facilitating the ability of MDR to exercise unilateral market power;
- d. Reducing MDR's incentives to improve service or product quality or to pursue further innovation; and
- e. Allowing MDR, unconstrained by effective competition, to increase prices.

X. ENTRY CONDITIONS

18. Entry into the K-12 data market would not be timely, likely, or sufficient to prevent or defeat the anticompetitive effects of the Acquisition.

19. New entry or fringe firm expansion at the scale necessary to restore the competition lost as a result of the Acquisition, or to create a competitively significant firm, is unlikely. A new entrant or expanded fringe firm would need an up-to-date database with the size, breadth and scope of market coverage comparable, at a minimum, to that held by QED prior to the Acquisition. Any such entry or fringe firm expansion would take more than two years and require substantial sunk costs, which are high relative to the size of a profit stream that the new entrant or fringe firm might anticipate.

20. Even if a new entrant or fringe firm could develop a database comparable to that held by QED prior to the Acquisition, it would face significant difficulty marketing its products and services to customers of MDR because its brand is unlikely to have the important reputation for quality that customers require. It would likely require any new entrant or fringe firm at least several years to acquire the necessary reputation for quality to become a potential competitive constraint.

XI. VIOLATIONS CHARGED

21. The Agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

22. The Acquisition may substantially lessen competition or tend to create a monopoly in violation of Section 7 of the Clayton

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Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

XII. NOTICE

Notice is hereby given to the respondent that the sixth day of January, 2011, at 10:00 a.m., is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, 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 and Clayton Acts to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations 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 said Rules.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the

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Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an answer is filed by the respondent. 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., Washington DC 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 five days of receiving respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

XIII. NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in connection with this matter that the Agreement violates Section 5 of the Federal Trade Commission Act, as amended, or the Acquisition 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 Respondent D&B as is supported by the record, including, but not limited to:

1. The divestiture with appropriate updates, of all assets necessary to restore the lost competition between MDR and QED, and in a manner that creates two or more distinct, separate, viable, and independent businesses in the relevant market(s), each with the full incentive, ability, and assets needed to offer the kinds of products and services that MDR and QED prior to the Acquisition had been offering, or had planned to offer.
2. A requirement that D&B divest and not retain all data obtained from QED.

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3. A requirement that D&B provide prior written notice to the Commission of all acquisitions, mergers, consolidations, or other combinations of its K-12 data business or assets with any other company providing K-12 data.
4. A requirement to file periodic compliance reports with the Commission.
5. Other relief appropriate to correct or remedy the anticompetitive effects of the Acquisition, or to ensure the creation of one or more viable, competitively significant, independent new entities, able to compete in all significant respects against D&B.

THEREFORE, the Federal Trade Commission on this sixth day of May, 2010, has issued this Complaint against Respondent The Dun & Bradstreet Corporation.

By the Commission, Commissioner Rosch dissenting.

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having heretofore issued its complaint charging The Dun & Bradstreet Corporation (“Respondent”), with violations of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, as amended, and Respondent having been served with a copy of that complaint, together with a notice of contemplated relief, and Respondent having answered the complaint denying said charges but admitting the jurisdictional allegations set forth therein; and

The Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order (“Consent Agreement”), an admission by the

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Respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by 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 Secretary of the Commission having thereafter withdrawn the matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having thereafter 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, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Respondent The Dun & Bradstreet Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business at 103 JFK Parkway, Short Hills, New Jersey 07078. Dun & Bradstreet, Inc. is a subsidiary of Respondent The Dun & Bradstreet Corporation. Market Data Retrieval is a division of Dun & Bradstreet, Inc. and has its office and principal place of business at 6 Armstrong Road, Suite 301, Shelton, Connecticut 06484.
2. The Commission has jurisdiction over the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

Decision and Order

ORDER**I.
Definitions**

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

- A. “D&B” or “Respondent” means The Dun & Bradstreet Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by The Dun & Bradstreet Corporation, including but not limited to Dun & Bradstreet, Inc. and MDR, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “MCH” means MCH, Inc., a corporation organized, existing and doing business under and by virtue of the laws of Missouri, with its office and principal place of business located at 601 East Marshall Street, P.O. Box 295, Sweet Springs, Missouri 65351.
- C. “MDR” means Market Data Retrieval, a division of Dun & Bradstreet Inc., a subsidiary of Respondent.
- D. “QED” means the former Quality Education Data marketing services division of Scholastic, Inc.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer” means MCH or any other Person approved by the Commission to acquire the QED K-12 Data Business Assets and the Augmented QED K-12 Database pursuant to this Order.
- G. “Acquisition” means MDR’s acquisition of QED from Scholastic Inc. on or about February 11, 2009.
- H. “Acquisition Date” means the date the Acquisition was consummated.

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- I. “Augmented QED K-12 Database” means the QED K-12 Database augmented and updated by Respondent pursuant to the Revision Protocol.
- J. “Contract” means any contract or other agreement, other than a Volume Discount Plan, between a Customer and a provider of K-12 Data that imposes a future obligation to purchase or lease K-12 Data. Contract includes, but is not limited to, contract data leases, database agreements, license agreements, and subscription plans. Contract excludes purchase orders and other agreements relating solely to one-time purchases.
- K. “Customer” means any Person who purchases or leases K-12 Data.
- L. Divestiture Agreement(s)” means the MCH Agreements, or any other agreement(s) that effectuate the divestiture of the QED K-12 Business Assets and the Augmented QED K-12 Database, as required by this Order.
- M. “Divestiture Date” means the closing date of the Divestiture Agreement, including without limitation, the MCH Agreement. If there is more than one Divestiture Agreement then the Divestiture Date shall be the closing date that is latest in time.
- N. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.
- O. “Intellectual Property” means any type of intellectual property, including all rights to intellectual property owned by any Third Party, and including without limitation, copyrights, trademarks, domain names, trade dress, trade secrets, techniques, data, inventions, patents, practices, methods and other confidential know-how and proprietary technical, business, research, or development information.

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- P. “K-12 Data” means a collection of PIN Numbers, names, job titles, course titles, demographic information and/or contact information of education industry participants, including institutions and individuals, covering kindergarten through grade twelve, that is available for use, sale or lease to Customers or Third Parties.
- Q. “K-12 Database” means an education list database containing K-12 Data (including all data formats, data configurations, data structures and tables).
- R. “K-12 Data Business” means the development, maintenance, updating, correction, marketing, lease and sale of K-12 Data.
- S. “MCH Agreements” means the Acquisition Agreement between MCH, Inc. and Dun & Bradstreet, Inc., dated August 12, 2010, including all amendments, exhibits, attachments, agreements, and schedules, attached as Confidential Appendix A.
- T. “Monitor” means any monitor appointed by the Commission pursuant to the relevant provisions of this Order.
- U. “Net Names Discount” means the maximum percentage of names purchased by a Third Party for which the Third Party can receive a credit on the basis that the names purchased are duplicates of names already in the possession of such Third Party. For example, a Net Names Discount of 30% means that a Third Party who purchased 1000 names can receive credit for up to 300 duplicate names.
- V. “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.

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- W. “PIN Number” means a unique identification number assigned to an individual institutional record (such as a record for a school, school district, daycare, college or library) in a K-12 Database that is used to help customers track and update particular records in such database.
- X. “PIN Number Bridge” means the cross-reference file created by MDR using, in whole or in part, information obtained through the Acquisition that relates the PIN Number used by QED to the corresponding number used by MDR and that is used by MDR to assist customers in migrating from using QED PIN Numbers to using MDR PIN Numbers, or *vice versa*.
- Y. “QED Confidential Business Information” means all information not in the public domain related to QED’s K-12 Database and/or the QED K-12 Data Business Assets except that QED Confidential Business Information shall not include information a) that is not required to be divested under this Order, or b) for which this Order requires divestiture of only a copy of such information.
- Z. “QED Customer” means any Person who purchased or leased K-12 Data from QED during the twelve (12) months preceding the Acquisition Date.
- AA. “QED Customer Information” means all information located in the MDR central files and owned by, or in the possession or control of, MDR that relates to QED Customers, including, but not limited to:
1. All the data in the former QED Onyx customer relations management system;
 2. Copies of any and all Volume Discount Plans, Contracts and other agreements between QED and a Customer; and
 3. Copies of all information available through MDR’s salesforce.com customer relations management

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system relating to a QED Customer who had a Contract or Volume Discount Plan with QED on, or within thirty (30) days prior to, the Acquisition Date.

BB. “QED K-12 Database” means the K-12 Database acquired by Respondent in connection with the Acquisition, as maintained as of the Divestiture Date.

CC. “QED K-12 Data Business Assets” means the following assets:

1. The QED K-12 Database and all copies thereof;
2. All Intellectual Property obtained by Respondent in connection with the Acquisition that QED or Scholastic, Inc. had used in the K-12 Data Business;
3. All software, source code, data and documentation, and all rights to and copies and tangible embodiments thereof obtained by Respondent in connection with the Acquisition that QED or Scholastic, Inc. had used in the K-12 Data Business,

Provided, however, that software that can readily be purchased or licensed from sources other than MDR and which has not been modified in a manner material to the use or function thereof (other than through user preference settings), *e.g.*, Microsoft Word, is excluded;

4. All commercial names, trade names, “doing business as” (d/b/a) names, registered and unregistered trademarks and service marks in the possession or control of Respondent that it obtained in connection with the Acquisition and that QED or Scholastic, Inc. had used in the K-12 Data Business;
5. QED Customer Information; and

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6. A copy of all amendments, addenda or other modifications to any Contract, Volume Discount Plan or other agreement relating, in whole or part, to the K-12 Data Business that was originally entered into between QED and a Customer prior to the Acquisition.
- DD. “QED Vendor” means any Third Party who, at any time during the twelve (12) months preceding the Acquisition Date, provided services to QED to update, maintain, edit and/or correct the QED K-12 Data or QED K-12 Database.
- EE. “Relevant Agreement” means
1. any Contract or Volume Discount Plan identified in Confidential Appendix E; or
 2. any Contract or Volume Discount Plan that
 - a. was originally entered into between a Customer and QED, or
 - b. is a Renewal of a Contract or Volume Discount Plan originally entered into between a Customer and QED, or
 - c. is a Contract or Volume Discount Plan of the same type that was in effect between QED and a Customer on, or within thirty (30) days prior to, the Acquisition Date (i.e. is a Contract Data Lease where prior to the Acquisition the Customer had a Contract Data Lease with QED), or
 - d. is with a Customer who did not have a Contract or Volume Discount Plan with MDR during the twelve months prior to the Acquisition Date; or
 3. any Volume Discount Plan that is with a Customer who purchased more than \$10,000 of K-12 Data from QED during the twelve (12) months preceding the Acquisition Date.

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- FF. “Relevant Employee(s)” means:
1. any current or former employee of Respondent who was an employee of QED or Scholastic, Inc. on the day prior to the Acquisition Date; or
 2. any current or former employee of Respondent whose job or duties primarily involve or involved the sale of K-12 Data,
- Provided, however,* that “Relevant Employee” does not include the sales management employees who are identified by job title on Confidential Appendix F, unless such employees were employees of Scholastic, Inc. on the day prior to the Acquisition Date.
- GG. “Renewal” means an agreement to continue a Contract or Volume Discount Plan, including all amendments or modifications thereto, for an additional term beyond the initial expiration date contained in such Contract or Volume Discount Plan.
- HH. “Revision Protocol” means the protocol described in Confidential Appendix B for updating and augmenting the QED K-12 Database.
- II. “Third Party” or “Third Parties” means any Person or Persons other than Respondent or the Acquirer.
- JJ. “Volume Discount Plan” means an agreement between a Customer and provider of K-12 Data that provides discounts based on annual volume levels of future purchases or leases of K-12 Data.

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

- A. Not later than five (5) days after the date on which this Order becomes final, Respondent shall execute the Divestiture Agreements and shall divest, absolutely

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and in good faith, to the Acquirer the QED K-12 Data Business Assets in accordance with this Order and the Divestiture Agreement(s).

- B. Not later than thirty (30) days after the Divestiture Date, Respondent shall divest, absolutely and in good faith, to the Acquirer the Augmented QED K-12 Database, and all copies thereof, in accordance with this Order and the Divestiture Agreement(s).
- C. To the extent Respondent imported or transferred data from the QED K-12 Database to the MDR K-12 Database after June 1, 2010, Respondent shall purge or remove such data from the MDR K-12 Database,

Provided, however, that other than as required by this Paragraph, Respondent shall not be required to purge or remove any data imported from the QED K-12 Database to the MDR K-12 Database.

- D. Prior to divesting the QED K-12 Data Business Assets, Respondent shall secure all consents and waivers from Third Parties that are necessary to permit Respondent fully to divest the QED K-12 Data Business Assets and the Augmented QED K-12 Database.

Provided, however, that Respondent may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

- E. Until the Augmented QED K-12 Database is fully and finally delivered to the Acquirer, Respondent shall maintain and preserve the QED K-12 Data Business Assets and prevent their deterioration and wasting.
- F. Respondent shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Divestiture Agreement, or in any agreement related to Respondent's K-12 Data Business, a decision the result of which would be inconsistent with the terms of this Order.

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- G. The purpose of the divestiture of the QED K-12 Data Business Assets is:
1. to create a viable and effective competitor for the development, marketing, updating, correction, lease and sale of K-12 Data who is independent of the Respondent and is able to provide a range of data products at least equivalent to those provided by QED; and
 2. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.
Remedial Relief

IT IS FURTHER ORDERED that

- A. At the request of the Acquirer, Respondent shall take all steps reasonably necessary to facilitate the ability of the Acquirer to enter into a contract with a QED Vendor that is equivalent in terms and scope to the most recent contract between QED and such QED Vendor. Such steps shall include, but are not limited to, modifying any agreement or contract between Respondent and such QED Vendor that interferes with the ability of the Acquirer to enter into a contract that complies with the provisions of this subsection.
- B. For a period lasting until one (1) year after the Augmented QED K-12 Database is fully and finally delivered to the Acquirer, Respondent shall provide to the Acquirer such assistance as is reasonably necessary to assist the Acquirer in accessing and using the QED K-12 Data Business Assets and the Augmented QED K-12 Database, including but not limited to information, technical assistance, advice, training and access to personnel and such other assistance as may be specified in the Divestiture Agreement(s). Respondent shall provide such assistance at a price

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agreed to by Respondent and the Acquirer and approved by the Commission as part of the Divestiture Agreement and within a reasonable time, but in any case no more than five (5) days, after a request by the Acquirer.

Provided, however, that nothing in this paragraph shall require Respondent to acquire new assets or develop new capabilities in order to fulfill its obligations under this subsection.

IV.
Customers

IT IS FURTHER ORDERED that:

- A. For a period lasting until twenty-one (21) months after the Augmented QED K-12 Database is fully and finally delivered to the Acquirer, Respondent shall permit any Customer to terminate any Relevant Agreement to which such Customer is a signatory, upon thirty (30) days written notice stating (1) the Customer's intent to terminate the Relevant Agreement, and (2) that the purpose of the termination is to consider alternative sources of K-12 Data. Respondent shall permit such termination without penalty, forfeiture or other similar charges to such Customer. Further, with respect to such Relevant Agreements:
1. with respect to any Volume Discount Plan, Respondent shall base the discount level for purchases made pursuant to such agreement on an annualized purchase volume (*i.e.*, the average monthly volume purchased by the Customer during the period prior to termination multiplied by twelve (12)); and
 2. with respect to any Contract, Respondent, in consultation with the Customer, shall determine the fair value of products or services already provided under the Relevant Agreement as of the date of

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termination (“Fair Value”) and either (i) refund any monies paid by the Customer in excess of the Fair Value or (ii) invoice the Customer for any monies due for products and services provided by Respondent under the Contract prior to the termination date. The Fair Value shall be determined by comparing the products and services actually received with all products and services to be provided over the term of the Contract and the total contract price. If Respondent and Customer have not agreed on the Fair Value within five business (5) days of the Customer notifying Respondent of the termination of the Contract, then the Monitor shall determine, within seven (7) days, the Fair Value, which shall be binding upon Respondent.

- B. No later than thirty (30) days after the Augmented K-12 Database is fully and finally delivered to the Acquirer:
1. Respondent shall notify all Customers who have a Relevant Agreement of their rights under this Order and offer each such Customer the opportunity to terminate any Relevant Agreement with Respondent (“Termination Notice Date”); and
 2. Respondent shall send written notification in the form of the letter attached as Appendix D, with a copy of, or link on the Commission website to, this Order and the Complaint, by certified mail with return receipt requested to the person designated in the Relevant Agreement to receive notices from Respondent or, if no such person has been designated, the Chief Executive Officer or General Counsel of the Customer. Respondent shall keep a file of such return receipts for two (2) years after the Divestiture Date.

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- C. Respondent shall not directly or indirectly:
1. Require any Customer to make or pay any payment (other than any amount determined in Paragraph IV.A. in this Order), penalty, or charge for, or provide any consideration in relation to, or otherwise deter, the exercise of the option to terminate and end a Relevant Agreement as provided for in the Order; or
 2. Retaliate against or take any action adverse to the economic interests of any Customer that exercises its rights under this Order,
- Provided however,* that Respondent shall retain its right to enforce, 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 its option to terminate a Relevant Agreement with Respondent, and
- Provided further, however,* that nothing in this provision shall prevent Respondent from competing for any customer in its ordinary course of business.
- D. Respondent shall, at no cost, facilitate the ability of a Customer who terminates a Relevant Agreement to convert from using MDR PIN Numbers to using QED PIN Numbers (“Converting Customer”) by i) licensing and delivering to the Converting Customer the PIN Number Bridge, and ii) providing the information and assistance reasonably necessary to enable the Converting Customer to use the bridge for the purpose and period of time described in this subsection. Such license shall have a term of one-hundred eighty (180) days following the termination of the Relevant Agreement, and shall permit the Converting Customer to continue to use the MDR PIN Numbers for the purpose of converting to QED PIN Numbers, notwithstanding any restrictions to the contrary in any other agreement between the Converting Customer and MDR.

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- E. After Respondent's obligations under Paragraph IV.D. of this Order are completed, Respondent shall destroy and no longer use the PIN Number Bridge.
- F. For a period lasting until twenty-one (21) months after the Augmented QED K-12 Database is fully and finally delivered to the Acquirer, Respondent shall offer all Third Parties placing orders for K-12 Data with Respondent a Net Names Discount no smaller than thirty percent (30%) with respect to direct mail addresses and electronic mail addresses obtained from the Acquirer.

V.
Employees

IT IS FURTHER ORDERED that:

- A. For a period lasting until one (1) year after the Divestiture Date:
 - 1. Respondent shall, within ten (10) days of a request by the Acquirer, provide the following information to the Acquirer (to the extent permitted by applicable law and to the extent that Respondent has such information) regarding any Relevant Employee:
 - a. the date of hire and effective service date;
 - b. job title or position held;
 - c. a specific description of the Relevant Employee's responsibilities related to the K-12 Data Business; *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 and current target or guaranteed bonus, if any;

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- 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; and
 - h. copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.
2. Respondent shall not interfere with the ability of the Acquirer to solicit, interview or hire any Relevant Employee and shall remove any impediments within the control of Respondent that may deter any Relevant Employee from accepting employment with the Acquirer, including without limitation, any non-compete or non-disclosure provisions of any employment or other contracts. Respondent shall not make any counteroffer to a Relevant Employee who has received a written offer of employment from the Acquirer,

Provided, however, that Respondent shall not be required to release any Relevant Employee from restrictions i) imposed by a Third Party on the disclosure or use of information provided to Respondent by such Third Party, or ii) on disclosure of confidential information regarding Respondent that is not related to the K-12 Data Business, the QED K-12 Data Business Assets or the Augmented QED K-12 Database.

- B. For a period lasting until two (2) years after the Divestiture Date, Respondent shall not solicit or otherwise attempt to induce any employee hired by the Acquirer to terminate his or her employment relationship with the Acquirer,

Provided, however, that Respondent may i) hire any Relevant Employee whose employment has been

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terminated by the Acquirer or who independently applies for employment with Respondent, 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 Relevant Employees; or iii) hire a Relevant Employee who contacts Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from Respondent.

VI.
Confidentiality

IT IS FURTHER ORDERED that

- A. Respondent shall not use, disclose or convey any QED Confidential Business Information, directly or indirectly, to any Third Party, except that Respondent may disclose QED Confidential Business Information to the Acquirer or Persons specifically authorized by the Acquirer to receive such information,

Provided, however, that nothing in this agreement shall prohibit Respondent from using or disclosing any QED Confidential Business Information licensed by Respondent through the Divestiture Agreement(s).

- B. Within thirty (30) days of the Divestiture Date, Respondent shall provide written notice of the restrictions on the disclosure and use of QED Confidential Business Information contained in this Order to all employees who had access to QED Confidential Business Information obtained in connection with the Acquisition. Respondent 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.

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

- A. The Commission may appoint a Monitor to assure that Respondent expeditiously complies with all obligations and performs all responsibilities required by this Order.
- B. The Commission appoints Richard Casabonne as Monitor and approves the Monitor Agreement between Mr. Casabonne and Respondent, attached as Appendix C.
- C. Respondent shall facilitate the ability of the Monitor to comply with the duties and obligations set forth in this Order, and shall take no action that interferes with or hinders the Monitor's authority, rights or responsibilities as set forth in this Order or any agreement between the Monitor and Respondent.
- D. The Monitor's duties and responsibilities shall include the following:
 - 1. the Monitor shall act in a fiduciary capacity for the benefit of the Commission;
 - 2. the Monitor shall have the power and authority to monitor Respondent's compliance with Paragraphs II through VI 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 including, but not limited to, the determinations required in Paragraph IV.A.2, and monitoring the augmentation and updating of the QED K-12 Database pursuant to the Revision Protocol;
 - 3. the Monitor shall, in his or her sole discretion, consult with Third Parties in the exercise of his or

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her duties under this Order or any agreement between the Monitor and Respondent; and

4. the Monitor shall evaluate the reports submitted to the Commission by Respondent pursuant to the Order and the Consent Agreement, and within thirty (30) days from the date the Monitor receives a report, report in writing to the Commission concerning performance by Respondent of its obligations under Paragraphs II through VI of the Order.
- E. Respondent shall grant and transfer to the 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. Respondent shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent's compliance with Paragraphs II through VI of the Order;
 2. subject to any demonstrated legally recognized privilege, Respondent shall provide the Monitor full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent's compliance with its obligations under Paragraphs II through VI of the Order;
 3. within five days of submitting a report required by this Order or the Consent Agreement to the Commission, Respondent shall deliver a copy of such report to the Monitor;
 4. the Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions to

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which the Monitor and Respondent agree and that the Commission approves;

5. the Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
6. Respondent shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor; and
7. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement,

Provided, however, that such agreement shall not restrict the Monitor from providing any information to the Commission or require the Monitor to report to Respondent the substance of communications to or from the Commission or the Acquirer.

- 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 related to Commission materials and information received in connection with the performance of the Monitor's duties.

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- G. The Monitor shall serve until the termination of all Respondent's obligations under Paragraphs II through VI of the Order.
- H. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor. The Commission shall select the substitute 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 any proposed substitute Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed substitute Monitor, Respondent shall be deemed to have consented to the selection of the proposed substitute Monitor.
- I. 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.
- J. 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.

VIII.
Divestiture Trustee

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 relevant assets as required by this Order, the Commission may appoint a 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

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the event that the Commission or the Attorney General brings an action pursuant to §5(l) of the Federal Trade Commission Act, 15 U.S.C. §45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to 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 Respondent to comply with this Order.

- B. The Commission shall select the Divestiture Trustee, subject to the consent of the 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 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. 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 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

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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, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission, and,

Provided further, however, that Respondent shall select such entity within five business (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 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

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contingent on the divestiture of all of the relevant assets that are 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 Monitor pursuant to the relevant provisions of this Order;

8. the Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
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, 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.

IX.**Incorporation of Divestiture Agreement****IT IS FURTHER ORDERED** that:

- A. Each Divestiture Agreement, if approved by the Commission, 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 Respondent under a Divestiture Agreement. Respondent shall comply with the terms of each Divestiture Agreement, and a breach by Respondent 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 Respondent cannot fully comply with both, Respondent shall comply with the term of this Order.
- B. Respondent shall include in each Divestiture Agreement a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of Respondent's obligations to the Acquirer pursuant to this Order.

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- C. Between the date the Commission grants approval of a Divestiture Agreement and the Divestiture Date, Respondent shall not modify or amend any material term of any Divestiture Agreement without the prior approval of the Commission. Further, any failure to meet any material condition precedent to closing (whether waived or not) shall constitute a violation of this Order.
- D. After the Divestiture Date and during the term of each Divestiture Agreement, Respondent shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Divestiture Agreement. Further, Respondent shall seek Commission approval of such modification (material or otherwise) within ten (10) days of filing such notification. If the Commission denies approval, the Commission will notify Respondent and Respondent shall expeditiously rescind the modification or make such other changes as are required by the Commission.

X.**Reporting and Inspection****IT IS FURTHER ORDERED** that

- A. 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 the date this Order becomes final and every thirty (30) days thereafter until Respondent has complied with the obligations of Paragraphs II.A through E of this Order;
 2. Six (6) months after the date this Order becomes final; and

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3. On the first anniversary of the date on which the Order becomes final, and annually for three (3) years, thereafter.
- B. 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 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:
1. 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 the Respondent; and
 2. to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

XI.**Notice of Dissolution**

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

- A. any proposed dissolution of Respondent; or
- 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

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of subsidiaries, if such change may affect compliance obligations arising out of this Order.

XII.
Termination

IT IS FURTHER ORDERED that this Order shall terminate on September 10, 2020.

By the Commission.

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CONFIDENTIAL APPENDIX A

ACQUIRER AGREEMENTS

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

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CONFIDENTIAL APPENDIX B

REVISION PROTOCOL

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

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APPENDIX C**MONITOR AGREEMENT
[Redacted Public Version]**

This Monitor Agreement (“Monitor Agreement”), entered into this 9th day of August 2010, between The Dun & Bradstreet Corporation (“Respondent”) and Richard Casabonne (“Mr. Casabonne”) provides as follows:

WHEREAS, the Staff of the United States Federal Trade Commission (the “Commission”), in In the Matter of The Dun & Bradstreet Corporation and Respondent have agreed to an Agreement Containing Consent Order (“Consent Agreement”), incorporating a Decision and Order (“Order”) with Respondent, which, among other things, requires Respondent to divest or transfer certain defined assets pursuant to the Acquisition Agreement between Respondent and MCH, Inc. (“Acquirer”) and those ancillary agreements referenced therein (collectively, the “Remedial Agreement”), and provides for the appointment of a Monitor to ensure that Respondent complies with its obligations under the Order and the Remedial Agreement;

WHEREAS, the staff of the Commission may appoint Mr. Casabonne as such monitor (the “Monitor”) pursuant to the Order to monitor Respondent’s compliance with the terms of the Order and with the Remedial Agreement referenced in the Order, and Mr. Casabonne has consented to such appointment;

WHEREAS, the Staff of the Commission on July 30, 2010, notified Respondent of selection of Mr. Casabonne as the Monitor, and Respondent agreed to the selection of Mr. Casabonne, and is executing this Monitor Agreement that, subject to the prior approval of the Commission, confers on the Monitor all rights and powers necessary to permit the Monitor to monitor Respondent’s compliance with the relevant requirements of the Order in a manner consistent with the purpose of the Order;

WHEREAS, this Monitor Agreement, although executed by the Monitor and Respondent is not effective for any purpose, including but not limited to imposing rights and responsibilities

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on Respondent or the Monitor under the Order, until it has been approved by the Commission; and

WHEREAS, the parties to this Monitor Agreement intend to be legally bound; NOW, THEREFORE, the parties agree as follows:

- (1) Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Order.
- (2) The Monitor shall have all of the powers, responsibilities and protections conferred upon the Monitor by the Order.
- (3) Respondent hereby agrees that Respondent will fully comply with all terms of the Order requiring it to confer its rights, powers, authority and privileges upon the Monitor, or to impose upon itself any duties or obligations with respect to the Monitor, to enable the Monitor to perform the duties and responsibilities of the Monitor thereunder.
- (4) Respondent further agrees that:
 - a) it will use commercially reasonable best efforts to provide the Monitor with prompt notification of significant meetings, including date, time and venue, scheduled after the execution of this Monitor agreement, relating to the Remedial Agreement and such meetings may be attended by the Monitor or his representative, at the Monitor's option, or at the request of the Commission or staff of the Commission;
 - b) it will provide the Monitor the minutes of the above-referenced meetings as soon as practicable and, in any event, not later than those minutes are available to any employee of the Respondent;
 - c) it will provide the Monitor with electronic or hard copies, as may be appropriate, of all reports submitted to the Commission pursuant to the Order, simultaneous with the submission of such reports to the Commission, for the duration of the Monitor's term under this Monitor Agreement;

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d) it will, subject to any demonstrated legally recognized privilege, grant the Monitor 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 may reasonably request, related to Respondent's compliance with their obligations under the Order, including but not limited to, their obligations related to the relevant assets; and

e) it will 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's compliance with the Order.

(5) Respondent shall promptly notify the Monitor of any significant written or oral communication that occurs after the date of this Monitor Agreement between the Commission and the Respondent related to the Remedial Agreement, together with copies of such communications.

(6) The Monitor 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 shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

(7) Respondent shall pay Monitor in accordance with the fee schedule attached hereto as Confidential Appendix A, for all reasonable time spent in the performance of the Monitor's duties and responsibilities, including all monitoring activities, all work in connection with the negotiation and preparation of this Monitor Agreement, all work in the nature of final reporting and file closure, and all reasonable and necessary travel time.

a) In addition, Respondent will pay (i) all out-of-pocket expenses reasonably incurred by the Monitor in the performance of the Monitor's duties and responsibilities, including any telephone calls and auto, train or air travel in the

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performance of the Monitor's duties, and (ii) all fees and disbursements reasonably incurred by such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.

b) The Monitor shall have full and direct responsibility for compliance with all applicable laws, regulations and requirements pertaining to work permits, income and social security taxes, unemployment insurance, worker's compensation, disability insurance, and the like.

(8) The Monitor shall maintain the confidentiality of all information provided to the Monitor by Respondent. Such information shall be used by the Monitor only in connection with the performance of the Monitor's duties pursuant to this Monitor Agreement. Such information shall not be disclosed by the Monitor to any third party other than:

a) persons employed by, or working with the Monitor under this Monitor Agreement, in which case and such persons shall be informed and agree in writing to abide by the confidentiality obligations applicable to the Monitor, in accordance with Paragraph 12 below, or

b) persons employed at the Commission and working on this matter;

c) other persons if consented to by Respondent.

(9) The Monitor shall maintain a record and inform the Commission of all persons (other than representatives of the Commission) to whom confidential information related to this Monitor Agreement has been disclosed.

(10) The Monitor shall act in a fiduciary capacity for the benefit of the Commission.

(11) Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall promptly return to the Respondent all materials provided to the Monitor by Respondent

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and shall destroy any material prepared by the Monitor that contains or reflects any confidential information of Respondent. Nothing herein shall abrogate the Monitor's duty of confidentiality, including the obligation to keep such information confidential for a period of ten (10) years after the termination of this Monitor Agreement.

(12) The Monitor shall keep confidential for a period of ten (10) years all other aspects of the performance of his duties under this Monitor Agreement and shall not disclose any confidential or proprietary information relating thereto. To the extent that the Monitor wishes to retain any employee, agent, consultant or any other third party to assist the Monitor in accordance with the Order, the Monitor shall ensure that, prior to being retained, such persons execute a confidentiality agreement in a form agreed upon by the Monitor and Respondent.

(13) Nothing in this Monitor Agreement shall require Respondent to disclose any material or information that is subject to a legally recognized privilege or that Respondent is prohibited from disclosing by reason of law or any agreement with a third party.

(14) Each party shall be reasonably available to the other to discuss any questions or issues either party may have concerning compliance with the Order as they relate to Respondent.

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

(16) Upon this Monitor Agreement becoming effective, the Monitor shall be permitted, and

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Respondent shall be required, to notify Acquirer with respect to Monitor's appointment.

(17) In the event of a disagreement or dispute between Respondent and Monitor concerning Respondent's obligations under this Order, and in the event that such disagreement or dispute cannot be resolved by the parties, either party may seek the assistance of the Commission's Compliance Division to resolve this issue.

(18) This Monitor Agreement shall be subject to the substantive law of the State of New York (regardless of the choice of law principles of New York or those of any other jurisdiction).

(19) This Monitor Agreement shall terminate when the last obligation under it has been fully performed, provided however, that the Commission may extend this Monitor Agreement as may be necessary or appropriate to accomplish the purpose of the Order. The confidentiality obligations of this Monitor Agreement shall survive its termination.

(20) In the event that, during the term of this Monitor Agreement, the Monitor becomes aware that he has or may have a conflict of interest that may affect or could have the appearance of affecting the performance by the Monitor of any of his duties under this Monitor Agreement, the Monitor shall promptly inform both Respondent and the Commission of such conflict or potential conflict.

(21) In the performance of his functions and duties under this Monitor Agreement, the Monitor shall exercise the standard of care and diligence that would be expected of a reasonable person in the conduct of his or her own business affairs.

(22) It is understood that the Monitor will be serving under this Monitor Agreement as an independent contractor and that the relationship of employer and employee shall not exist between Monitor and Respondent.

(23) This Monitor Agreement is for the sole benefit of the Parties hereto and their permitted assigns and the Commission,

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and nothing herein express or implied shall give or be construed to give any other person any legal or equitable rights hereunder.

(24) This Monitor Agreement contains the entire agreement between the parties hereto with respect to the matters described herein and replaces and any and all prior agreements or understandings, whether written or oral.

(25) Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail, facsimile (with acknowledgement of receipt of such facsimile having been received), or electronic mail, to the applicable party at its address below (or to such other address as to which such party shall hereafter notify the other party):

If to the Monitor, to:

Richard Casabonne
Casabonne Associates, Inc.
141 Dickerman Road
Newton, MA 02461
Phone: (510) 757-8768
Email: rcasabonne@casabonneassociates.com

If Respondent to:

The Dun & Bradstreet Corporation
Attention: John Cinque, Esq. Associate General Counsel
The Dun & Bradstreet Corporation
103 JFK Parkway
Short Hills, NJ 07078
Telephone: (973) 921-5674
Fax: (866) 321-3893
Email: CinqueJ@dnb.com

With copy to:

Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022

Attention: Wayne Dale Collins

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Telephone: (212) 848-4127
Facsimile: (646) 848-4127
Email: wcollins@shearman.com

If to the Commission, to:

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Attention: Secretary
Telephone: (202) 326-2514
Facsimile: (202) 326-2496

With a copy to:

Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20001

Attention: Dan Ducore, Director for Compliance
Telephone: (202) 326-2526
Facsimile: (202) 326-3396
Email: dducore@ftc.gov

- (26) This Monitor Agreement shall not become binding until it has been approved by the Commission.
- (27) This Monitor Agreement may be signed in counterparts.

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

RESPONDENT

MONITOR

Jeffrey S. Hurwitz
Senior Vice President,
General Counsel and
Corporate Secretary
The Dun & Bradstreet Corporation

Richard Casabonne
Casabonne Associates, Inc.

**MONITOR AGREEMENT
APPENDIX A**

FEE SCHEDULE

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

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APPENDIX D

TERMINATION LETTER FORM

[CDL/Subscription Customer Notice]

On Official MDR Letterhead
Certified Mail, Return Receipt Requested

[Date]

Name
Company Name
Address
City, State ZIP

Re: Notification of Your Right to Terminate Contract

Dear [MDR Customer]:

This letter is to notify you that you have the right to terminate certain contract(s) with MDR, if you choose to do so. Pursuant to an Order issued by the Federal Trade Commission in connection with a settlement we reached with the FTC, we are required to give you this notice, and to honor a request to terminate, as fully described below.

As you may know, MDR acquired QED from Scholastic Inc. in February 2009. Although we believe there are significant customer benefits from the QED acquisition, the Federal Trade Commission filed an administrative complaint against MDR's parent company, The Dun & Bradstreet Corporation, alleging that MDR's acquisition of QED violated the federal antitrust laws. Although MDR strongly believes that the acquisition is consistent with the antitrust laws, we have decided to settle the charges and pursuant to this settlement, the Commission has issued a Decision and Order. The FTC's administrative complaint is available at [url] and the Decision and Order at [url] so you may refer to them if you would like more detail about the settlement.

Decision and Order

As part of the settlement, MDR agreed to sell MCH an updated version of the QED K-12 database that we acquired. MDR also agreed to give certain customers, including you, the option of terminating, without penalty, certain contracts they have with MDR.

In accordance with Paragraph IV.B of the Order, this letter provides you with the required notice that, in accordance with the settlement, any time before [DATE] you may terminate your contract or subscription agreement if you give us 30 days written notice stating that you wish to terminate the contract and that you are doing so in order to consider alternative sources of K-12 data products or services. You should send any notice of termination to _____.

Paragraph IV.A.2 of the Order provides that, if you terminate, you may be entitled to a refund of any payments made exceeding the fair value of products and services received as of the date of termination, or you may be required to pay for products and services received but not yet paid for. The process for determining fair market value is described in the Order.

The settlement also requires that, if you elect to terminate your MDR contract, MDR must, at no cost, assist you if you wish to convert from using MDR PID numbers to using QED PIN numbers, by making available a PIN Number Bridge (or cross-reference file) and information and assistance reasonably necessary to enable you to use the PIN Number Bridge for the conversion. If you would like to convert to using QED PIN numbers, please contact [IDENTIFY CONTACT] for assistance.

The FTC has appointed Richard Casabonne to monitor MDR's compliance with its obligations under the settlement. We encourage you to raise any questions you may have with us by calling your MDR sales representative or me directly at 800-333-8802. You may also contact the monitor, who may be reached by

Decision and Order

telephone at (510) 757-8768 or by e-mail at rcasabonne@casabonneassociates.com

Sincerely,

[MDR Officer]

* * *

[VDP Customer Notice]

On Official MDR Letterhead
Certified Mail, Return Receipt Requested

[Date]

Name
Company Name
Address
City, State ZIP

Re: Notification of Your Right to Terminate Contract

Dear [MDR Customer]:

This letter is to notify you that you have the right to terminate certain contract(s) with MDR, if you choose to do so. Pursuant to an Order issued by the Federal Trade Commission pursuant to a settlement we reached with the FTC, we are required to give you this notice, and to honor a request to terminate, as fully described below.

As you may know, MDR acquired QED from Scholastic Inc. in February 2009. Although we believe there are significant customer benefits from the QED acquisition, the Federal Trade Commission filed an administrative complaint against MDR's parent company, The Dun & Bradstreet Corporation, alleging that MDR's acquisition of QED violated the federal antitrust laws. Although MDR strongly believes that the acquisition is consistent

Decision and Order

with the antitrust laws, we have decided to settle the charges and pursuant to this settlement, the Commission has issued a Decision and Order. The FTC's administrative complaint is available at [url] and the Decision and Order at [url] so you may refer to them if you would like more detail about the settlement.

As part of the settlement, MDR agreed to sell MCH an updated version of the QED K-12 database that we acquired. MDR also agreed to give certain customers, including you, the option of terminating, without penalty, certain contracts they have with MDR.

In accordance with Paragraph IV.B of the Order, this letter provides you with the required notice that, in accordance with the settlement, any time before [DATE] you may terminate your volume discount plan agreement if you give us 30 days written notice stating that you wish to terminate the VDP and that you are doing so in order to consider alternative sources of K-12 data products or services. You should send any notice of termination to _____.

Paragraph IV.A.1 of the Order provides that, if you terminate, the discount level applicable to purchases already made under your VDP shall be determined by annualizing the volume of purchases made as of the date of termination.

The FTC has appointed Richard Casabonne to monitor MDR's compliance with its obligations under the settlement. We encourage you to raise any questions you may have with us by calling your MDR sales representative or me directly at 800-333-8802. You may also contact the monitor, who may be reached by telephone at (510) 757-8768 or by e-mail at rcasabonne@casabonneassociates.com

Sincerely,

[MDR Officer]

Decision and Order

CONFIDENTIAL APPENDIX E

RELEVANT AGREEMENTS

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

Decision and Order

CONFIDENTIAL APPENDIX F

EXCLUDED EMPLOYEE POSITIONS

**[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. Overview**

The Federal Trade Commission (“Commission”) has accepted for public comment an Agreement Containing Consent Order (“Consent Agreement”) with Respondent The Dun & Bradstreet Corporation (“D&B”), and has issued a final Decision and Order (“Order”) that resolves an administrative Complaint issued by the Commission on May 7, 2010. The Complaint alleges that the \$29 million acquisition by Market Data Retrieval (“MDR”) (a division of D&B) of Quality Educational Data (“QED”) (a division of Scholastic, Inc.) in February 2009 eliminated its closest rival and created a near monopoly in the United States K-12 data market, 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.

The Commission issued the administrative Complaint because it had reason to believe that MDR and QED were the only significant U.S. suppliers of kindergarten through twelfth-grade educational marketing data (“K-12 data”), which is used by customers for their direct mail and email marketing efforts. The K-12 data that companies like MDR and QED sell include contact, demographic, and other information that allow their customers to market to teachers, administrators, schools, and individual school districts. MDR, QED, and Mailings Clearing House (“MCH”) were the only companies prior to the acquisition that provided that data. Other sources of marketing data, such as teacher association membership lists, are not close substitutes because of their more limited coverage, reduced functionality, and less frequent updating. Customers indicated that they would not shift their purchases toward these alternatives in response to a small but significant nontransitory increase in price.

According to documentary evidence and customers, competition from QED had constrained MDR’s pricing and spurred MDR to improve product quality, including the development of new product features. Customers viewed MDR and QED as offering the most comparable products and were able

Analysis to Aid Public Comment

to obtain better terms by the threat of turning to the other company. By contrast, MCH lacked a K-12 database comparable to MDR or QED's, generally served a different customer base, was not viewed by many MDR and QED customers as capable of meeting their needs, and had a very small share of the K-12 data market. MDR's near-monopoly position in the K-12 data market after the transaction is protected in part by significant barriers to entry, including the time and cost to develop a database with market coverage and accuracy comparable to MDR or QED's pre-merger databases and the need to obtain a reputation for data quality. A small firm that has begun to offer K-12 data is unlikely to be able to replace the lost competition resulting from the acquisition of QED for at least several years.

One of MDR's primary defenses to the acquisition was that MDR's purportedly high margins created a disincentive to raise prices post-merger. The Bureau of Economics and the Bureau of Competition were not persuaded by this critical loss argument because, as set forth in Section 4.1.3 of the 2010 Merger Guidelines, it failed to account for the possibility that high margins might also imply highly inelastic demand and thus fewer lost sales from a price increase. Indeed, as described above, the weight of the evidence indicated that post-merger market conditions would provide an incentive to raise prices.

The Consent Agreement is designed to remedy the likely anticompetitive effects of the acquisition by restoring, to the extent possible, the lost competition between MDR and QED. Among other things, it requires that D&B divest an updated and augmented K-12 database of names, addresses, and other pertinent information to MCH, a competitor in the K-12 data market. The Order also provides for the divestiture to MCH of the QED name and associated intellectual property as well as the appointment by the Commission of a monitor to ensure that all of the terms of the Consent Agreement are fully implemented by D&B.

Analysis to Aid Public Comment

II. Respondent D&B

D&B is a corporation organized, existing and doing business under the laws of the State of Delaware, with its principal place of business at 103 JFK Parkway, Short Hills, New Jersey 07078. D&B is the world's leading supplier of commercial information on businesses. In 2008, D&B's revenue exceeded \$1.7 billion. MDR, a division of D&B, has its headquarters at 6 Armstrong Road, Suite 301, Shelton, Connecticut 06484. MDR also has offices in Chicago, Illinois, and San Francisco, California.

III. The Commission's Complaint

The Complaint alleges that, prior to MDR's acquisition of QED, MDR was the largest provider of K-12 data in the United States. K-12 data is sold or leased to customers, including book publishers and other suppliers of educational products and services, that use the information to market the various products and services that they offer to education institutions. The Complaint further alleges that MDR's closest competitor in the K-12 data market was QED. After acquiring QED, MDR attained a near monopoly. Two firms, one of which was MCH, accounted for the remaining competition.

The Complaint alleges that if allowed to stand, the acquisition would likely enable MDR unilaterally to exercise market power in various ways, including by increasing prices and reducing product quality and services. IV. Terms of the Order

A. MCH is the Acquirer.

MCH is a privately held company with offices located at 601 E. Marshall Street, Sweet Springs, Missouri 65351. The Commission believes that MCH is an appropriate acquirer of the assets to be divested, and that with those assets, it will be in a position to restore the competition that was lost when MDR acquired QED. MCH currently has a small share of the K-12 data market, but is a company with over 80 years of experience in the broader data market industry.

Analysis to Aid Public Comment

B. The Assets to be Divested.

The key asset that MCH will acquire is an updated K-12 database. As a result, MCH's database not only will rival MDR's, but will exceed the size and scope of the QED database when MDR acquired it.

A second important asset that MCH will acquire is the QED name and its associated intellectual property. The combination of the QED name and the updated database has the potential to enable MCH to compete for and offer customers K-12 data comparable to what QED had been offering when it was acquired by MDR.

C. Other Requirements Imposed upon MDR.

The Order also includes several provisions that will facilitate the ability of MCH to compete on a more even footing with MDR. The Order grants certain categories of MDR customers the option to terminate their contracts with MDR, without penalty, for a period of 21 months, upon 30 days' notice to MDR that the customer intends to terminate its contract(s) for the purpose of considering alternative sources of K-12 data. The Order does not require that these customers actually make a purchase from an alternative source, nor does it require that the alternative source be limited to MCH. MDR will be required to notify customers with potentially terminable contracts, by certified mail, of their termination rights.

To facilitate the ability of customers to switch away from MDR to MCH, the Order also requires that MDR grant such customers access to a data translation table containing both MDR's and QED's unique identification numbers assigned to educational institutions contained in their K-12 databases [PIN/PID numbers]. The table assists customers in converting their internal marketing data systems from MDR's data reference numbering system [PIN] to QED's data reference numbering system [PID].

Former QED employees and certain MDR employees also are released from any restrictions on their ability to join MCH.

Analysis to Aid Public Comment

Another provision of the Order requires that for a period of 21 months, MDR offer all third parties placing orders for K-12 data with MDR a “net names” discount of up to 30% for names obtained from MCH (i.e., a discount for overlap names).

The Order also requires that MDR, for up to one year, provide MCH with reasonably necessary technical assistance within five days of such a request and further requires MDR to facilitate the ability of MCH to enter into contracts with any vendor that had been doing business with QED.

D. A Monitor Will Help Ensure Compliance.

The Order provides for the appointment by the Commission of an independent monitor, with fiduciary responsibilities to the Commission, to help ensure that D&B carries out all of its responsibilities and obligations under the Order. The Commission has appointed Mr. Richard Casabonne, a person with significant experience in the K-12 data market, as monitor. Mr. Casabonne is chief executive officer of Casabonne Associates, Inc., a consulting firm that focuses on educational activities. In the event D&B fails to comply with its divestiture obligations, the Order also provides that the Commission may also appoint a divestiture trustee to fulfill those requirements.

V. Opportunity for Public Comment

The Consent Agreement 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 comments received and determine whether to take further action. The purpose of this analysis is to facilitate comment on the Order. This analysis does not constitute an official interpretation of the Consent Agreement or Order, nor does it modify their terms in any way. The Consent Agreement does not constitute an admission by D&B that it violated the law or that the facts as alleged in the Complaint, other than jurisdictional facts, are true.

Complaint

IN THE MATTER OF

FIDELITY NATIONAL FINANCIAL, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket No. C-4300; File No. 091 0032**Filed September 13, 2010 — Decision, September 13, 2010*

The consent order addresses allegations that Fidelity National Financial, Inc.'s ("Fidelity") 2008 acquisition of three LandAmerica title insurance subsidiaries reduced competition in certain parts of Oregon and Michigan. The consent order requires Fidelity to divest assets and data relating to its Oregon business to Northwest Title, and to divest data relating to its Michigan business to an FTC-approved buyer. The consent order also requires Fidelity to notify the Commission prior to acquiring a majority interest in any collection of title data in California, Colorado, Nevada, New Mexico, Oregon, or Texas, without providing advance notification to the Commission.

Participants

For the *Commission*: *Joe Lipinsky and Danica Noble.*

For the *Respondent*: *Joe Simons, Paul, Weiss, Rifkind, Wharton, Garrison LLP.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that Respondent, Fidelity National Financial, Inc. ("Fidelity"), a corporation subject to the jurisdiction of the Commission, has purchased three title insurance underwriters – Commonwealth Land Title Insurance Company ("Commonwealth"), Lawyers Title Insurance Corporation ("Lawyers"), and United Capital Title Insurance Company ("United") – from LandAmerica Financial Group, Inc. ("LandAm"), 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

Complaint

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

I. DEFINITIONS

1. "Title Plant" means a privately owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public records, as well as such collections of information that are not regularly updated.

2. "Title information services" means providing selected information contained in a title plant to a customer or user or permitting a customer or user to have access to information contained in a title plant.

3. "Acquisition" means the acquisition by Fidelity of Commonwealth, Lawyers, and United (collectively, the "LFG Underwriters") from LandAm pursuant to an amended stock purchase agreement dated November 25, 2008.

4. "Respondent" or "Fidelity" means Fidelity National Financial, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups and affiliates in each case controlled by Fidelity (including, but not limited to, the LFG Underwriters, Security Title Guaranty Co., and Ticor Title Insurance Company), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

II. RESPONDENT

5. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 601 Riverside Avenue, Jacksonville, FL 32204. Respondent, among other things, is engaged in the sale of title insurance and the provision of title information services.

Complaint

6. Respondent is a person subject to the jurisdiction of the Commission.

7. 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.

III. THE ACQUIRED SUBSIDIARIES

8. Commonwealth and Lawyers were title insurance underwriters with their executive offices located at 5600 Cox Road, Glen Allen, VA 23060, while United was a title insurance underwriter with its executive office located at 3250 Wilshire Boulevard, Los Angeles, CA 90010. Commonwealth, Lawyers, and United were engaged, among other things, in the sale of title insurance and the provision of title information services.

IV. THE ACQUISITION

9. On November 25, 2008, Respondent and LandAm entered into an Acquisition Agreement under which Fidelity acquired three of LandAm’s title insurance underwriters for an amount valued, at the time of entering into the Acquisition Agreement, at approximately \$258 million (“Acquisition”).

V. THE RELEVANT MARKETS

10. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is the provision of title information services.

11. For the purposes of this Complaint, the relevant geographic areas in which to analyze the effects of the Acquisition in the relevant line of commerce are the following counties or other local jurisdictions in the United States: tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington Counties, Oregon; Benton County, Oregon; Jackson County, Oregon; Linn County, Oregon; Marion County, Oregon; Oakland County, Michigan; Macomb County,

Complaint

Michigan; and Wayne County, Michigan. Title information is generated and collected on a county level and because of the highly local character of the real estate markets in which the title information services are used, geographic markets for title information services are highly localized.

VI. THE STRUCTURE OF THE MARKETS

12. The markets for title information services in the geographic areas listed under Paragraph 11 are highly concentrated. The Acquisition significantly increases concentration in the relevant markets.

VII. BARRIERS TO ENTRY

13. Entry into the market for providing title information services is unlikely and would not occur in a timely manner to deter or counteract the adverse competitive effects described in Paragraph 14, because of, among other things, the time and expense necessary to develop effective data collection technology and the time necessary to develop historical data, and the importance of an established reputation for accuracy.

VIII. EFFECTS OF THE ACQUISITION

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

- a. by eliminating actual, direct and substantial competition between Respondent and Commonwealth and Lawyers in the relevant markets;
- b. by increasing the likelihood that Respondent will unilaterally exercise market power in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington Counties, Oregon, and in the Detroit, Michigan counties of Oakland, Macomb, and Wayne, and;

Decision and Order

- c. by increasing the likelihood of collusion or coordinated interaction in Benton, Jackson, Marion, and Linn Counties in Oregon, where the acquisition reduced the number of title plants from four to three.

IX. VIOLATIONS CHARGED

15. The allegations contained in paragraphs 1-14 are repeated and re-alleged as though fully set forth here.

16. The Acquisition Agreement described in Paragraph 9 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

17. The Acquisition described in Paragraph 9 constituted 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 thirteenth day of September, 2010, issues its Complaint against said Respondent.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the acquisition by Respondent Fidelity National Financial, Inc. ("Fidelity") of three title insurance underwriters from LandAmerica Financial Group, Inc. ("LandAmerica"), 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 5 of the Federal

Decision and Order

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

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 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 waives 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 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 Decision and Order (“Order”):

1. Respondent Fidelity is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices located at 601 Riverside Avenue, Jacksonville, FL 32204.
2. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over Respondent, and the proceeding is in the public interest.

Decision and Order

ORDER**I.**

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

- A. "Respondent" or "Fidelity" means Fidelity National Financial, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its subsidiaries, divisions, joint ventures, groups and affiliates in each case controlled by Fidelity (including, but not limited to, the LFG Underwriters, Security Title Guaranty Co., and Ticor Title Insurance Company), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "LandAmerica" means LandAmerica Financial Group, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Virginia with its office and principal place of business located at 5600 Cox Road, Glen Allen, VA 23060.
- C. "Commission" means the Federal Trade Commission.
- D. "Acquirer(s)" means the acquirer(s) approved by the Commission pursuant to Paragraph II. and Paragraph III. (or Paragraph IV.) of this Order. If approved by the Commission, "Acquirer(s)" includes Northwest Title and Datatrace.
- E. "Acquisition" means the acquisition by Fidelity of Commonwealth Land Title Insurance Company, Lawyers Title Insurance Corporation, and United Capital Title Insurance Company (collectively, the "LFG Underwriters") from LandAmerica pursuant to an amended stock purchase agreement dated November 25, 2008.
- F. "Copy" means a reproduction of a Title Plant that will enable an Acquirer to use the reproduction in a

Decision and Order

qualitatively similar way to the original Title Plant. A Copy will reproduce all of the records, indices, documents and other information contained in the original Title Plant and enable such information to be accessed no less quickly and no less conveniently than it could be using the original Title Plant.

- G. “Datatrace” means Datatrace Information Services LLC, a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 4 First American Way, Santa Ana, CA 92707.
- H. “Datatrace Access Agreement” means the Title Plant Services, Access and Marketing Agreement, dated as of July 31, 2000, between Datatrace and LandAmerica.
- I. “Divestiture Agreement(s)” means any and all agreement(s) between the Respondent (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and an Acquirer, and all amendments, exhibits, attachments, agreements and schedules thereto, that have been approved by the Commission pursuant to Paragraph II. and/or Paragraph III. (or Paragraph IV.) of this Order. All Divestiture Agreements are incorporated by reference into this Order and made a part hereof as a confidential appendix. If approved by the Commission, “Divestiture Agreement(s)” includes the Northwest Title TriPlant Divestiture Agreement and the Northwest Title Downstate Divestiture Agreement.
- J. “Divestiture Assets” means, individually and collectively: (1) with respect to Paragraph II. of this Order, the TriCounty Title Plant Divestiture Interest and the Downstate Title Plant Assets; and (2) with respect to Paragraph III. of this Order, the Michigan Title Plant Assets.

Decision and Order

- K. “Divestiture Date(s)” means the date(s) on which Respondent (or a Divestiture Trustee) fully completes the divestiture of each of the Divestiture Assets, as applicable, as required by Paragraph II. and/or Paragraph III. (or Paragraph IV.) of this Order.
- L. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to Paragraph IV. of this Order.
- M. “Downstate Title Plant Assets” means, for each of the counties or local jurisdictions listed below: (1) all rights, title, and Interest owned or otherwise held either by Fidelity prior to the Acquisition or by the LFG Underwriters prior to the Acquisition in all Title Plants serving each such county or local jurisdiction, or (2) a Copy of all Title Plants owned or otherwise held either by Fidelity prior to the Acquisition or by the LFG Underwriters prior to the Acquisition and serving each such county or local jurisdiction:
- Benton County, Oregon
Jackson County, Oregon
Linn County, Oregon
Marion County, Oregon
- N. “Interest” means any and all rights, present or contingent, to hold any membership or partnership share, voting or nonvoting stock, share capital, equity or other interests, and/or beneficial ownership in a Title Plant.
- O. “Michigan Title Plant Assets” means a Copy of the Title Plants owned or otherwise held by the LFG Underwriters immediately prior to the Acquisition, as more particularly set out in the Datatrace Access Agreement, and serving each of the following counties or local jurisdictions:
- Macomb County, Michigan
Oakland County, Michigan
Wayne County, Michigan

Decision and Order

- P. “Northwest Title” means Northwest Title, LLC, a limited liability company organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3000 A Street, Suite 200, Anchorage, AK 99503.
- Q. “Northwest Title Downstate Divestiture Agreement” means any and all agreement(s) between the Respondent (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and Northwest Title for the divestiture of the Downstate Title Plant Assets, and all amendments, exhibits, attachments, agreements and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order.
- R. “Northwest Title TriPlant Divestiture Agreement” means any and all agreement(s) between the Respondent (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order) and Northwest Title for the divestiture of the TriCounty Title Plant Divestiture Interest, and all amendments, exhibits, attachments, agreements and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order.
- S. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business entity, and any subsidiaries, divisions, groups or affiliates thereof.
- T. “Third Party(ies)” means any non-governmental Person other than the Respondent or the Acquirer(s).
- U. "Title Plant" means a privately owned collection of records and/or indices regarding the ownership of and interests in real property. The term includes such collections that are regularly maintained and updated by obtaining information or documents from the public

Decision and Order

records, as well as such collections of information that are not regularly updated.

- V. “TriCounty Title Plant” means the joint venture Title Plant established pursuant to the TriCounty Title Plant Partnership Agreement that covers records and/or indices regarding the ownership of and interests in real property located in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington Counties, Oregon, in which both Fidelity and LandAmerica owned Interests prior to the Acquisition.
- W. “TriCounty Title Plant Divestiture Interest” means a membership share and Interest representing Security Title Guaranty Co.’s Interest in the TriCounty Title Plant, including any and all voting and other rights and privileges, tangible and intangible, present or contingent, associated with such membership share and Interest.
- X. “TriCounty Title Plant Partnership Agreement” means the TriCounty Title Plant Partnership Agreement, effective as of October 15, 1992, and all amendments, exhibits and attachments thereto.

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

- A. Not later than ten (10) days after the date this Order becomes final, Respondent shall divest the TriCounty Title Plant Divestiture Interest and the Downstate Title Plant Assets, absolutely and in good faith, at no minimum price, to Northwest Title, pursuant to and in accordance with the Northwest Title TriPlant Divestiture Agreement and the Northwest Title Downstate Divestiture Agreement (which agreements 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 Northwest Title or to reduce

Decision and Order

any obligations of Respondent under such agreements), and each such agreement, if it becomes a Divestiture Agreement for the TriCounty Title Plant Divestiture Interest and/or the Downstate Title Plant Assets, is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondent has divested the TriCounty Title Plant Divestiture Interest and/or the Downstate Title Plant Assets (“Divestiture Assets”) to Northwest Title prior to the date this Order becomes final and if, at the time the Commission determines to make this Order final:

1. The Commission determines and notifies Respondent that Northwest Title is not an acceptable acquirer of one or both of the Divestiture Assets, then Respondent shall immediately rescind the relevant transaction(s) with Northwest Title and shall divest the relevant Divestiture Asset(s) no later than six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers and only in a manner that receives the prior approval of the Commission; or
 2. The Commission determines and notifies Respondent that the manner in which one or both of the divestitures was accomplished is not acceptable, the Commission may direct the Respondent, or appoint a Divestiture Trustee pursuant to Paragraph IV. of this Order, to effect such modifications to the manner of divesting the relevant Divestiture Asset(s) to Northwest Title (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.
- B. Prior to the Divestiture Date, Respondent shall obtain all consents, approvals and waivers from all Third Parties that are necessary to permit Respondent to

Decision and Order

divest the relevant Divestiture Assets and transfer all associated rights to the Acquirer(s).

- C. Until Respondent fully complies with Paragraphs II.A. and B. (or Paragraph IV., if applicable) of this Order, Respondent:
1. shall take such actions as are necessary to maintain the viability and marketability of the Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Divestiture Assets except for ordinary wear and tear;
 2. shall not sell, transfer, encumber or otherwise impair the Divestiture Assets (other than as required by this Order) nor take any action that lessens their viability, marketability or competitiveness; and
 3. shall maintain the operations of the Downstate Title Plant Assets 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 the Downstate Title Plant Assets. Among other things as may be necessary, with respect to the Title Plants comprising the Downstate Title Plant Assets, Respondent shall cause the Title Plants to be maintained, including but not limited to updating the records and/or indices contained in the Title Plants, to the extent and in the manner maintained prior to the Acquisition.
- D. Respondent shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, exercise any of its voting rights under Section 11.01(f) of the TriCounty Title Plant Partnership Agreement to expel

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the Acquirer of the TriCounty Title Plant Divestiture Interest.

- E. The purpose of the divestiture:
1. of the TriCounty Title Plant Divestiture Interest is to remedy the lessening of competition in the tri-county Portland metropolitan area consisting of Clackamas, Multnomah, and Washington Counties, Oregon, resulting from the Acquisition as alleged in the Commission's Complaint; and
 2. of the Downstate Title Plant Assets is to remedy the lessening of competition in Benton County, Jackson County, Linn County, and Marion County, Oregon, resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. Not later than one-hundred twenty (120) days after the date the Consent Agreement is accepted by the Commission for public comment, Respondent shall divest the Michigan Title Plant Assets, absolutely and in good faith, at no minimum price, to an Acquirer, and in a manner (including execution of a Divestiture Agreement with the Acquirer), that receives the prior approval of the Commission. Respondent shall comply with all provisions of any Divestiture Agreement approved by the Commission (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 the Acquirer or to reduce any obligations of Respondent under such agreements), and failure by Respondent to comply with any provision of a Divestiture Agreement shall constitute a failure to comply with this Order. Such agreement, if it becomes a Divestiture

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Agreement, is incorporated by reference into this Order and made a part hereof.

- B. Prior to the Divestiture Date, Respondent shall obtain all consents, approvals and waivers from all Third Parties that are necessary to permit Respondent to divest the Michigan Title Plant Assets and transfer all associated rights to the Acquirer.
- C. Until Respondent fully complies with Paragraphs III.A. and B. (or Paragraph IV., if applicable) of this Order, Respondent shall not sell, transfer, encumber or otherwise impair the Michigan Title Plant Assets (other than as required by this Order) nor take any action that lessens their viability, marketability or competitiveness.
- D. The purpose of the divestiture of the Michigan Title Plant Assets is to remedy the lessening of competition in Macomb County, Oakland County, and Wayne County, Michigan, resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. If Respondent Fidelity has not fully complied with its obligations to divest the Divestiture Assets as required by this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest, grant, license, transfer or otherwise convey such assets and rights and effectuate such provisions 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, Fidelity shall consent to the appointment of a Divestiture Trustee in such action. 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

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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 the 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, 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, 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 relevant divestiture(s), license grant or other specified transaction(s) 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:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest, grant, license, transfer or otherwise convey the assets and/or rights that are required by this Order to be

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divested, granted, licensed, transferred 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 specified 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.
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 and/or rights that are required to be divested, granted, licensed, transferred 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 or license. Any delays in divestiture caused by Respondent shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to 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

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Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of 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 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 that are 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

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

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
 8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the specified divestiture.
 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*, 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(s), license grant or other specified transactions required by this Order.

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V.

IT IS FURTHER ORDERED that Respondent shall comply with all terms of any Divestiture Agreement(s), and any breach by Respondent of any term of a Divestiture Agreement shall constitute a violation of this Order. If any term of a 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. Any material modification of any Divestiture Agreement between the date the Commission approves the Divestiture Agreement and the Divestiture 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.

VI.

IT IS FURTHER ORDERED that:

- A. For a period of ten (10) years from the date this Order becomes final, Respondent shall not, directly or indirectly, through subsidiaries, partnerships, or otherwise, without providing advance written notification to the Commission, acquire any Interest in any joint Title Plant serving any county or other local jurisdiction in the states listed below where, as a result of such acquisition (including as aggregated with any Interest(s) already owned or otherwise held by Respondent), Respondent would own or otherwise hold an Interest of fifty (50) percent or more in such joint Title Plant:

California
Colorado
Nevada
New Mexico
Oregon
Texas

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- B. The prior notification required by this Paragraph VI. 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 Respondent and not of any other party to the transaction. In addition to the information required to be supplied on such Notification and Report Form pursuant to the above-referenced regulation, Respondent shall submit the following supplemental information in Respondent's possession or reasonably available to Respondent:
1. The name of each county or local jurisdiction to which the terms of Paragraph VI.A. are applicable;
 2. A description of the Title Plant assets or interests that are being acquired; and
 3. With respect to each Title Plant serving each county or local jurisdiction to which the terms of Paragraph VI.A. are applicable (including all Title Plants in which the Respondent owns or otherwise holds a direct or indirect Interest as well as other Title Plants known to the Respondent), the names of all Persons that own or otherwise hold any direct or indirect Interest in the Title Plant and the percentage Interest held by each Person; the time period covered by each category of title records contained in the Title Plant; whether the respective categories of title records are regularly being updated; the indexing system or systems used with respect to each category of title records; and the names of all Persons, including but not limited to title insurers or agents, who have access to the Title Plant.

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- C. 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), 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 VI. 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.

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

- A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until Respondent has fully complied with the provisions of Paragraphs II., III. and IV. of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with Paragraphs II., III. and IV. of this Order, including a description of all substantive contacts or negotiations for accomplishing the specified actions and the identity of all parties contacted. Respondent shall include in its compliance reports copies of all written communications to and from such parties, all internal

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memoranda, and all reports and recommendations concerning the accomplishment of the specified actions and obligations.

- B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other 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 this Order.

VIII.

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 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, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and 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 and in the presence of counsel, to all facilities and 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

Analysis to Aid Public Comment

shall be provided by the Respondent at its expense;
and

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

X.

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

By the Commission.

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDER TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission (“Commission” or “FTC”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Fidelity National Financial, Inc. (“Fidelity”). Fidelity purchased three title insurance subsidiaries from LandAmerica Financial, Inc. (“LandAmerica”). The subsidiaries were Commonwealth Land Title Insurance Company (“Commonwealth”), Lawyers Title Insurance Company (“Lawyers”), and United Capital Title Insurance Company (“United”). Fidelity’s acquisition of Commonwealth and Lawyers created likely anticompetitive effects that the proposed Consent Agreement resolves. Under the terms of the proposed Consent Agreement, Fidelity is required, among other things, to divest one share of its ownership interest in a joint title plant serving the Portland, Oregon, metropolitan area, and divest a copy of its title data serving Benton, Jackson, Linn, and Marion Counties, in Oregon. Additionally, Fidelity will sell a copy of title data that LandAmerica had provided to a third party,

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Data Trace, to a pre-approved purchaser to remedy the competitive concern in three counties in the Detroit, Michigan, metropolitan area.

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.

On November 25, 2008, Fidelity and LandAmerica entered into an acquisition agreement under which Fidelity acquired LandAmerica's title insurance subsidiaries for an amount valued, at the time of entering into the acquisition agreement, at approximately \$258 million ("Acquisition"). The Commission's Complaint alleges that Fidelity's acquisition violates 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 eliminating an actual, direct, and substantial competitor from certain local markets in the United States.

II. Description of the Parties and the Acquisition

Fidelity, a publicly traded company, is based in Jacksonville, Florida. Its title insurance services facilitate the purchase, sale, transfer, and finance of residential and commercial real estate. Fidelity provides title insurance to residential and commercial property buyers and sellers, real estate agents and brokers, developers, attorneys, mortgage brokers and lenders, and title insurance agents through its subsidiaries, Fidelity National Title Company, Title Insurance Company, Ticor Title Insurance Company, Commonwealth, and Lawyers.

LandAmerica was a publicly traded company based in Glen Allen, Virginia, that operated through wholly owned subsidiaries. LandAmerica generated the majority of its income from its title insurance subsidiaries, Commonwealth and Lawyers.

On Tuesday, December 16, 2008, the United States Bankruptcy Court for the Eastern District of Virginia held a

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hearing on LandAmerica's motion to sell its subsidiaries to Fidelity. The bankruptcy court took testimony from LandAmerica, Fidelity, the unsecured creditors committee, the secured creditors committee, and the FTC. The court found that Fidelity's purchase of the LandAmerica title insurance subsidiaries was in the best interest of the estate, and approved the sale of the subsidiaries to Fidelity.

III. Title Information Services

Title insurance companies insure clients against the risk that clear title is not transferred during the sale of property. Risks include failure to detect defective deeds or to discover liens, adverse court judgments, or encumbrances created by other security interests. In order to conduct title searches in a timely fashion, title insurers need access to the most accurate, up-to-date, and conveniently arranged title information. That information is found, among other places, in title plants, which are private collections of historic and current information about the status of title to real property. Because title information is essential to conducting a title search, ownership of, or access to, a title plant is a title insurer's primary competitive asset.

IV. The Complaint

The Commission's Complaint alleges that Fidelity's acquisition of LandAmerica's title insurance subsidiaries may substantially lessen competition in the provision of title information services in several counties in Oregon, and three counties making up the Detroit, Michigan, metropolitan area, 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.

The Complaint alleges that the relevant product market in which to analyze the effects of the acquisition is the provision of title information services. "Title information services" means access to selected information contained in a title plant that is used to determine ownership of, and interests in, real property in connection with the underwriting and issuance of title insurance policies.

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The Complaint also alleges that the relevant geographic markets are local in nature. Title information is generated and collected on a county level and, because of the highly local character of the real estate markets in which the title information services are used, geographic markets for title information services are highly localized and consist of the county or other local jurisdiction embraced by the real property information contained in the title plant. The three geographic areas of concern outlined in the Complaint are: (1) the tri-county Portland, Oregon, metropolitan area consisting of Clackamas, Multnomah, and Washington Counties; (2) Benton, Jackson, Linn, and Marion Counties, in Oregon; and (3) the tri-county Detroit, Michigan, metropolitan area consisting of Oakland, Macomb, and Wayne Counties.

In the Portland, Oregon, metropolitan area, the acquisition of LandAmerica's subsidiaries vested Fidelity with a controlling interest in the sole title plant providing title insurance information services. Absent the proposed relief regarding the title plant serving the Portland metropolitan area, Fidelity's acquisition of LandAmerica's subsidiaries increases the risk that Fidelity would unilaterally restrict or withhold access to title information, thus eliminating the potential for a new title insurance company to enter.

In Benton, Jackson, Linn, and Marion Counties in Oregon, the acquisition of LandAmerica's subsidiaries reduced the number of independent title plants providing title information services in these counties from four to three. Absent the proposed relief in these counties, Fidelity's acquisition would increase the risk of collusion among the remaining market participants to restrict or withhold access to title information, thus eliminating the potential for a new title insurance company to enter.

In three counties in the Detroit, Michigan, metropolitan area, Fidelity's purchase of LandAmerica's subsidiaries may give Fidelity the power to affect the competitive significance of Data Trace, an independent title information services provider. Data Trace, in which LandAmerica once had an ownership interest, is a provider of title plant information services in the Detroit metropolitan area.

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Based on the facts above, the Complaint alleges that Fidelity's acquisition of LandAmerica's subsidiaries could eliminate actual, direct, and substantial competition between Fidelity and LandAmerica's subsidiaries in the relevant markets; increase Fidelity's ability to unilaterally exercise market power in the Detroit and Portland metropolitan areas; and substantially increase the level of concentration and enhance the probability of coordination in Benton, Jackson, Linn, and Marion Counties, in Oregon.

As stated in the Complaint, entry would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of this acquisition. There are relatively long time frames and large capital expenses associated with building and maintaining title plants. Among other things, intensive time and labor are required in each local jurisdiction to develop effective data collection technology and to compile historical data.

V. The Terms of the Consent Agreement

The proposed Consent Agreement will remedy the Commission's competitive concerns resulting from Fidelity's acquisition in each of the relevant markets discussed above. Pursuant to the proposed Consent Agreement, Fidelity will divest one share of its ownership interest in a joint title plant that serves the Portland, Oregon, metropolitan area to Northwest Title. This will remedy the competitive harm in that local market by ensuring that Fidelity no longer owns a majority of the only joint title plant serving that market. The proposed Consent Agreement also requires Fidelity to divest a copy of each of the title plants serving Benton, Jackson, Linn, and Marion Counties, in Oregon to Northwest Title. The sale of the title plants in Benton, Jackson, Linn, and Marion counties will eliminate the competitive harm that otherwise would have resulted in those markets by restoring the number of independent title plant owners within each county to the pre-acquisition level.

Northwest Title is a privately-held company that is part of a family of six companies involved in real estate. Although the company will be a new entrant in the relevant markets, it does

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have experience in the title insurance business, and has pre-existing relationships with entities and individuals in the real estate market, mortgage banking industry, and related businesses. Moreover, Northwest Title is financially viable and is positioned to quickly achieve the remedial purposes of the proposed Consent Agreement.

Additionally, pursuant to the proposed Consent Agreement, Fidelity will sell a copy of the title data that LandAmerica's subsidiaries had provided to Data Trace to a pre-approved purchaser, for the three counties making up the Detroit, Michigan, metropolitan area.

Finally, the proposed Consent Agreement requires Fidelity to provide the Commission with prior written notice before acquiring fifty (50) percent or more of any joint title plant in the following states: California, Colorado, Nevada, New Mexico, Oregon, and Texas. In all of these states, Fidelity's acquisition of LandAmerica's subsidiaries increased Fidelity's ownership interest in joint title plants. Without this prior notification provision, in the future Fidelity could gain a controlling interest in joint plants serving these states without the FTC's knowledge.

VI. Opportunity for Public Comment

The Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the Consent Agreement again and the comments received and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final. By accepting the Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to inform and invite public comment on the Consent Agreement, including the proposed divestitures, and to aid the Commission in its determination of whether to make the Consent Agreement final. This analysis is not intended to constitute an official interpretation of the Consent Agreement, nor is it intended to modify the terms of the Consent Agreement in any way.

Complaint

IN THE MATTER OF

PEPSICO, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket No. C-4301; File No. 091 0133**Filed September 27, 2010 — Decision, September 27, 2010*

The complaint alleges that acquisition by PepsiCo, Inc. (“PepsiCo”) of certain assets of Dr. Pepper Snapple Group (“Snapple”) would result in reduced competition in the sale and distribution of branded soft drink concentrate and carbonated soft drinks. The consent order requires PepsiCo, Inc. (“Pepsi”) to set up a firewall to ensure that its ownership of the bottling companies does not give certain Pepsi employees access to commercially sensitive confidential marketing and brand plans for Dr. Pepper Snapple Group.

Participants

For the *Commission*: *Joseph Brownman and W. Stephen Sockwell.*

For the *Respondent*: *Deborah Feinstein and Michael Sohn, Arnold & Porter; James Long, Briggs and Morgan; Michael Knight, Jones Day; and Jay Brown and Richard Steuer, Mayer Brown.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Respondent PepsiCo, Inc. (“PepsiCo”), a corporation, has entered into agreements to acquire, and subsequently did acquire, the outstanding voting securities of three of its independent bottlers, Pepsi Bottling Group, Inc. (“PBG”), PepsiAmericas, Inc. (“PAS”), and Pepsi-Cola Bottling Co. of Yuba City, Inc. (“PYC”), and subsequently obtained a license agreement to continue to produce and distribute several carbonated soft drink brands of Dr Pepper Snapple Group, Inc. (“DPSG”) that bottlers PBG, PAS, and PYC had produced and distributed, and that the agreements violate Section 5 of the

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Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the agreements and terms of such agreements, when consummated or satisfied, resulted in a violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT PEPSICO, INC.

1. Respondent PepsiCo is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 700 Anderson Hill Road, Purchase, New York 10577.

2. PepsiCo is a food and beverage company that includes PepsiCo Americas Beverages (a beverage arm), Frito-Lay (a snack food arm), and Quaker Foods (a cereal arm). Among other things, PepsiCo produces the concentrate (or flavor ingredient) for the PepsiCo carbonated soft drink beverage brands that are distributed by its independent bottlers. Three of those independent bottlers were Pepsi Bottling Group, Inc. (“PBG”), PepsiAmericas, Inc. (“PAS”), and Pepsi-Cola Bottling Co. of Yuba City, Inc. (“PYC”). Some of the PepsiCo carbonated soft drink brands distributed by PBG, PAS, and PYC were Pepsi-Cola, Diet Pepsi, Mountain Dew, Diet Mountain Dew, Sierra Mist, and Mug Root Beer.

3. PepsiCo in 2009 had total worldwide revenues from the sale of all products of about \$43 billion. PepsiCo’s United States sales in 2009 of carbonated soft drink concentrate totaled about \$3 billion.

4. PepsiCo 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 Federal Trade Commission Act, 15 U.S.C. § 44.

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II. THIRD PARTY DR PEPPER SNAPPLE GROUP, INC.

5. DPSG is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5301 Legacy Drive, Plano, Texas 75024.

6. Among other things, DPSG produces concentrate (or syrup) for the DPSG carbonated soft drink beverage brands that are marketed, distributed, and sold by independent bottlers. Three of those independent bottlers were PBG, PAS, and PYC. Some of the DPSG carbonated soft drink brands distributed by PBG, PAS, and PYC, in at least some territories, were Dr Pepper, Diet Dr Pepper, Crush, Schweppes, A&W, Canada Dry, Squirt, and 7-UP.

7. DPSG in 2009 had total revenues from the sale of all products of about \$6 billion. DPSG's United States sales in 2009 of all carbonated soft drink concentrate totaled about \$1.5 billion.

8. DPSG 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 Federal Trade Commission Act, 15 U.S.C. § 44.

III. PEPSI BOTTLING GROUP, INC., PEPSIAMERICAS,
INC., AND PEPSI-COLA BOTTLING CO.
OF YUBA CITY, INC.

9. PBG and PAS were the two largest independently owned bottlers of the carbonated soft drink brands of PepsiCo. PBG and PAS together accounted for about 75 % of the United States sales of PepsiCo's brands of carbonated soft drinks and about 20 % of the United States sales of DPSG's brands of carbonated soft drinks. PYC was a relatively small bottler that accounted for a relatively small percentage of the sales of PepsiCo and DPSG carbonated soft drink brands.

10. PBG was a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Pepsi

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Way, Somers, New York 10589. PBG's United States sales in 2009 of all carbonated soft drink brands totaled about \$6 billion.

11. The geographic areas or territories in which PBG was licensed to distribute the carbonated soft drink brands of PepsiCo included all or a portion of 41 states and the District of Columbia. The principal geographic areas or territories in which PBG is licensed to distribute some of the carbonated soft drink brands of DPSG include Atlanta, Georgia; Washington, D.C.; Baltimore, Maryland; Buffalo and Rochester, New York; Hartford, Connecticut; Minneapolis and St. Paul, Minnesota; Tulsa, Oklahoma; Denver, Colorado; Salt Lake City, Utah; San Francisco, California; Sacramento, California; Seattle, Washington; Portland, Oregon; and various cities in Florida.

12. PBG accounted for about 56% of sales of PepsiCo's United States bottler-distributed carbonated soft drink brands and about 15% of DPSG's United States bottler-distributed carbonated soft drink brands.

13. PAS was a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 4000 RBC Plaza, 60 South Sixth Street, Minneapolis, Minnesota 55402. PAS's United States sales in 2009 of all carbonated soft drink brands totaled about \$ 2.5 billion.

14. The principal geographic areas or territories in which PAS was licensed to distribute the carbonated soft drink brands of PepsiCo included all or a portion of 19 states, primarily in the Midwest. The geographic areas or territories in which PAS was licensed to distribute some of the carbonated soft drink brands of DPSG include Kansas City, Kansas and Missouri; and Cleveland, Ohio.

15. PAS was responsible for about 19% of the sales of PepsiCo's United States bottler-distributed carbonated soft drink brands and about 5% of the sales of DPSG's United States bottler-distributed carbonated soft drink brands.

16. PYC was a corporation organized, existing and doing business under and by virtue of the laws of the State of California,

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with its office and principal place of business located at 750 Sutter Street, Yuba City, California 95991. PYC's United States sales in 2009 of all carbonated soft drink brands totaled about \$21 million.

17. The principal geographic areas or territories in which PYC was licensed to distribute the carbonated soft drink brands of PepsiCo included Yuba City, California and its surrounding areas. The geographic areas or territories in which PYC was licensed to distribute some of the carbonated soft drink brands of DSPG included parts of Yuba City, California and its surrounding areas.

18. PYC was responsible for a relatively small percentage of PepsiCo's and DSPG's United States bottler-distributed carbonated soft drink brands.

IV. PEPSICO'S ACQUISITION OF PBG, PAS, AND PYC

19. On or about August 3, 2009, PepsiCo entered into separate agreements with PBG and PAS to acquire all of their outstanding voting securities and equity interests. PepsiCo acquired PBG and PAS on or about February 26, 2010. PepsiCo acquired PYC on or about April 19, 2010.

20. At the time of the agreements with PBG and PAS, PepsiCo had about a 40% equity interest in PBG and about a 40% equity interest in PAS. PepsiCo had no equity interest in PYC.

21. Under the terms of the license agreements that DSPG (or its predecessor companies) had entered into with PBG, PAS, and PYC, a change of ownership of those bottlers would, depending upon the brand and/or territory involved, either automatically trigger the termination of the license agreement the bottler had with DSPG or require that DSPG consent to the acquisition of the license by the bottler's new owner.

22. The proposed acquisition by PepsiCo of all outstanding voting securities of PBG and PAS would, before consummation, give PepsiCo control over them. This prospective change in control was the kind of change in ownership of PBG and PAS that, upon consummation, would either trigger the automatic

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termination clause of the license agreement with DPSG or require that DPSG consent to the change.

23. For brand Dr Pepper, DPSG did not consent to the transfer to PepsiCo of the licenses held by PBG and PAS. For certain other DPSG brands, the proposed change in ownership of PBG and PAS, upon consummation of the ownership change, automatically terminated the DPSG licenses.

V. PEPSICO'S ACQUISITION OF DPSG LICENSES

24. On or about December 7, 2009, in anticipation of the termination of the DPSG-PBG and DPSG-PAS license agreements upon the acquisition by PepsiCo of those two bottlers, PepsiCo and DPSG entered into an agreement for PepsiCo, upon acquiring PBG and PAS, to obtain a license to distribute the Dr Pepper, Crush, and Schweppes carbonated soft drink brands of DPSG in the former PBG and PAS territories.

25. Under the terms of the DPSG-PepsiCo license agreement, DPSG and PepsiCo also agreed that for any future acquisitions by PepsiCo of bottlers that distribute any DPSG brands in the United States, PepsiCo would automatically acquire rights to distribute those brands. Pursuant to this license provision, PepsiCo acquired rights to distribute some DPSG brands in territories licensed by DPSG to Ab-Tex Beverage Ltd. in some areas of the approximately 125 counties in central Texas where this bottler was a distributor of PepsiCo carbonated soft drinks. PepsiCo also acquired rights to distribute some DPSG brands in some of the Yuba City, California, areas where PYC was a distributor of some PepsiCo carbonated soft drinks brands.

26. The DPSG-PepsiCo license agreement also provided, among other things, that (a) PepsiCo would acquire the exclusive right to sell and distribute the Dr Pepper, Crush, and Schweppes carbonated soft drink brands in the PBG and PAS territories, (b) the license agreement would have a term of twenty (20) years, with a provision that it be "automatically renewed for additional twenty (20) year successive periods" for "no additional payments," (c) PepsiCo would acquire a non-exclusive right to produce the Dr Pepper, Crush, and Schweppes carbonated soft

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drink brands in the PBG and PAS territories, and (d) PepsiCo would pay DPSG \$900 million.

27. Pursuant to the DPSG-PepsiCo license agreement, PepsiCo and DPSG entered into additional, associated terms, whereby PepsiCo has undertaken performance obligations to, among other things (a) distribute the Dr Pepper brand in all classes of trade based in some measure upon the Pepsi and Mountain Dew brands; (b) grow the Dr Pepper brand based in some measure upon the sales of other carbonated soft drink brands; (c) advertise, promote, and market the DPSG beverages, and provide sales support for such promotions, based in some measure upon PepsiCo's promotions of the PepsiCo brands, and (d) in connection with price-off promotions, promote the Dr Pepper brand based in some measure upon the Pepsi and Mountain Dew brands and engage in media advertising at a tie-in rate based upon those PepsiCo brands.

28. The DPSG-PepsiCo license agreement would not provide adequate safeguards against the passage access by PepsiCo to competitively sensitive and confidential information regarding DPSG carbonated soft drink brands provided to PepsiCo by DPSG pursuant to the license.

VI. TRADE AND COMMERCE

A. Relevant Product Markets

29. The relevant product markets in which to assess the effects of the PepsiCo - DPSG license agreement and the associated performance terms are (a) branded, direct-store-door delivered carbonated soft drinks and (b) the branded concentrate used to produce branded, direct-store-door delivered carbonated soft drinks.

B. Relevant Geographic Markets

30. The relevant geographic markets in which to assess the effects of the DPSG-PepsiCo license agreement and the associated performance agreement terms, in both relevant product

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markets, are (a) the United States as a whole and (b) local areas in the PBG, PAS, and PYC territories.

C. Conditions of Entry

31. Entry into each relevant market would not be timely, likely, or sufficient to prevent or mitigate any anticompetitive effect.

32. Effective (price constraining) entry requires that branded carbonated soft drinks be delivered by direct-store-door delivery. There are generally only three bottlers in the local carbonated soft drink markets that have exclusive rights to distribute their branded carbonated soft drink products, and they do so by direct-store-door delivery. Bottlers operate under flavor restrictions imposed upon them by concentrate companies PepsiCo, DPSG, and The Coca-Cola Company. The bottlers therefore are not permitted to carry the new brand of an existing flavor without first dropping the brand of that flavor that they carry. For the cola flavor, the bottlers of PepsiCo and Coke are required to carry Pepsi-Cola and Coca-Cola, respectively, as well as no other cola flavored carbonated soft drink.

33. There is no market for branded concentrate other than for the production of branded carbonated soft drinks.

D. Market Structure

34. Each relevant market is very highly concentrated, whether measured by the Herfindahl-Hirschman Index (“HHI”) or by two-firm and four-firm concentration ratios.

35. The carbonated soft drink brands of PepsiCo and DPSG are the first and second choices for a substantial number of consumers.

VII. EFFECTS OF THE ACQUISITION

36. PepsiCo’s access to competitively sensitive confidential information provided by DPSG to PepsiCo in furtherance of the DPSG-PepsiCo license agreement, or the use by PepsiCo of competitively sensitive information passed to it by DPSG in

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furtherance of the DPSG-PepsiCo license agreement, may substantially lessen competition in the relevant markets in some or all of the following ways,

- a. by eliminating direct competition between PepsiCo and DPSG,
- b. by increasing the likelihood that PepsiCo may unilaterally exercise market power or influence and control DPSG's prices, and
- c. by increasing the likelihood of, or facilitating, coordinated interaction;

each of which may result in higher prices to consumers.

VIII. VIOLATIONS CHARGED

37. PepsiCo's access to competitively sensitive confidential information from DPSG, provided in furtherance of the DPSG-PepsiCo license agreement and associated performance terms entered into between Respondent PepsiCo and DPSG for the sale and distribution by PepsiCo of DPSG's brands of carbonated soft drinks, could lead to anticompetitive conduct and constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and upon consummation, constituted a 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of September, 2010, issues its Complaint against Respondent PepsiCo.

By the Commission, Commissioner Ramirez recused.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent PepsiCo, Inc. (“PepsiCo” or “Respondent”), of carbonated soft drink bottlers Pepsi Bottling Group, Inc. (“PBG”), and PepsiAmericas, Inc. (“PAS”), and the subsequent proposed acquisition and associated agreements for PepsiCo to acquire rights to produce, distribute, market, and sell some of the carbonated soft drink brands of Dr Pepper Snapple Group, Inc. (“DPSG”), that had been distributed by PBG and PAS, and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“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 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 modified the draft Complaint and the draft Decision and Order in certain respects, 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”):

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1. Respondent PepsiCo is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 700 Anderson Hill Road, Purchase, New York 10577.
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, the following definitions shall apply:

- A. “PepsiCo” or “Respondent” means PepsiCo, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by PepsiCo, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; after the Acquisition, PepsiCo includes PBG and PAS.
- B. “Acquisition” means the acquisition by PepsiCo of PBG and PAS.
- C. “Additional Firewalled PepsiCo Personnel” means those employees that are identified and approved pursuant to Paragraph II.C. of this Order
- D. “Bottler” means an entity licensed by a Concentrate Company to produce, distribute, market, price, and sell carbonated soft drink products under the brands of that Concentrate Company.
- E. “Bottler Functions” means the following activities, and no others, of a Bottler, which are typical of a Bottler

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that no Concentrate Company owns or has a controlling interest in: (1) purchasing concentrate from one or more Concentrate Companies for use in the production of carbonated soft drinks, (2) producing carbonated soft drinks, (3) marketing, advertising, promoting, distributing, pricing, and selling carbonated soft drinks, (4) implementing the marketing, advertising, and promotional programs of the Concentrate Company, (5) determining and coordinating the amount or timing of funding of retail-related promotions of carbonated soft drinks for that retailer's operations for the brands of carbonated soft drink products of more than one Concentrate Company, and (6) formulating and engaging in marketing, advertising, or promotional activities for the brands of carbonated soft drink products of more than one Concentrate Company within the Territories or across geographic areas broader than the Territories; *provided, however*, that no Concentrate-Related Functions are included in Bottler Functions. For the avoidance of doubt, for purposes of this Order, Bottler Functions include those of PepsiCo as a Bottler.

- F. "Commission" means the Federal Trade Commission.
- G. "Concentrate Company" means a company that formulates concentrate for the production of carbonated soft drink products and other beverages and sells the concentrate to Bottlers. For the avoidance of doubt, for purposes of this Order, PepsiCo and DPSG are Concentrate Companies.
- H. "Concentrate-Related Functions" means the activities of a Concentrate Company that are typical of a Concentrate Company operating separately from and independently of any Bottler in which it may have an interest, including: (1) setting the price of the concentrate sold by the Concentrate Company and selling that concentrate, (2) making decisions with respect to formulating and introducing new brands and flavors to offer to Bottlers, (3) making decisions with respect to introducing new flavors and package sizes

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of existing brands, (4) formulating and designing marketing and advertising programs of the Concentrate Company, and (5) determining whether, to what extent, and when the Concentrate Company will fund Promotional Activities. For the avoidance of doubt, for purposes of this Order, Concentrate-Related Functions include those of PepsiCo.

- I. "DMA" means the Designated Market Areas or geographic areas defined by Nielsen Media Research Company.
- J. "DPSG" means Dr Pepper Snapple Group, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5301 Legacy Drive, Plano, Texas 75024.
- K. "DPSG Beverages" means carbonated soft drink products sold by PepsiCo in the Territories under the DPSG brands and all package sizes and flavors sold under those brands, including fountain sales; DPSG Beverages also includes any new sizes and flavors introduced by DPSG and carried by PepsiCo in the Territories.
- L. "DPSG Bottler Functions" means Bottler Functions related to DPSG Beverages.
- M. "DPSG Commercially Sensitive Information" means all information provided, disclosed, or otherwise made available by DPSG to PepsiCo relating to DPSG Beverages that is not in the public domain, including but not limited to information related to the research, development, production, marketing, advertising, promotion, pricing, distribution, sales, or after-sales support of DPSG Beverages; DPSG Commercially Sensitive Information includes (1) DPSG Information Relating to Concentrate-Related Functions and (2) DPSG Information Relating to Bottler Functions.

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- N. “DPSG Concentrate-Related Functions” means Concentrate-Related Functions related to DPSG Beverages.
- O. “DPSG Information Relating to Bottler Functions” means DPSG Commercially Sensitive Information Relating to DPSG Bottler Functions; DPSG Information Relating to Bottler Functions includes no more than the type of information that DPSG provided to its Bottlers in the Territories prior to the Acquisition; *provided, however*, that DPSG Information Relating to Bottler Functions may not necessarily include all such information.
- P. “DPSG Information Relating to Concentrate Functions” means DPSG Commercially Sensitive Information relating to DPSG Concentrate-Related Functions.
- Q. “DPSG Information Relating to Independent DPSG Promotions” means DPSG Commercially Sensitive Information relating to planned Promotional Activities for DPSG Beverages that are separate from and independent of planned Promotional Activities for PepsiCo Beverages.
- R. “DPSG National Accounts” means those retailers that sell DPSG Beverages in the Territories (or those retailers that do not sell DPSG Beverages in the Territories but that DPSG is calling on to persuade them to sell DPSG Beverages in the Territories) to which DPSG makes account calls in support of the DPSG Beverages sold by PepsiCo in the Territories.
- S. “Legal or Regulatory Functions” means activities necessary to comply with financial or other regulatory requirements, obtain or provide legal advice, or otherwise comply with applicable laws and regulations.

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- T. “License Transaction” means the agreement between PepsiCo and DPSG containing a license to produce, distribute, market, price, and sell DPSG Beverages in the United States, dated on or about December 7, 2009.
- U. “MSA” means the Metropolitan or Micropolitan Statistical Areas or geographic areas defined by the U.S. Office of Management and Budget.
- V. “Management Documents” means all electronic and computer files and written, recorded, and graphic materials of every kind, including copies of documents that are not identical duplicates of the originals, that were written by, addressed to, or delivered to, officials with managerial, oversight, or reviewing responsibilities.
- W. “Monitor” means the person appointed by the Commission pursuant to Paragraph III. of this Order.
- X. “National Accounts Sales Team” means the PepsiCo Bottling Operations Personnel who (1) call on DPSG National Accounts and (2) determine and formulate the level and timing of Promotional Activities in support of PepsiCo Beverages sold by PepsiCo in the Territories that do not include DPSG Beverages.
- Y. “PAS” means PepsiAmericas, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 4000 RBC Plaza, 60 South Sixth Street, Minneapolis, Minnesota 55402.
- Z. “PBG” means The Pepsi Bottling Group, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Pepsi Way, Somers, New York 10589.

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- AA. “PepsiCo Beverages” means PepsiCo brands of carbonated soft drink products and all package sizes and flavors thereof; PepsiCo Beverages shall not include DPSG Beverages.
- BB. “PepsiCo Bottling Operations Personnel” means the persons, functions, or positions of or within PepsiCo that satisfy all of the criteria described in Paragraph II. of this Order; “PepsiCo Bottling Operations Personnel” as of the date the Agreement Containing Consent Order is executed shall include, but not be limited to, the names, functions, or positions described in Appendix A to this Order (“List”) and all people who report (directly or indirectly) to such names, functions, or positions; the List shall indicate those who have limited access under paragraph II.A; all changes to the PepsiCo Bottling Operations Personnel shall be in accordance with the procedure described in Paragraph II. of this Order.
- CC. “Promotional Activities” means price promotions, end-aisle displays, and newspaper inserts.
- DD. “Relating To” means discussing, analyzing, summarizing, describing, or constituting, but not merely referring to.
- EE. “Territories” means, for each brand, those territories shown in Appendix B.

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

- A. PepsiCo shall use DPSG Commercially Sensitive Information only under the following conditions:
1. the DPSG Commercially Sensitive Information consists only of DPSG Information Relating to Bottler Functions;

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2. the DPSG Commercially Sensitive Information is provided, disclosed, or otherwise made available only to PepsiCo Bottling Operations Personnel or to Additional Firewalled PepsiCo Personnel;
3. PepsiCo Bottling Operations Personnel shall include only those persons, functions, or positions that:
 - a. are responsible for Bottler Functions or Legal or Regulatory Functions only; *provided, however,* that persons, functions, or positions included within “PepsiCo Bottling Operations Personnel” because they are responsible for Legal or Regulatory Functions shall have access to and use of such DPSG Commercially Sensitive Information only to the extent such information is necessary to perform such Legal or Regulatory Functions;
 - b. are not responsible for Concentrate-Related Functions, and if any such person, function, or position reports (directly or indirectly) to a person responsible for Concentrate-Related Functions, that person, function, or position shall not disclose, provide, or otherwise make available DPSG Commercially Sensitive Information to the person responsible (directly or indirectly) for Concentrate-Related Functions; and
 - c. do not receive bonus or other tangible benefits related to the marginal sale of PepsiCo Beverages as a disproportionate benefit to any bonus or tangible benefit related to the marginal sale of DPSG Beverages;
4. an executed non-disclosure agreement and a statement attesting that he or she has received a copy of this Order, will comply with its terms, and will take all reasonable steps to assure that

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employees that report to him or her will comply with its terms:

- a. shall be submitted to the staff of the Commission by each person specifically identified in Appendix A no later than twenty (20) days after Respondent executes the Agreement Containing Consent Order; and
 - b. by each PepsiCo Bottling Operations Personnel who replaces any of those specifically identified in Appendix A or who are given responsibilities comparable to those people specifically identified in Appendix A no later than ten (10) days after assuming those responsibilities;
5. the DPSG Commercially Sensitive Information is used only in connection with DPSG Bottler Functions, or solely for the purpose of Legal or Regulatory Functions;
 6. the DPSG Commercially Sensitive Information is used only in the Territories;
 7. the DPSG Commercially Sensitive Information is not used in connection with Concentrate-Related Functions in any way, such prohibition to include but not be limited to using the information even if the DPSG Commercially Sensitive Information is not itself revealed;
 8. all DPSG documents and copies of documents reflecting or containing DPSG Commercially Sensitive Information (whether in the form provided by DPSG or in a form created by PepsiCo) are maintained as confidential until the earlier of five (5) years or when DPSG Commercially Sensitive Information becomes public through no act of PepsiCo; and

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9. DPSG Information Relating to DPSG Independent Promotions shall not be provided to the National Accounts Sales Team any time prior to the disclosure of such information to any Bottler other than PepsiCo.
- B. PepsiCo shall change the PepsiCo Bottling Operations Personnel only pursuant to the following procedures:
1. replacing individuals who report (directly or indirectly) to the people, functions, or positions specifically identified in Appendix A shall be in accordance with the usual and customary business practices of PepsiCo;
 2. replacing any of the people specifically identified in Appendix A or re-organizing functions or positions specifically identified in Appendix A shall be in accordance with the usual and customary business practices of PepsiCo after notification to the Monitor;
 3. adding new functions or positions that are not specifically identified in Appendix A shall require prior notification to the Monitor and staff of the Federal Trade Commission in accordance with the following:
 - a. the staff shall have ten (10) days from notification to consider the proposed change; and
 - b. if the staff does not object to the change within ten (10) days of its notification, PepsiCo shall be permitted to make the change.
- C. PepsiCo shall disclose DPSG Commercially Sensitive Information to Additional Firewalled PepsiCo Personnel only under the following conditions:
1. such Additional Firewalled PepsiCo Personnel:

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- a. are employees or agents of PepsiCo; and
 - b. are approved by DPSG, receive only the limited information approved by DPSG, for the time period approved by DPSG, all according to the procedure described in ¶ II.C.2. of the Order, below.
2. PepsiCo shall comply with the following procedure in connection with Additional Firewalled PepsiCo Personnel:
- a. PepsiCo shall submit the name, position, and function of any proposed Additional Firewalled PepsiCo Personnel to DPSG, the Monitor, and Commission staff, together with a statement of the reasons for the need to include such person, the specific DPSG Information Relating to Bottler Functions that is necessary to be shared, and the time period during which the information is intended to be shared;
 - b. DPSG shall notify PepsiCo, the Monitor, and Commission staff within twenty (20) days whether or not it objects to the proposal;
 - c. if DPSG does not object within twenty (20) days of receiving notification of the proposal, PepsiCo shall notify the Commission staff;
 - d. if Commission staff does not object within ten (10) days of its notification that DPSG does not object, the person shall be an Additional Firewalled PepsiCo Personnel; and
 - e. PepsiCo must obtain from each Additional Firewalled PepsiCo Personnel an executed non-disclosure agreement and a statement attesting that he or she has received a copy of this Order and will comply with its terms.

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- D. PepsiCo shall develop and implement procedures with respect to DPSG Commercially Sensitive Information, with the advice and assistance of the Monitor, to comply with the requirements of this Order.
1. such procedures shall assure, without limitation, that DPSG Commercially Sensitive Information is:
 - a. disclosed only if it is DPSG Information relating to Bottler Functions;
 - b. disclosed only to PepsiCo Bottling Operations Personnel or to Additional Firewalled PepsiCo Personnel;
 - c. used solely for DPSG Bottler Functions in the Territories or Legal or Regulatory Functions and not for Concentrate-Related Functions; and
 - d. maintained confidentially;
 2. such procedures shall include, without limitation:
 - a. monitoring compliance;
 - b. enforcing compliance with appropriate remedial action in the event of non-compliant use or disclosure;
 - c. distributing information regarding the procedures annually to all employees of PepsiCo associated with its carbonated soft drink products; and
 - d. requiring that the PepsiCo Bottling Operations Personnel and the Additional Firewalled PepsiCo Personnel comply with the requirements of this Order.

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

- A. At any time after PepsiCo signs the Consent Agreement in this matter, the Commission may appoint a monitor (“Monitor”) to assure that PepsiCo complies with all obligations and performs all responsibilities required by this Order.
- B. The Commission shall select the Monitor, subject to the consent of PepsiCo, which consent shall not be unreasonably withheld. If PepsiCo 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 PepsiCo of the identity of any proposed Monitor, PepsiCo shall be deemed to have consented to the selection of the proposed Monitor.
- C. Not later than ten (10) days after the appointment of the Monitor, PepsiCo shall execute an agreement that, subject to the prior approval of the Commission, confers upon the Monitor all the rights and powers necessary to permit the Monitor to monitor PepsiCo’s compliance with the requirements of this Order.
- D. If a Monitor is appointed by the Commission, PepsiCo 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 PepsiCo’s compliance with the requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the underlying purpose of this Order and in consultation with the Commission. In carrying out its functions, the Monitor is authorized (among other appropriate things) to

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provide specific information to Commission staff as to whether:

- a. DPSG Commercially Sensitive Information provided to PepsiCo is DPSG Information Relating to Bottler Functions;
 - b. DPSG Information relating to Bottler Functions is conveyed only to Pepsico Bottling Operations Personnel or to Additional Firewalled PepsiCo Personnel; and
 - c. DPSG Information Relating to Bottler Functions that is conveyed to the PepsiCo Bottling Operations Personnel or to Additional Firewalled PepsiCo Personnel is used solely for the purpose of carrying out DPSG Bottler Functions or Legal or Regulatory Functions.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. The Monitor shall serve until five (5) years after the License Transaction is effective; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purpose of this Order.
 4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to PepsiCo's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to PepsiCo's compliance with its obligations under this Order. PepsiCo 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 PepsiCo's compliance with this Order.

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5. The Monitor shall serve, without bond or other security, at the expense of PepsiCo, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of PepsiCo, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
6. PepsiCo shall indemnify the Monitor and hold the Monitor harmless against all losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.
7. PepsiCo shall report to the Monitor in accordance with the requirements of this Order. The Monitor shall evaluate the reports submitted to the Monitor by PepsiCo. Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by PepsiCo of its obligations under this Order.
8. PepsiCo may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor (and its representatives) from providing any information to the Commission.

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9. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
10. In the event the Commission determines that the Monitor has ceased to act or failed diligently to act, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.
11. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

IV.

IT IS FURTHER ORDERED that, for the term of this Order, if PepsiCo intends to acquire a Bottler that is licensed to distribute PepsiCo Beverages anywhere in the United States and is also licensed to distribute DPSG Beverages in geographic areas outside of the Territories ("To-Be-Acquired Bottler"), PepsiCo may use DPSG Commercially Sensitive Information relating to the specific brand or brands in the geographic areas covered by the To-Be-Acquired Bottler's license for the DPSG Beverages, after PepsiCo's acquisition of the To-Be-Acquired Bottler, as long as PepsiCo complies with the obligations of Paragraph II.A. 1. - 5., and 7. - 9. of this Order, and satisfies the following additional conditions:

- A. PepsiCo shall comply with the obligations of this Order with respect to that DPSG Commercially Sensitive Information;
- B. For acquisitions of To-Be-Acquired Bottlers that are subject to Section 7A of the Clayton Act, 15 U.S.C. § 18a ("HSR Act"), PepsiCo shall also comply with the

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reporting and waiting obligations of the HSR Act and the rules promulgated thereunder, 16 C.F.R. § 800 et seq.;

- C. For acquisitions of To-Be-Acquired Bottlers that are not subject to the HSR Act:
1. PepsiCo shall provide at least forty-five (45) days' advance written notification of the acquisition to the staff of the Commission, such notification to include:
 - a. the name, headquarters address, telephone number, and name of contact person of the To-Be-Acquired Bottler;
 - b. a description of the proposed acquisition and the assets to be acquired, and the acquisition price;
 - c. a copy of all existing and draft licenses and performance obligations entered into or anticipated to be entered into between DPSG, Respondent, and/or the To-Be-Acquired Bottler;
 - d. a description of the geographic areas in which the To-Be-Acquired Bottler is licensed, and in which PepsiCo is anticipated to be licensed, to produce, distribute, market, price, or sell PepsiCo Beverages, and, to the extent PepsiCo has such information, a description of the geographic areas in which the To-Be-Acquired Bottler is licensed to produce, distribute, market, price, or sell DPSG Beverages;
 - e. the date each license or anticipated license was, or is expected to be, entered into between DPSG, Respondent, and/or the To-Be-Acquired Bottler with respect to:

(1) PepsiCo Beverages and

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- (2) DPSG Beverages;
- f. for each MSA, DMA, city, or other geographic area in which the To-Be-Acquired Bottler bottles, distributes, or sells PepsiCo Beverages and/or DPSG Beverages,
- (1) for any and all carbonated soft drinks:
- (a) all Nielsen, IRI, or similar data with respect to that MSA, DMA, city, or other geographic area; and
- (b) all market share information, written or otherwise, with respect to that MSA, DMA, city, or other geographic area,
- that PepsiCo has, and
- (2) for the most recent 12-month period for which PepsiCo has such information, sales in units (in constant case equivalents) and dollars, of
- (a) PepsiCo Beverages, by brand, of the To-Be-Acquired Bottler, and
- (b) concentrate, by brand, to the To-Be-Acquired Bottler;
- g. all documents Relating To communications between Respondent, DPSG, and the To-Be-Acquired Bottler with respect to the acquisition of the To-Be-Acquired Bottler, the DPSG Beverage licenses, expected licenses, or performance obligations; and
- h. all Management Documents Relating To the proposed acquisition;

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2. Early termination of the 45-day period described in Paragraph IV.C.1. may be requested and, where appropriate, granted by letter from the Director of the Bureau of Competition; and
3. If, after notification of the proposed transaction (including the information specified in Paragraph IV.C.1. a. - h.), representatives of the Commission make a written request for additional information or documentary material with respect to the acquisition of the To-Be-Acquired Bottler, PepsiCo shall respond expeditiously and submit all such additional information and documentary material and certify substantial compliance with the request;

provided, however, that a determination that PepsiCo has complied with the obligations contained in this Paragraph IV. in connection with its acquisition of a To-Be-Acquired Bottler shall not be construed as a determination by the Commission, or its staff, that the acquisition of the To-Be-Acquired Bottler does or does not violate any law enforced by the Commission; and provided further that nothing contained herein shall preclude the Commission or its staff from investigating the acquisition or proposed acquisition by PepsiCo of any Bottler, including a To-Be-Acquired Bottler, and seeking any relief available under any statute enforced by the Commission.

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

- A. Within thirty (30) days after this Order becomes final, PepsiCo 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. PepsiCo shall include in its report, among other information that may be required, a list of all Bottlers of PepsiCo Beverages that, at the time of submission of the list, also bottle DPSG

Decision and Order

Beverages; for each such Bottler, PepsiCo shall list:

- a. each brand of PepsiCo Beverages that such Bottler is licensed to distribute, together with a description of the geographic areas in which each brand is licensed to be distributed; and
 - b. each brand of DPSG Beverages that such Bottler is distributing anywhere in each county within each geographic area described in Paragraph V.A.1.a. to the extent that PepsiCo has this information or can obtain it from industry publications to which it subscribes.
2. PepsiCo shall at the same time also provide a copy of its report concerning compliance with this Order to any Monitor that may have been appointed.
- B. One (1) year after this Order becomes final, annually for the next nineteen (19) years on the anniversary of that date, and at other times as the Commission may require:
1. PepsiCo 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 this Order.
 2. PepsiCo shall also include in each of its annual reports:
 - a. any changes to the list of Bottlers of PepsiCo Beverages submitted under Paragraph V.A. of this Order, including any deletions, additions, or other changes; and
 - b. for all To-Be-Acquired Bottlers acquired by PepsiCo during the previous year, a description of the geographic areas in which the To-Be-Acquired Bottler is licensed to produce,

Decision and Order

distribute, market, price, or sell each DPSG Beverage.

VI.

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

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

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 PepsiCo made to its principal United States offices, registered office of its United States subsidiary, or headquarters address, PepsiCo shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of PepsiCo 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 PepsiCo related to compliance with this Order, which copying services shall be provided by PepsiCo at the request of the authorized representative(s) of the Commission and at the expense of PepsiCo.
- B. The opportunity to interview officers, directors, or employees of PepsiCo, who may have counsel present, related to compliance with this Order.

Decision and Order

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on September 27, 2030.

By the Commission, Commissioner Ramirez recused.

Decision and Order

APPENDIX A**PEPSICO BOTTLING OPERATIONS PERSONNEL****(Dated as of September 27, 2010)**

CEO, Pepsi Beverages Company, who at the time of the closing of the Acquisition will be Eric Foss:

- The CEO will be responsible for all bottler operations.
- The CEO, all of his direct reports, and the entire organization below them, will be part of the PepsiCo Bottling Operations, referred to as “Pepsi Beverages Company” by Respondent; all will have only Bottling Functions and no Concentrate-Related Functions.
- CEO will report to the CEO of PepsiCo (who at the time of the closing of the Acquisition is Indra Nooyi).

President, North America Field Operations, who at the time of the closing of the Acquisition will be Mike Durkin:

- This position will be responsible for operations in the U.S., Canada, and Mexico.
- This position will oversee Pepsi Beverages Company’s day-to-day field operations with responsibility for developing and delivering the annual operating plan of Pepsi Beverages Company.
- This position will report directly to CEO, Pepsi Beverages Company.

Executive Vice President and Chief Commercial Officer, who at the time of the closing of the Acquisition will be Tom Greco:

- This position will lead the retail selling efforts across the U.S. and Canada.
- This position will have responsibility for national accounts, channel strategy, shopper insights, field marketing and category management for the bottling organization.
- This position will manage sales for the warehouse-delivered beverages.
- This position will have a dual reporting relationship to CEO of Pepsi Beverages Company and to CEO of PepsiCo Beverages Americas (PBA), who at the time of

Decision and Order

APPENDIX A

the closing of the Acquisition is Massimo d'Amore, for other PepsiCo products, such as Tropicana and Gatorade. There will be a firewall between this position and the CEO of PBA.

Executive Vice President, Supply Chain and System Transformation, who at the time of the closing of the Acquisition will be Victor Crawford:

- This position will be responsible for manufacturing and warehouse, transportation and logistics, selling and delivery and information technology.
- This position will report directly to CEO, Pepsi Beverages Company.

Senior Vice President of Human Resources and Integration, who at the time of the closing of the Acquisition will be John Berisford:

- This position will be responsible for all aspects of Pepsi Beverages Company's human resources function, including talent management, compensation and benefits, labor relations, diversity and communications.
- This position will report directly to CEO, Pepsi Beverages Company.

Chief Strategy Officer of Pepsi Beverages Company, who at the time of the closing of the Acquisition will be Eric Liopis:

- This position will be responsible for identifying local market opportunities, and seeking strategic distribution opportunities.
- This position will report directly to CEO, Pepsi Beverages Company.

Senior Vice President of Global Bottling Capabilities and Best Practices, who at the time of the closing of the Acquisition will be Jim Rogers:

- This position will be responsible for identifying best practices in the areas of supply chain, sales execution, and service and support tools and capabilities, and bringing

Decision and Order

APPENDIX A

these practices and initiatives throughout the broader global PepsiCo organization.

- This position will report directly to CEO, Pepsi Beverages Company.

General Counsel of Pepsi Beverages Company, who at the time of the closing of the Acquisition will be Dave Yawman:

- This position will be responsible for overseeing Pepsi Beverages Company's legal, regulatory and legislative affairs and manage both internal and external counsel.
- This position will report directly to CEO, Pepsi Beverages Company.

Senior Vice President and Chief Financial Officer, who at the time of the closing of the Acquisition will be Cindy Swanson:

- This position will be responsible for leading the integration of the finance functions of PBG and PAS - as public companies - into the larger PepsiCo organization.
- This position is also responsible for analyzing and refining financial algorithms to help plan for overall system transformation and long-term performance.
- This position will report directly to CEO, Pepsi Beverages Company.

Decision and Order

APPENDIX B

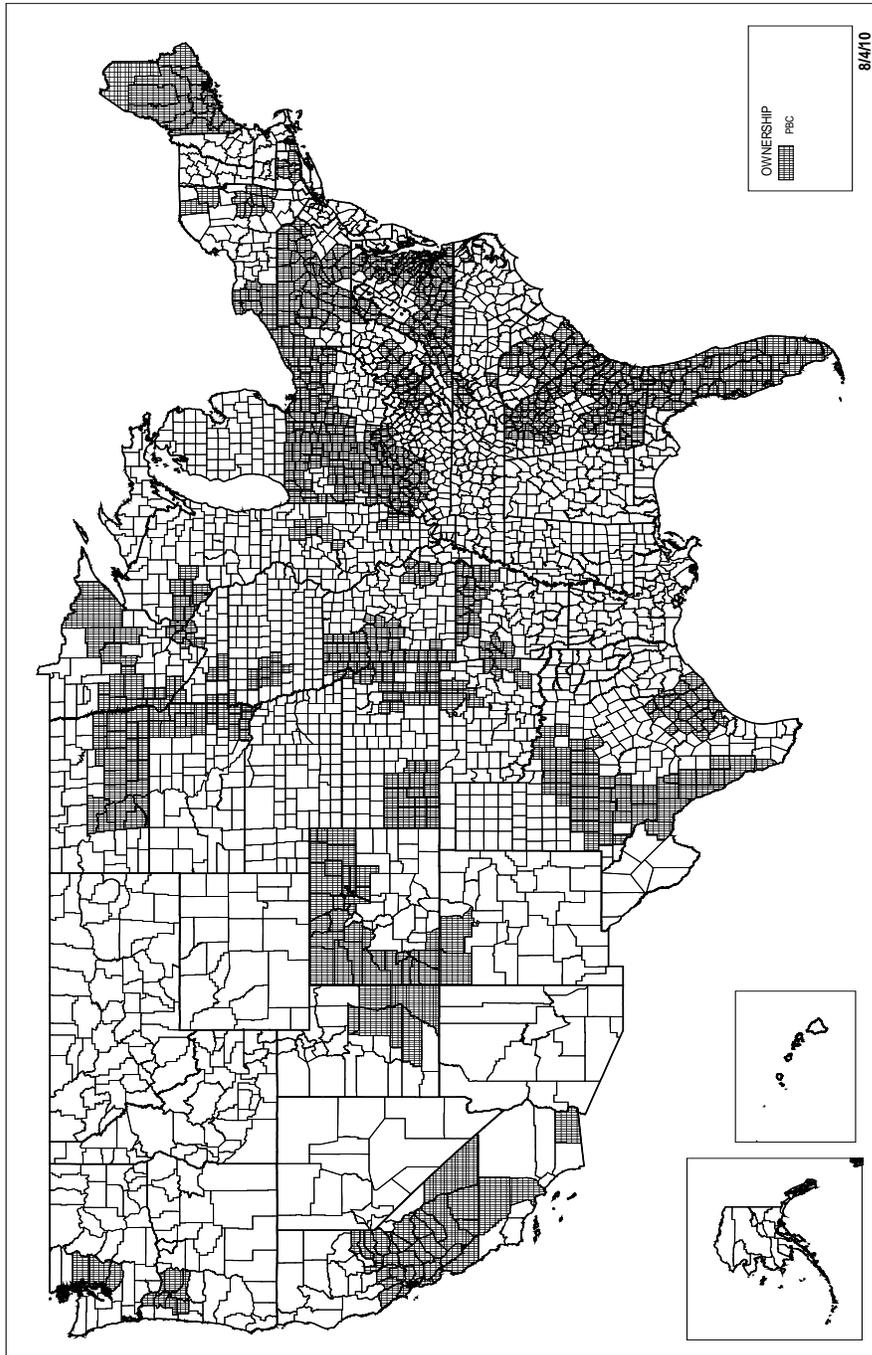
Appendix B includes the following maps:

1. PEPSI BEVERAGES COMPANY
DR PEPPER FOOTPRINT
8/4/10
2. PEPSI BEVERAGES COMPANY
7UP FOOTPRINT
8/4/10
3. PEPSI BEVERAGES COMPANY
A&W FOOTPRINT
8/4/10
4. PEPSI BEVERAGES COMPANY
CANADA DRY FOOTPRINT
8/4/10
5. PEPSI BEVERAGES COMPANY
CRUSH FOOTPRINT
8/4/10
6. PEPSI BEVERAGES COMPANY
SUNKIST FOOTPRINT
8/4/10
7. PEPSI BEVERAGES COMPANY
SQUIRT FOOTPRINT
8/4/10
8. PEPSI BEVERAGES COMPANY
SCHWEPPE'S FOOTPRINT
8/4/10
9. PEPSI BEVERAGES COMPANY
VERNORS FOOTPRINT
8/4/10

Decision and Order

APPENDIX B

**PEPSI BEVERAGES COMPANY
DR PEPPER FOOTPRINT**

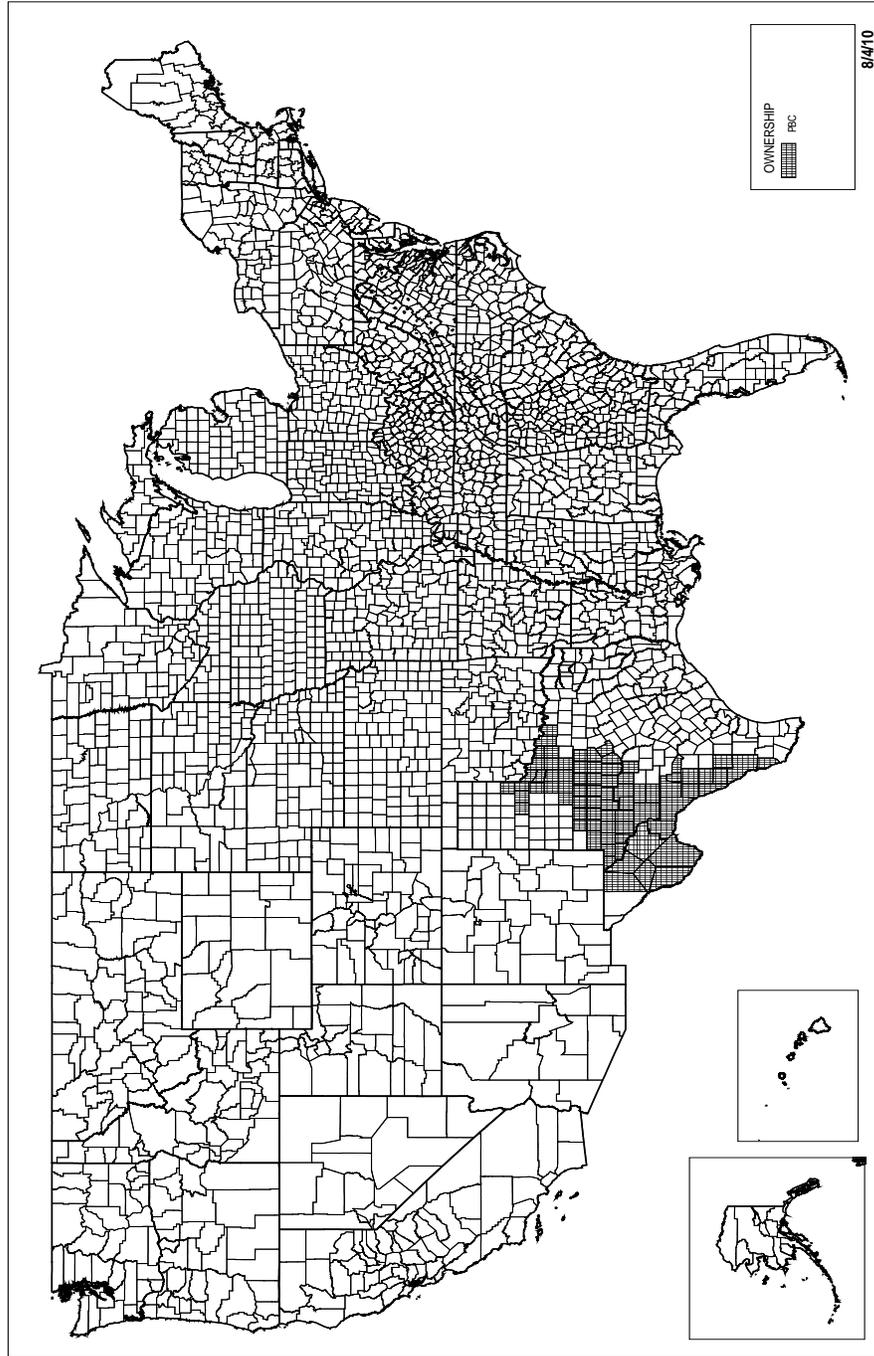


8/4/10

Decision and Order

APPENDIX B

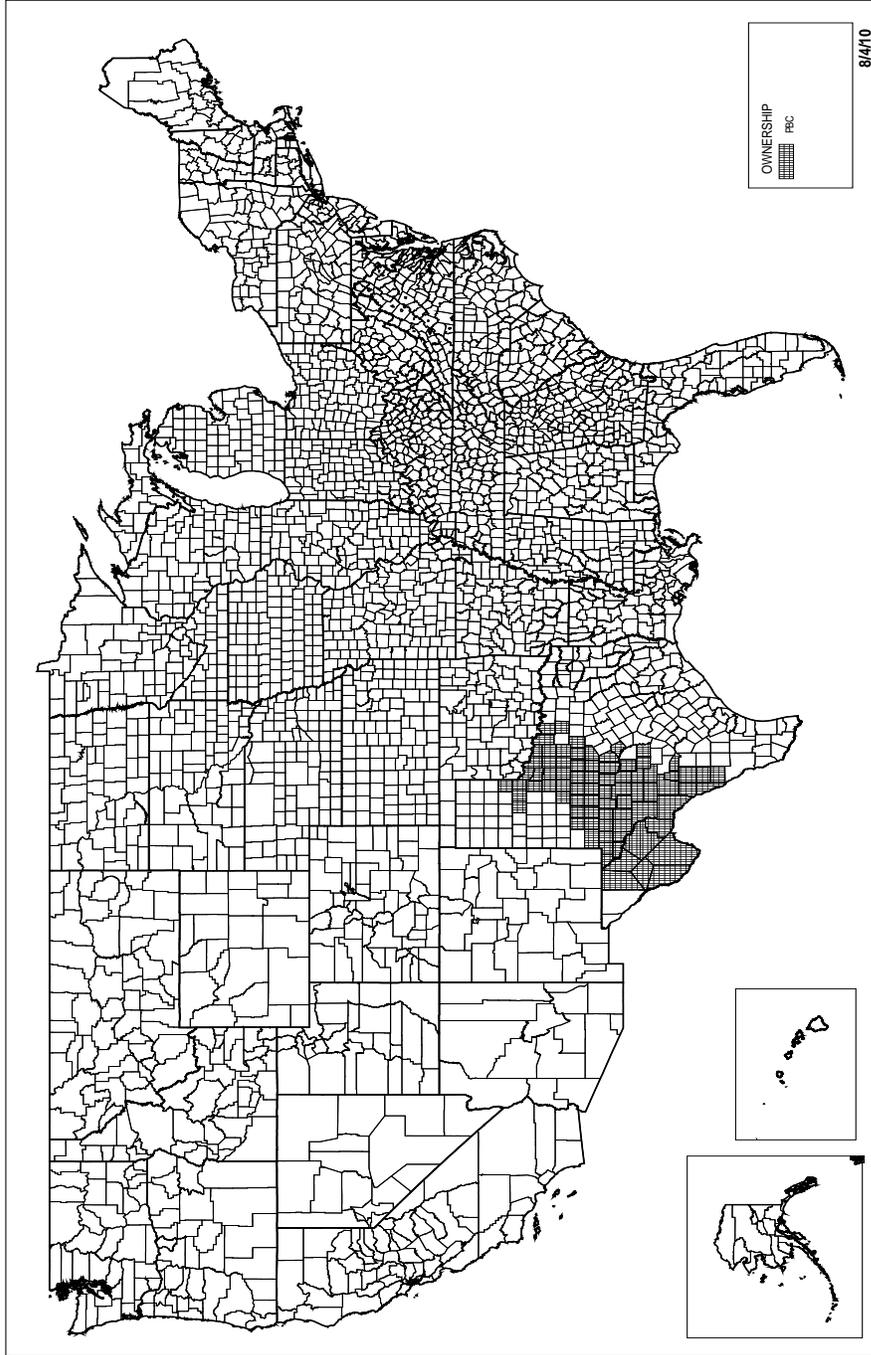
**PEPSI BEVERAGES COMPANY
7UP FOOTPRINT**



Decision and Order

APPENDIX B

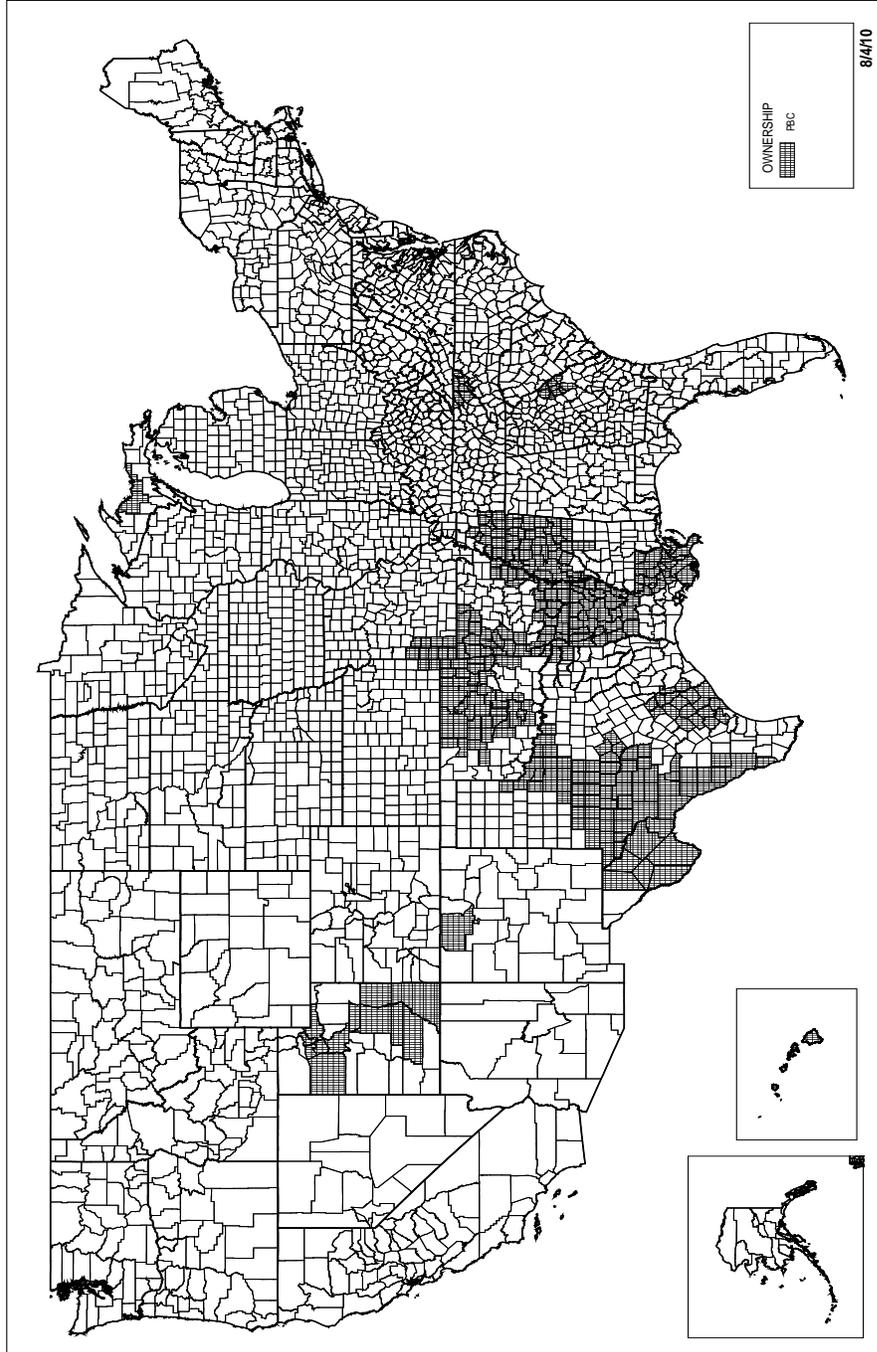
**PEPSI BEVERAGES COMPANY
A&W FOOTPRINT**



Decision and Order

APPENDIX B

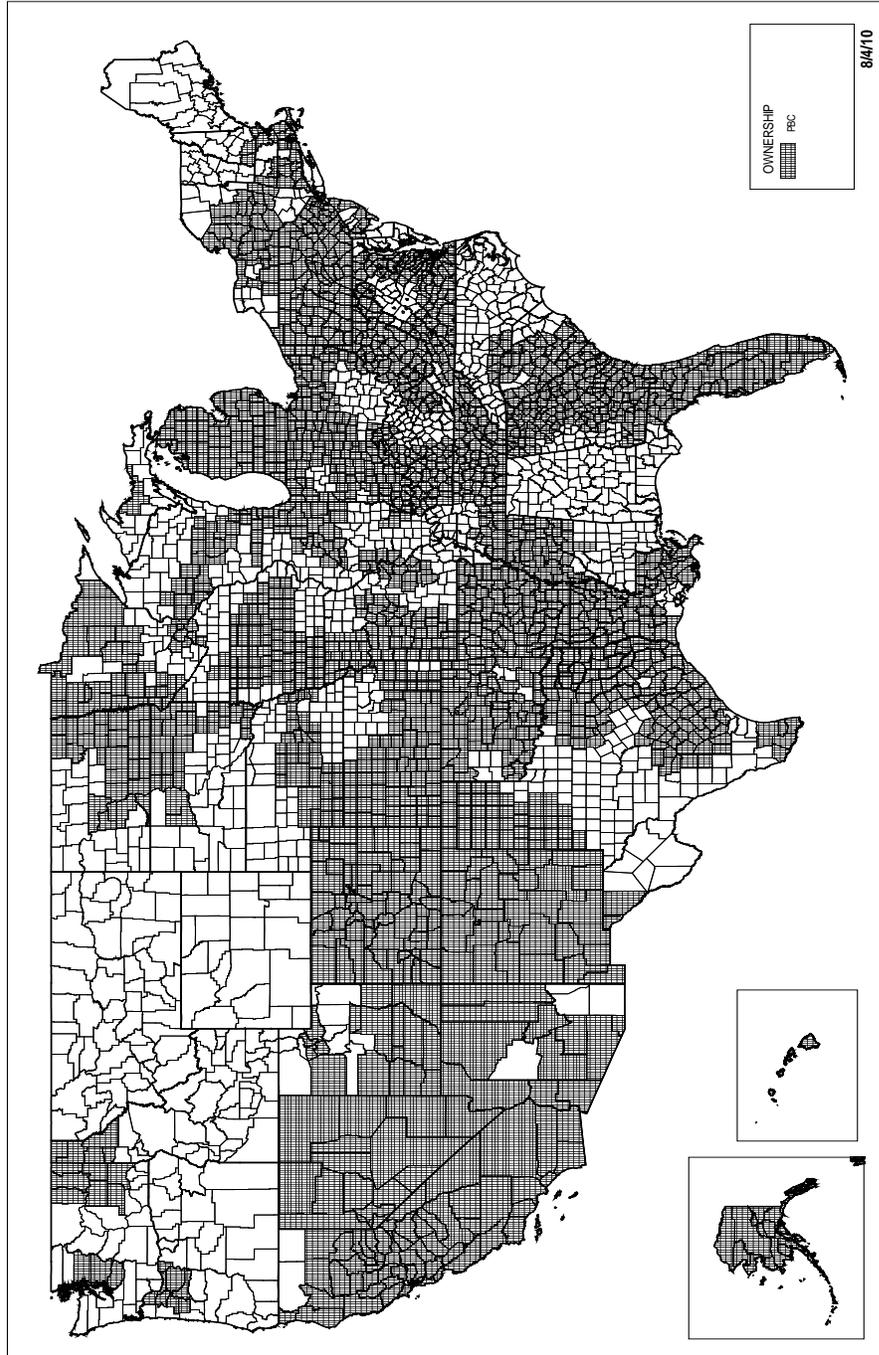
PEPSI BEVERAGES COMPANY
CANADA DRY FOOTPRINT



Decision and Order

APPENDIX B

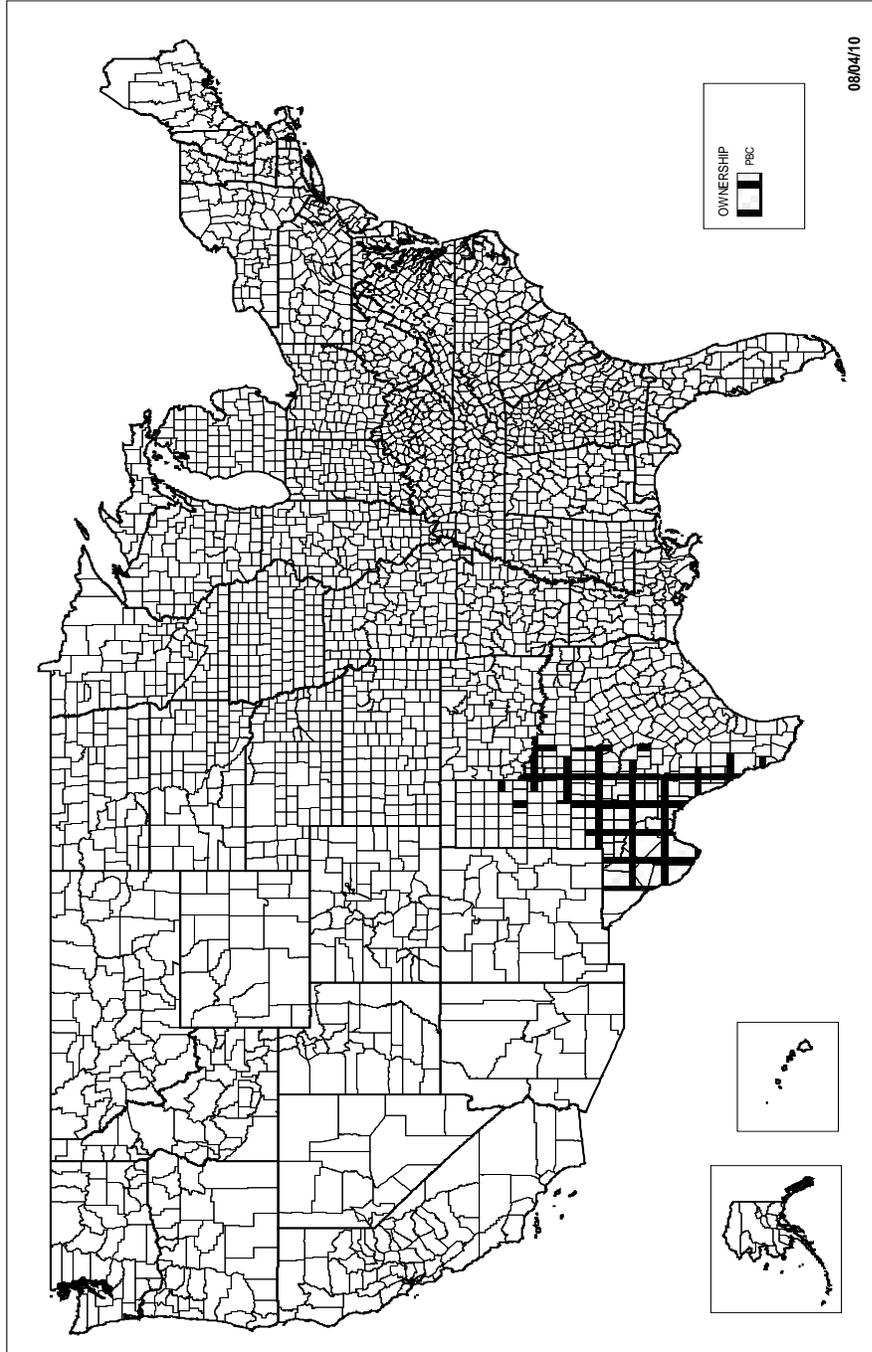
**PEPSI BEVERAGES COMPANY
CRUSH FOOTPRINT**



Decision and Order

APPENDIX B

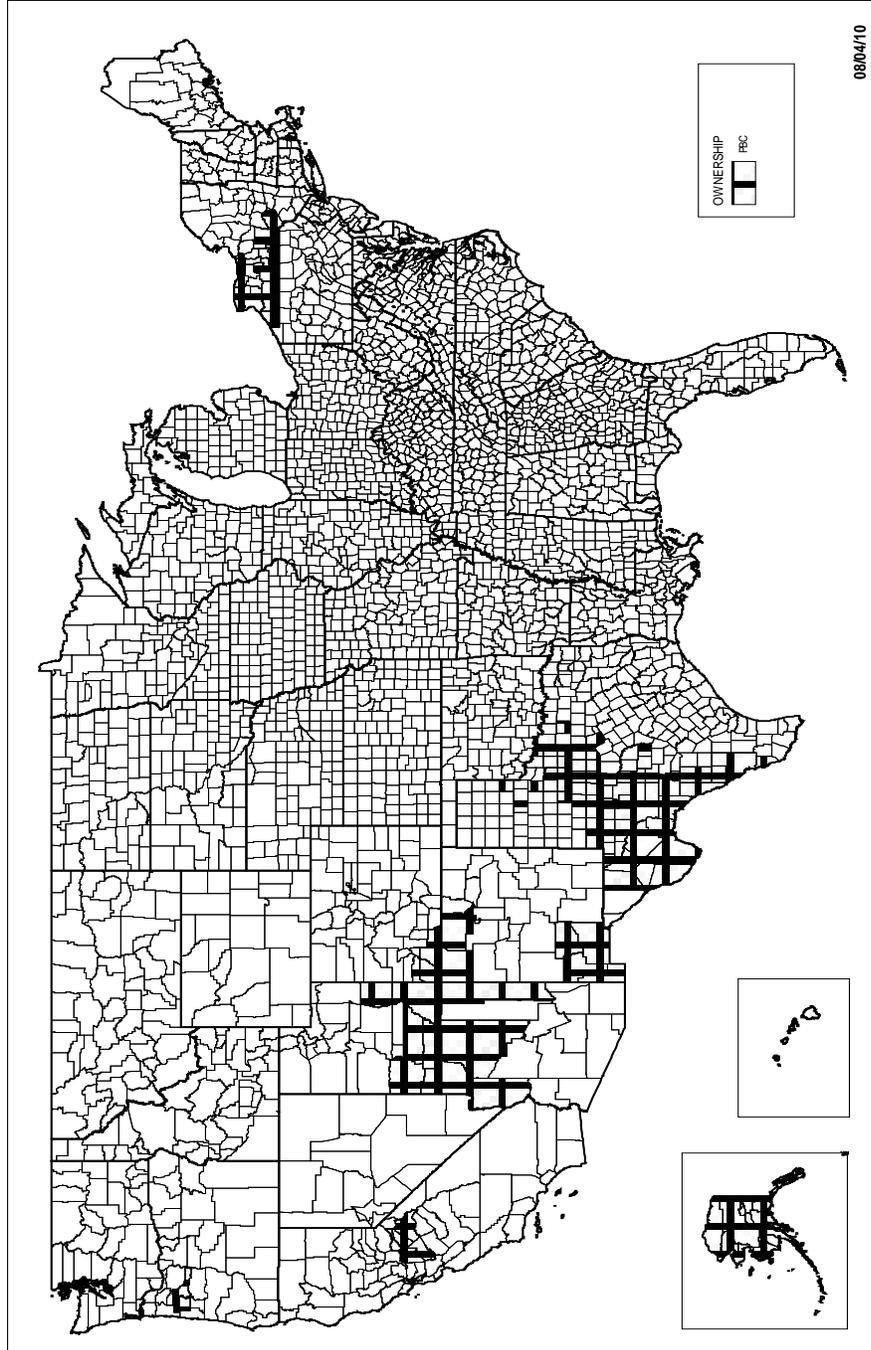
**PEPSI BEVERAGES COMPANY
SUNKIST FOOTPRINT**



Decision and Order

APPENDIX B

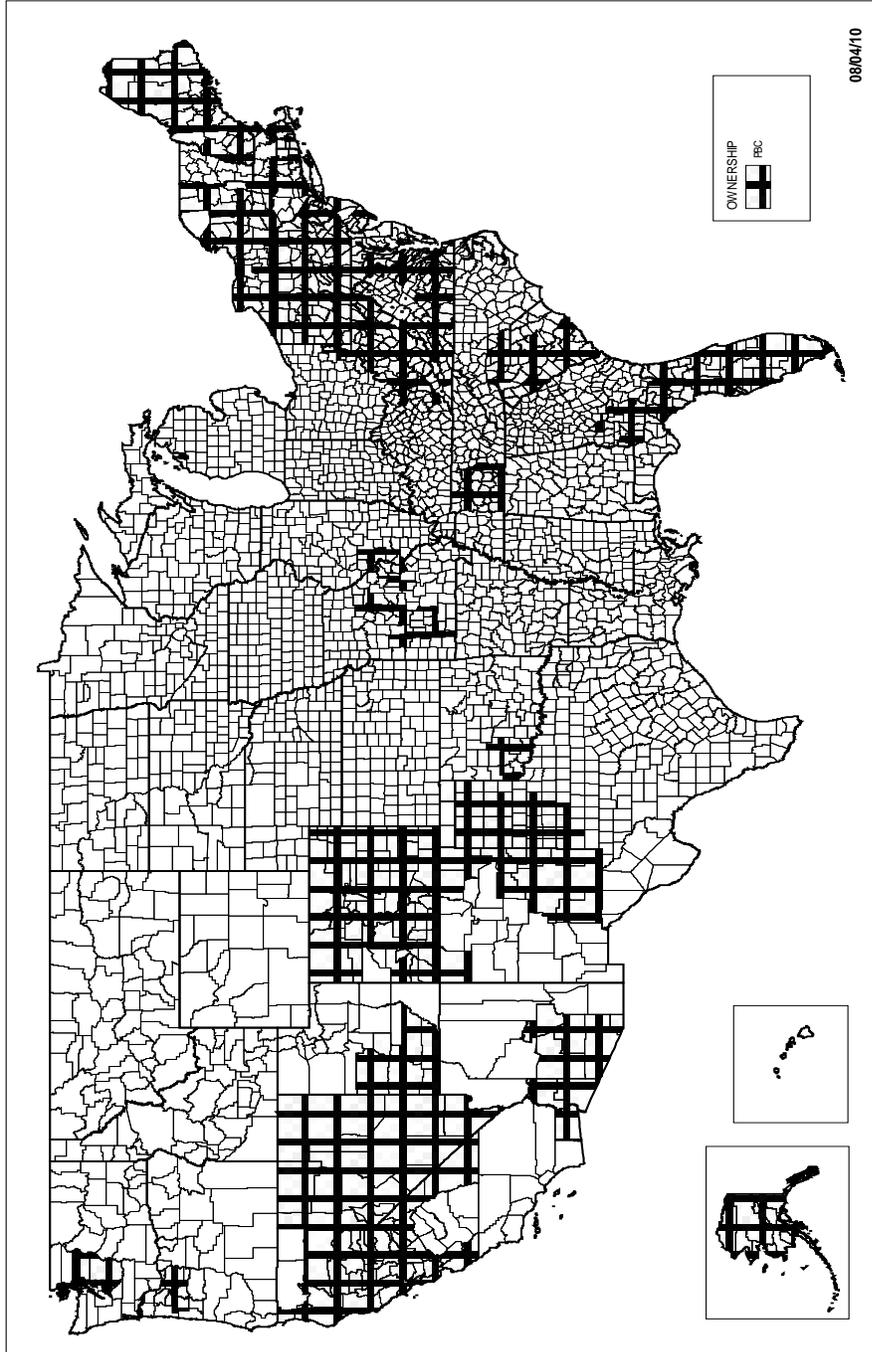
**PEPSI BEVERAGES COMPANY
SQUIRT FOOTPRINT**



Decision and Order

APPENDIX B

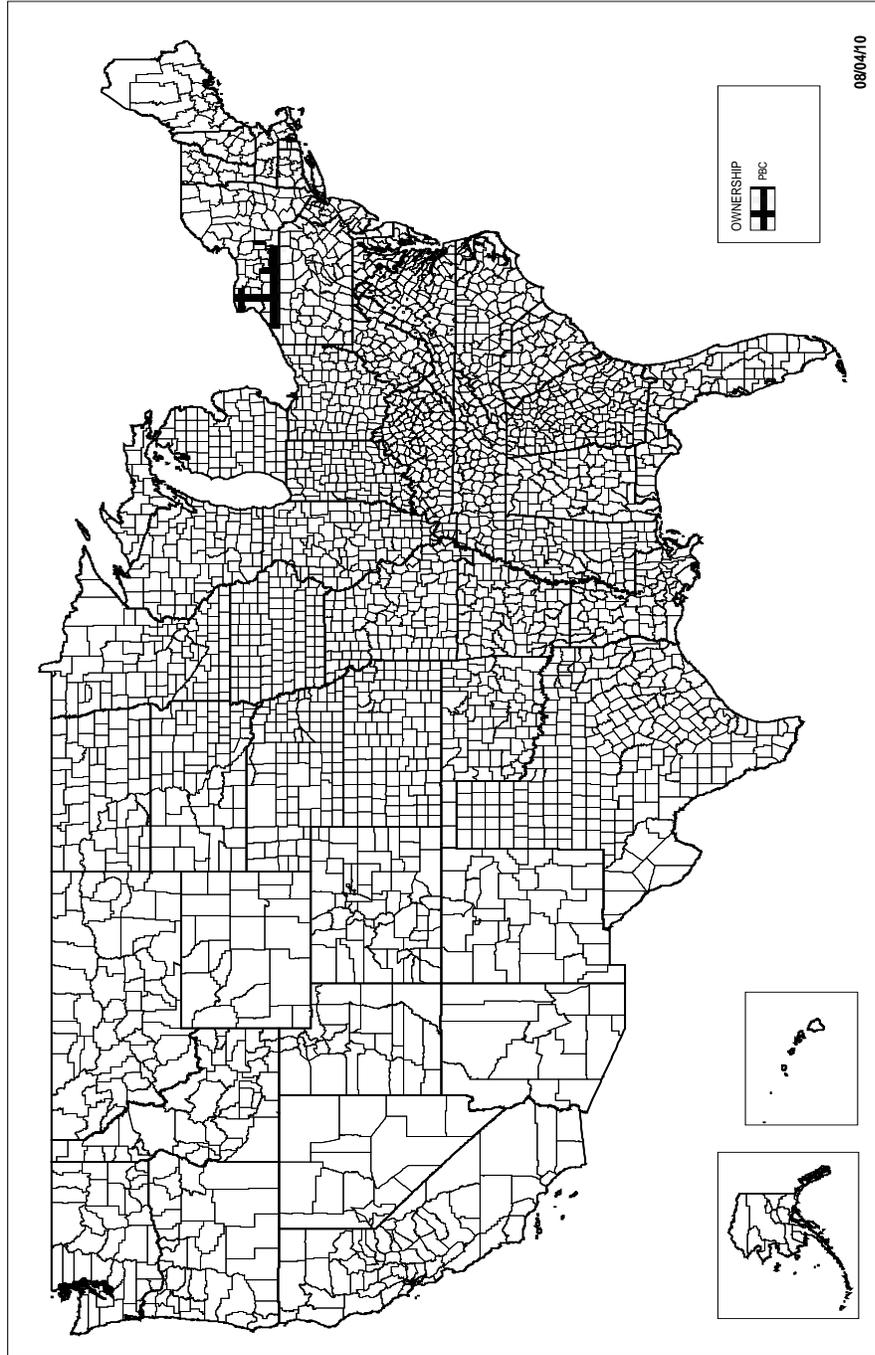
PEPSI BEVERAGES COMPANY
SCHWEPES FOOTPRINT



Decision and Order

APPENDIX B

PEPSI BEVERAGES COMPANY
VERNORS FOOTPRINT



Analysis to Aid Public Comment

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDER TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order from Respondent PepsiCo, Inc. (“PepsiCo”), to address concerns in connection with PepsiCo’s acquisitions of two of its bottlers and the subsequent exclusive license from Dr Pepper Snapple Group, Inc. (“DPSG”), to bottle, distribute and sell the Dr Pepper, Crush, and Schweppes carbonated soft drink brands of DPSG in certain territories. The Consent Agreement requires, among other things, that PepsiCo limit the persons within the company who have access to commercially sensitive confidential information that DPSG will provide to PepsiCo to enable PepsiCo to carry out the distribution functions contemplated by the license.

The DPSG - PepsiCo license agreement followed PepsiCo’s announced proposed acquisitions of its two largest bottler-distributors, Pepsi Bottling Group, Inc. (“PBG”), and PepsiAmericas, Inc. (“PAS”). These two bottler-distributors had been licensed by PepsiCo and by DPSG to bottle and distribute many of their carbonated soft drink brands. Following the acquisitions, PepsiCo will take on the bottling and distribution functions previously performed by PBG and PAS.

The Complaint alleges that, as a result of PepsiCo’s acquisition of PBG and PAS, PepsiCo will have access to DPSG’s commercially sensitive confidential marketing and brand plans. Without adequate safeguards, PepsiCo could misuse that information, leading to anticompetitive conduct that would make DPSG a less effective competitor or would facilitate coordination in the industry. To remedy this problem, the proposed Consent Agreement allows only PepsiCo employees who perform traditional carbonated soft drink “bottler functions” access to the DPSG commercially sensitive information. It prohibits PepsiCo employees involved in traditional “concentrate-related functions” from seeing that information.

Analysis to Aid Public Comment

II. Respondent PepsiCo, Inc.

PepsiCo is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at 700 Anderson Hill Road, Purchase, New York 10577. PepsiCo in 2009 had total worldwide revenues from the sale of all products of about \$43 billion. PepsiCo's United States sales in 2009 of carbonated soft drink concentrate totaled about \$3 billion. United States sales of all of PepsiCo's carbonated soft drink brands are over \$20 billion.

PepsiCo is a food and beverage company that includes PepsiCo Americas Beverages (a beverage arm), Frito-Lay (a snack food arm), and Quaker Foods (a cereal arm). Among other products, PepsiCo produces the concentrate for the PepsiCo carbonated soft drink beverage brands that are distributed by its bottlers. Some of those brands are Pepsi-Cola, Diet Pepsi, Mountain Dew, Diet Mountain Dew, Sierra Mist, Slice, and Mug Root Beer.

III. Licensor Dr Pepper Snapple Group, Inc.

DPSG is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5301 Legacy Drive, Plano, Texas 75024. Among other things, DPSG produces the concentrate for the DPSG carbonated soft drink brands that are distributed by its bottlers. Some of those brands are Dr Pepper, Diet Dr Pepper, Crush, Schweppes, Canada Dry, Vernor's, A&W Root Beer, 7-UP, Hires Root Beer, IBC, RC Cola, Diet Rite, Welch's Grape Soda, Sunkist, and Squirt. DPSG in 2009 had total revenues of about \$6 billion. DPSG's United States sales in 2009 of carbonated soft drink concentrate totaled about \$1.5 billion.

IV. The Bottlers**A. Pepsi Bottling Group, Inc.**

PBG is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its

Analysis to Aid Public Comment

office and principal place of business located at One Pepsi Way, Somers, New York 10589. PBG is the nation's largest bottler and distributor of PepsiCo beverages and accounts for about 56% of PepsiCo's total U.S. bottler-distributed volume of carbonated soft drink beverages. PBG's United States sales in 2009 of carbonated soft drinks totaled about \$6 billion. PBG is the bottler-distributor for many PepsiCo and DSPG carbonated soft drink brands. The geographic areas or territories in which PBG is licensed to distribute PepsiCo brand carbonated soft drinks include all or a portion of 41 states and the District of Columbia.

B. PepsiAmericas, Inc.

PAS is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 4000 RBC Plaza, 60 South Sixth Street, Minneapolis, Minnesota 55402. PAS is the nation's second largest bottler and distributor of PepsiCo beverages. PAS's United States sales in 2009 of carbonated soft drinks totaled about \$2.5 billion. PAS accounts for about 19% of PepsiCo's total U.S. bottler-distributed volume of carbonated soft drinks. PAS is the bottler-distributor for many PepsiCo and DSPG carbonated soft drink brands. The principal geographic areas or territories in which PAS is licensed to distribute PepsiCo brand carbonated soft drinks include all or a portion of 19 states, primarily in the Midwest.

V. The Two Transactions

A. The Bottler Acquisitions

On August 3, 2009, PepsiCo entered into agreements with PBG and PAS, the two largest independent bottlers and distributors of its carbonated soft drink brands, to acquire all of their remaining outstanding voting securities. The total value of the acquired shares for both bottlers would be approximately \$7.8 billion. At the time of the agreements, PepsiCo owned about 40% of PBG and about 43% of PAS. Together, PBG and PAS have been responsible for about 75% of all United States bottler-distributed sales of PepsiCo carbonated soft drink brands and

Analysis to Aid Public Comment

about 20% of all United States bottler-distributed sales of DPSG carbonated soft drink brands.

B. The DPSG-PepsiCo License Agreement

Following the agreements to acquire PBG and PAS, PepsiCo sought a license to continue to bottle and distribute the DPSG brands that the bottling companies had distributed. (The DPSG licenses held by PBG and PAS were terminated by DPSG as a result of the proposed acquisitions.) In the DPSG-PepsiCo license agreement, dated December 7, 2009, PepsiCo agreed to bottle and distribute DPSG's Dr Pepper, Crush, and Schweppes carbonated soft drink brands in the former PBG and PAS territories, where those bottlers had been producing and distributing those products. PepsiCo agreed to pay DPSG \$900 million for a non-exclusive license to produce¹ and an exclusive, twenty-year² license to distribute and sell those brands. Under the license agreement, PepsiCo has agreed, among other things, to (a) distribute the Dr Pepper brand in all classes of trade based on the Pepsi brands; (b) grow the Dr Pepper brand based on the sales of other carbonated soft drink brands; (c) promote the DPSG beverages and provide sales support for such promotions, based on PepsiCo's promotions of its other soft drink beverages, and (d) in connection with price-off promotions and media advertising, promote and advertise the Dr Pepper brand based on rates of promotion and advertising of the PepsiCo brands.

VI. The Proposed Complaint

The Commission's Complaint alleges that PepsiCo and DPSG are direct competitors in the highly concentrated and difficult to enter markets for (a) branded concentrate and (b) branded and direct-store-door delivered carbonated soft drinks. The concentrate markets are both national and local, and the branded carbonated soft drink markets are local. Total United States sales

¹ The production right is not exclusive to allow DPSG to produce carbonated soft drinks in the former PBG and PAS territories for sale by DPSG outside those territories.

² The license agreement is for an initial term of twenty (20) years, with automatic renewal for additional twenty (20) year periods, unless terminated pursuant its terms.

Analysis to Aid Public Comment

of concentrate are about \$9 billion, and total United States sales of carbonated soft drinks, measured at retail, are about \$70 billion.

By acquiring PBG and PAS, PepsiCo will be bottling and distributing both its own products and those of its competitor DPSG. Concentrate manufacturers like DPSG share commercially sensitive information with bottlers so that bottlers can effectively carry out their responsibilities; DPSG currently provides this sort of information to PBG and PAS. As DPSG's bottler, PepsiCo will need this type of information.

At the same time, Pepsico remains a competitor of DPSG. PepsiCo could use the information in ways that undermine competition. The Complaint alleges that PepsiCo's access to DPSG's confidential information could eliminate competition between PepsiCo and DPSG, increase the likelihood that PepsiCo may unilaterally exercise market power, and facilitate coordinated interaction in the industry. In turn, that conduct could lead to higher prices for consumers.

VII. The Proposed Consent Order

To remedy the alleged competitive concern associated with access to the DPSG commercially sensitive confidential information, the consent decree prevents that information from reaching PepsiCo employees who could use it to either harm DPSG or to facilitate collusion. PepsiCo must set up a firewall to prevent persons responsible for "concentrate-related functions" – the kinds of functions in which PepsiCo engaged as a competitor of DPSG when both had their brands distributed by PBG and PAS – from access to the DPSG information. Persons at PepsiCo who are assigned to perform traditional "bottler functions" – the kinds of functions that PBG and PAS historically have performed for DPSG – will be permitted access to that information.

The proposed Consent Agreement also provides for the appointment of a monitor to assure PepsiCo's compliance with the Consent Agreement. The monitor will have a fiduciary responsibility to the Commission. The monitor will be appointed for a five (5) year term, but the Commission may extend or modify the term as appropriate.

Analysis to Aid Public Comment

The order, like the DPSG-Pepsi license agreement, will have a term of twenty (20) years.

VIII. Opportunity for Public Comment

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

By accepting the Consent Agreement subject to final approval, the Commission anticipates that the competitive problem alleged in the Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the Consent Agreement. It is not intended to constitute an official interpretation of the proposed Consent Agreement, nor is it intended to modify the terms of the Decision and Order in any way.

Complaint

IN THE MATTER OF

NOVARTIS AGCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket No. C-4296; File No. 101 0068**Filed August 16, 2010 — Decision, September 28, 2010*

The consent order addresses allegations that Novartis AG's acquisition of Alcon, Inc. would create a monopoly in the market for injectable miotics, a class of prescription eye care drugs used during cataract surgery. The consent order requires Novartis to divest the rights and assets related to its Miochol-E miotics product to Bausch & Lomb. The consent order also requires Novartis to provide transitional services and technical assistance to Bausch & Lomb to ensure that the transfer is successful.

Participants

For the *Commission*: *Stephanie C. Bovee, Thomas D. Mays, David Von Nirschl, Kari Wallace, and James Weiss.*

For the *Respondent*: *Michael H. Byowitz and David 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 the Respondent Novartis AG ("Novartis") has entered into an agreement to acquire 52 percent of the issued and outstanding shares of Alcon, Inc. ("Alcon") from Nestle, S.A. ("Nestle"), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate Section 7 of the of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

Complaint

I. RESPONDENT

1. Respondent Novartis AG is a corporation organized, existing, and doing business under and by the virtue of the Swiss Confederation, with its principal executive offices located at Lichtstrasse 35, CH 4056 Basel, Switzerland, and the address of its United States subsidiary, Novartis Pharmaceuticals Company (a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware), located at 59 Route 10, East Hanover, New Jersey 07936. Novartis is engaged in the research, development, manufacture, and sale of human pharmaceutical products.

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

II. THE ACQUIRED COMPANY

3. Nestle, S.A. is a corporation organized, existing, and doing business under and by the virtue of the Swiss Confederation, with its headquarters address at Avenue Nestle, 55, 1800 Vevey, Switzerland.

4. Nestle holds a controlling interest in Alcon. Alcon is a corporation organized, existing, and doing business under and by virtue of the laws of the Swiss Confederation, with its principal executive offices at Bösch 69, P.O. Box 62 Hünenberg, Switzerland. Nestle, among other things, is engaged in the research, development, manufacture, and sale of human pharmaceutical products in the United States through Alcon.

III. THE PROPOSED ACQUISITION

5. On January 4, 2010, Novartis exercised a call option under the April 6, 2008, Purchase and Option Agreement (the “Acquisition Agreement”) between Novartis and Nestle whereby Novartis proposes to acquire shares that represent approximately 52 percent of the outstanding stock of Alcon for approximately

Complaint

\$28.1 billion (the “Acquisition”). When combined with the approximately 25 percent of Alcon that Novartis already owns, the Acquisition will provide Novartis with control of Alcon and 77 percent of the issued and outstanding shares of Alcon.

IV. 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 the research, development, manufacture and sale of injectable miotics.

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

V. THE STRUCTURE OF THE MARKET

8. Injectable miotics are a class of prescription pharmaceutical products that are used to constrict the pupil during cataract surgery. The market for the research, development, manufacture and sale of injectable miotics is highly concentrated. Novartis and Alcon are the only companies that sell injectable miotics products in the United States. The Acquisition would create a monopoly in this market.

VI. ENTRY CONDITIONS

9. Entry into the relevant markets described in Paragraphs 6 and 7 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 drug development times and U.S. Food and Drug Administration approval requirements take at least two years. In addition, entry is not likely because the relevant markets are relatively small, limiting sales opportunities for any potential new entrant.

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VII. EFFECTS OF THE ACQUISITION

10. The effect of the Acquisition, if consummated, may be to substantially lessen competition and 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, by eliminating actual, direct, and substantial competition between Novartis and Alcon in the market for injectable miotics products, thereby: (1) increasing the likelihood that Novartis will be able to unilaterally exercise market power in this market, and (2) increasing the likelihood that customers would be forced to pay higher prices.

VIII. VIOLATIONS CHARGED

11. The Acquisition Agreement 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 sixteenth day of August, 2010, issues its Complaint against said Respondent.

By the Commission, Commissioner Kovacic recused.

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DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to 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 Novartis is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its principal

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executive offices located at Lichtstrasse 35, CH-4056 Basel, Switzerland, and the address of its United States subsidiary, Novartis Pharmaceuticals Corporation (a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware), located at 59 Route 10, East Hanover, New Jersey 07936.

2. Alcon, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its principal executive offices located at Bösch 69, P.O. Box 62, Hünenberg, Switzerland, and the principal offices of its United States subsidiary, Alcon Laboratories, Inc. (a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware), located at 6201 South Freeway, Fort Worth, Texas 76134-2099.
3. 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 the Order, the following definitions shall apply:

- A. “Novartis” or “Respondent” means Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Novartis AG, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition Date, the term “Novartis” shall include Alcon.
- B. “Alcon” means Alcon, Inc., 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 Alcon, Inc.

- C. “Commission” means the Federal Trade Commission.
- D. “Acquirer” means the following:
1. a Person specified by name in this Order to acquire particular assets or rights that Respondent is 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 Respondent is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- E. “Acquisition” means Respondent Novartis’s acquisition of shares of the common stock of Alcon from Nestlé. The “Acquisition” is pursuant to a call option contained in the Purchase and Option Agreement dated as of April 6, 2008, by and between Novartis and Nestlé.
- F. “Acquisition Date” means the date on which Respondent Novartis acquires, directly or indirectly, fifty (50) percent or more of the voting rights in Alcon.
- 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, without limitation, the United States Food and Drug Administration (“FDA”).

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- H. “Application(s)” means all of the following: “New Drug Application” (“NDA”), “Abbreviated New Drug Application” (“ANDA”), “Supplemental New Drug Application” (“SND A”), or “Marketing Authorization Application” (“MAA”), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondent and the FDA related thereto. The term “Application” also includes an “Investigational New Drug Application” (“IND”) for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, drafts and data necessary for the preparation thereof, and all correspondence between Respondent and the FDA related thereto.
- I. “Bausch & Lomb” means Bausch & Lomb Incorporated, a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal executive offices located at One Bausch & Lomb Place, Rochester, NY 14604-2701.
- J. “cGMP” means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.
- K. “Clinical Trial(s)” means a controlled study in humans 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 human study used in research and Development of a Product.
- L. “Closing Date” means the date on which Respondent (or a Divestiture Trustee) consummates a transaction

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to assign, grant, license, divest, transfer, deliver, or otherwise convey the Miotics Product Assets.

M. “Component(s)” means any active ingredient, 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 Respondent may retain the right, concurrently with the Acquirer’s rights, to use adjuvants and excipients that are used in both the Miotics Products and Retained Products.

N. “Confidential Business Information” means all information owned by, or in the possession or control of, the 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 Miotics Products;

provided however, that the restrictions contained in this Order regarding the Respondent’s 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;
2. information related to the Miotics Products that Alcon obtained without the assistance of Respondent Novartis prior to the Acquisition;
3. information that is required by Law to be publicly disclosed;
4. information that does not directly relate to the Miotics Products;

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5. information related to Retained Products
 6. information relating to either Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of pharmaceutical Products that does not discuss the Miotics Products with particularity;
 7. information specifically excluded from the Miotics Product Assets; or
 8. 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" means:
1. to manufacture a Miotics Product, or ingredient or Component thereof, or
 2. to supply or provide any part of the manufacturing process of a Miotics Product including, without limitation, the finish, fill, and/or packaging of a Miotics Product.
- P. "Contract Manufacture Products and Services" means:
1. any Miotics Product, ingredient or Component thereof, and
 2. any finish, fill, and/or packaging for a Miotics Product,
- for which any part of the manufacturing process is performed by the Respondent prior to the Closing Date at a facility that is not subject to divestiture pursuant to this Order.
- Q. "Copyrights" means rights to all original works of authorship of any kind directly related to the specified

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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 patients, 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 specified Product(s) or of any materials used in the research, Development, manufacture, marketing or sale of the specified Product(s), including all copyrights in raw data relating to Clinical Trials of the specified 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 specified 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 specified Product(s) or relating to its biology; all copyrights in adverse experience reports 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; and all correspondence with the FDA.

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- R. “Designee” means any Person other than Respondent Novartis or Alcon that has been designated by the Acquirer to manufacture a Miotics Product for that Acquirer.
- S. “Development” means all preclinical and clinical drug 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 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.
- 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. “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;
- 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, “Direct Cost” means such cost as is provided in such Remedial Agreement.*
- U. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to the relevant provisions of this Order.

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- V. “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 those Trademarks included in the Product Intellectual Property.
- W. “Drug Master Files” means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.
- X. “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 Miotics Products and related technologies.
- Y. “Geographic Territory” shall mean the United States of America (including all of the territories within its jurisdiction or control) and Canada unless otherwise specified.
- Z. “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.
- AA. “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 Miotics Product in the United States from the Respondent was, or is projected to be among the top twenty 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 Acquisition Date; (3)

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the end of the last quarter that immediately preceded the Closing Date; or (4) the end of the last quarter following the Acquisition and/or the Closing Date.

- BB. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.
- CC. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- DD. “Miotics Product(s)” means all Products that are intraocular solutions containing the active pharmaceutical ingredient generically known as acetylcholine together with any salts, esters, metabolites, derivatives, isomers, hydrates, solvates, ethers, quaternary amines, polymorphs and prodrugs thereof offered by Respondent Novartis for sale in the United States of America, including without limitation, under the brand name Miochol®-E, during the one (1) year period immediately preceding the Acquisition Date. The term “Miotics Product(s)” excludes any Product offered by Alcon prior to the Acquisition Date.
- EE. “Miotics Product Assets” means all of the Respondent’s rights, title and interest in and to all assets related to the Respondent’s business throughout the World related to the Miotics Products to the extent legally transferable, including the research, Development, manufacture, distribution, marketing, and sale of the Miotics Products, including, without limitation, the following assets related to the Miotics Products:
1. all Product Intellectual Property;
 2. all Freedom to Operate Searches;
 3. all Product Improvements;

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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 NDC Numbers used for Miotics Products, and rights, to the extent permitted by Law:
 - a. to require Respondent to cease and desist from using the NDC Numbers in the sale or marketing of Products other than with respect to returns, rebates, allowances, and adjustments for Miotics Products sold prior to the Acquisition Date;
 - b. to prohibit Respondent from seeking from any customer any type of cross- referencing of such NDC Numbers with any Retained Product(s);
 - c. to seek to change any cross-referencing by a customer of such NDC Numbers with the Retained Product(s) (including the right to receive notification from Respondent of any such cross-referencing that is discovered by Respondent);
 - d. to seek cross-referencing from a customer of such NDC Numbers with the Acquirer's NDC Numbers;
 - e. to approve the timing of Respondent's cessation of use of such NDC Numbers in the sale or marketing of Products other than with respect to returns, rebates, allowances, and adjustments for Miotics Products sold prior to the Acquisition Date; and

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- f. to approve any notification(s) from Respondent to any customer(s) regarding the use or cessation of use of such NDC numbers by Respondent prior to such notification(s) being disseminated to the customer(s);
9. all rights to all of Respondent's Applications;
10. Right of Reference or Use to the Drug 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;
12. at the Acquirer's option, all Product Assumed Contracts;
13. all strategic safety programs submitted to the FDA that are designed to decrease product risk by using one or more interventions or tools beyond the package insert;
14. all patient registries and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and identification information required to be maintained by the FDA to facilitate the investigation of adverse effects;
15. a list of all customers and/or targeted customers for the Miotics Product(s) and the net sales (in either units or dollars) of the Miotics 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 the Miotics Products on behalf of the High Volume Account and his or her business contact information;

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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 the Miotics Products as of the Closing Date, to be provided to the Acquirer not later than five (5) days after the Closing Date;
18. at the Acquirer's option, subject to any rights of the customer, all unfilled customer purchase orders for the Miotics Products; and
19. all of the Respondent's books, records, and files directly related to the foregoing or to the Miotics Products;

provided, however, that the term "Miotics Product Assets" shall not include: (1) documents relating to the Respondent's general business strategies or practices relating to research, Development, manufacture, marketing or sales of pharmaceutical Products, where such documents do not discuss with particularity the Miotics Products; (2) 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 Miotics Products; (4) any real estate and the buildings and other permanent structures located on such real estate; (5) Product Manufacturing Technology related to both the Miotics Products and the Retained Products; and (6) Product Licensed Intellectual Property.

provided further, however, that in cases in which documents or other materials included in the Miotics Product Assets contain information: (1) that relates both to the Miotics Products and to other Products or

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businesses of the Respondent and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Miotics Products; or (2) for which the Respondent has a legal obligation to retain the original copies, the Respondent 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 shall provide the 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 provides the Acquirer with the above-described information without requiring Respondent completely to divest itself of information that, in content, also relates to Retained Product(s).

- FF. “Miotics Product Core Employee(s)” means the Product Research and Development Employees and the Product Manufacturing Employees related to the Miotics Products.
- GG. “Miotics Product Divestiture Agreement(s)” means the following agreements:
1. “Asset Purchase Agreement” between Novartis Pharmaceuticals Corporation, Novartis Pharma AG and Bausch & Lomb Incorporated, dated as of July 21, 2010, and all amendments, exhibits, attachments, agreements, and schedules thereto;
 2. “Supply Agreement” between Novartis Pharma AG and Bausch & Lomb Incorporated in the form attached to the Asset Purchase Agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto;
 3. “Quality Agreement” in the form attached to the Supply Agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto;

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4. “Transitional Technical Services Agreement” between Novartis Pharm AG and Bausch & Lomb Incorporated in the form attached to the Asset Purchase Agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto;

provided, however, the term “Miotics Product Divestiture Agreements” excludes those provisions of any agreement that relate exclusively to the allocation of the purchase price for the purposes of taxes.

The Miotics Product Divestiture Agreements are attached to this Order and contained in non-public Appendix II.A.

- HH. “Miotics Product Licenses” means a perpetual, non-exclusive, fully paid-up and royalty-free license(s) with rights to sublicense to: (1) all Product Licensed Intellectual Property and (2) all Product Manufacturing Technology that relates to both the Miotics Products and the Retained Products including, without limitation, general manufacturing know-how, for all of the following purposes:
1. to research and Develop the Miotics Products for marketing, distribution or sale within the United States of America;
 2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the Miotics Products within the United States of America;
 3. to import or export the Miotics Products to or from the United States of America to the extent related to the marketing, distribution or sale of the Miotics Products; and
 4. to have the Miotics Products made anywhere in the World for distribution or sale within, or import into the United States of America;

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provided further however, that for any Product Licensed Intellectual Property that is the subject of a license from a Third Party to the Respondent, 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 Respondent.

- II. “Miotics Product Releasee(s)” means the Acquirer or any Person controlled by or under common control with the Acquirer, or any licensees, sublicensees, manufacturers, suppliers, distributors, and customers of the Acquirer, or of Acquirer-affiliated entities.

- JJ. “NDC Numbers” means the National Drug Code 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.

- KK. “Nestlé” means Nestlé S.A., a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its principal executive offices located at Avenue Nestlé 55, CH-1800 Vevey, Switzerland; its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Nestlé.

- LL. “Order Date” means the date on which this Decision and Order becomes final.

- MM. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.

- NN. “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

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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 by Respondent as of the Closing Date (except where this Order specifies a different time).

- OO. “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.
- PP. “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.
- QQ. “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 specified Product(s) within the Geographic Territory, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application.
- RR. “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) that are related to the research, Development, manufacture, distribution, finishing, packaging,

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marketing, sale, storage or transport of the Miotics Product(s) within the Geographic Territory:

1. that make specific reference to the Miotics 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 Miotics Product(s) from the Respondent unless such contract applies generally to the Respondent's sales of Products to that Third Party;
2. pursuant to which Respondent purchases the active pharmaceutical ingredient(s), Component, or other necessary ingredient(s) or had planned to purchase the active pharmaceutical ingredient(s), Component or other necessary ingredient(s) from any Third Party for use in connection with the manufacture of the Miotics Product(s);
3. relating to any Clinical Trials involving the Miotics Product(s);
4. with universities or other research institutions for the use of the Miotics Product(s) in scientific research;
5. relating to the particularized marketing of the Miotics Product(s) or educational matters relating solely to the Miotics Product(s);
6. pursuant to which a Third Party manufactures or packages the Miotics Product(s) on behalf of the Respondent;
7. pursuant to which a Third Party provides the Product Manufacturing Technology related to the Miotics Product(s) to the Respondent;
8. pursuant to which a Third Party is licensed by Respondent to use the Product Manufacturing Technology related to the Miotics Product(s);

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9. constituting confidentiality agreements pertaining to the Miotics Product(s) except such agreements that Respondent is specifically required to enforce on behalf of the Acquirer pursuant to a Remedial Agreement;
10. involving any royalty, licensing, or similar arrangement involving the Miotics Product(s);
11. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the Miotics Products to the Respondent including, but not limited to, consultation arrangements; and/or
12. pursuant to which any Third Party collaborates with Respondent in the performance of research, Development, marketing, distribution or selling of the Miotics Product(s) or the Miotics Product(s) business;

provided, however, that where any such contract or agreement also relates to a Retained Product(s), Respondent shall assign the Acquirer all such rights under the contract or agreement as are related to the Miotics Product(s), but concurrently may retain similar rights for the purposes of the Retained Product(s).

SS. “Product Development Reports” means:

1. Pharmacokinetic study reports related to the Miotics Product(s);
2. Bioavailability study reports (including reference listed drug information) related to the Miotics Product(s);
3. Bioequivalence study reports (including reference listed drug information) related to the Miotics Product(s);

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4. all correspondence to the Respondent from the FDA and from the Respondent to the FDA relating to the Application(s) submitted by, on behalf of, or acquired by, the Respondent related to the Miotics Product(s);
 5. annual and periodic reports related to the above-described Application(s), including any safety update reports;
 6. FDA approved Product labeling related to the Miotics Product(s);
 7. currently used product package inserts (including historical change of controls summaries) related to the Miotics Product(s);
 8. FDA approved patient circulars and information related to the Miotics Product(s);
 9. adverse event/serious adverse event summaries related to the Miotics Product(s);
 10. summary of Product complaints from physicians related to the Miotics Product(s);
 11. summary of Product complaints from customers related to the Miotics Product(s); and
 12. Product recall reports filed with the FDA related to the Miotics Product(s).
- TT. “Product Employee Information” means the following, for each Miotics Product Core 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 within ninety (90) days of the execution date of any Remedial Agreement);

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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 the Miotics Product; *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 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.

UU. "Product Improvements" means 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, the Miotics Product (including, without limitation, the addition,

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subtraction, substitution and/or modification of one or more Components in the Miotics Product).

VV. “Product Intellectual Property” means all of the following related to the Miotics Products (other than Product Licensed Intellectual Property):

1. Patents;
2. Copyrights;
3. Trademarks (including, without limitation, the “Miochol®-E” Trademark), Trade Dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information;
4. Software; and
5. 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 “Novartis,” or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by Respondent or the related logos thereof.

WW. “Product Licensed Intellectual Property” means all of the following:

1. Patents, Copyrights, Trademarks, and Software that are related to the Miotics Product(s) that Respondent can demonstrate have been routinely used, prior to the Acquisition Date, for a Retained Product(s) that has been marketed or sold by Respondent within the two-year period immediately preceding the Acquisition Date; and

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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 the Miotics Product(s) and that Respondent can demonstrate have been routinely used, prior to the Acquisition Date, for a Retained Product(s) that has been marketed or sold by the Respondent within the two-year period immediately preceding the Acquisition Date;

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 Date collectively are less than the aggregate retail sales in dollars within the same period of the Miotics Product(s), 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, Respondent 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 Respondent may be perpetual, fully paid-up and royalty-free license(s) with rights to sublicense.

- XX. "Product Manufacturing Employees" means all salaried employees of Respondent who have directly participated in the planning, design, implementation or operational management of the Product Manufacturing Technology of the Miotics 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.

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YY. “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 Miotics 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 Application(s) conformance and cGMP compliance, and labeling and all other information related to the manufacturing process, and supplier lists;
2. all active pharmaceutical ingredients related to the Miotics Product(s) to the extent owned or controlled by the Respondent; and,
3. 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 Miotics Product(s).

ZZ. “Product Marketing Materials” means all marketing materials used specifically in the marketing or sale of the Miotics 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

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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 related to the Miotics Product(s).

AAA. “Product Research and Development Employees” means all salaried employees of Respondent who directly have participated in the research, Development, or regulatory approval process, or clinical studies of the Miotics 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 preceding the Closing Date.

BBB. “Remedial Agreement(s)” means the following:

1. any agreement between Respondent and the 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 and a Third Party to effect the assignment of assets or rights of Respondent related to a Miotics Product to the benefit of the Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by

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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 and the Acquirer (or between a Divestiture Trustee and the 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 the requirements of this Order; and/or
4. any agreement between Respondent and a Third Party to effect the assignment of assets or rights of Respondent related to a Miotics Product to the benefit of the Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

CCC. "Retained Product(s)" means any Product(s) other than a Miotics Product.

DDD. "Right of Reference or Use" means the authority to rely upon, and otherwise use, an investigation for the purpose of obtaining approval of an Application, including the ability to make available the underlying raw data from the investigation for FDA audit.

EEE. "Software" means computer programs related to the specified Product(s), 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,*

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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).

FFF. “Supply Cost” means a cost not to exceed the manufacturer’s average direct per unit cost in United States dollars of manufacturing the Miotics Product for the twelve (12) month period immediately preceding the Acquisition 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, “Supply Cost” means the cost as specified in such Remedial Agreement.

GGG. “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, error-free, timely (i.e., ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, *inter alia*,

1. designating employees knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to the specified Product(s) who will be responsible for communicating directly with the Acquirer and/or its Designee, and the Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;
2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified Product(s) that are acceptable to the Acquirer;

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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 Product(s) in the quality and quantities achieved by the Respondent, or the manufacturer and/or developer of such specified Product(s);
 - b. obtain any Product Approvals necessary for the Acquirer or its Designee, to manufacture, distribute, market, and sell the specified Product(s) in commercial quantities and to meet all Agency-approved specifications for the specified Product(s); and
 - c. receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified Product(s).

HHH. “Third Party(ies)” means any non-governmental Person other than the following: Respondent Novartis, Alcon, or the Acquirer.

III. “Trade Dress” means the current trade dress of the specified Product, including but not limited to, Product packaging, and the lettering of the Product trade name or brand name.

JJJ. “Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names,

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

KKK. “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 Respondent; *provided, however*, “Website” shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), except to the extent that Respondent can convey its rights, if any, therein; or (2) content unrelated to any of the Miotics Product(s).

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

A. Not later than the earlier of: (1) ten (10) days after the Acquisition Date or (2) ten (10) days after the Order Date, Respondent shall divest the Miotics Product Assets and grant the Miotics Product Licenses, absolutely and in good faith, to Bausch & Lomb pursuant to, and in accordance with, the Miotics 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 Bausch & Lomb or to reduce any obligations of the Respondent under such agreements), and each such agreement, if it becomes a Remedial Agreement is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondent has divested Miotics Product Assets and granted the Miotics Product Licenses to Bausch & Lomb prior to the Order

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Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that Bausch & Lomb is not an acceptable purchaser of the Miotics Product Assets, then Respondent shall immediately rescind the transaction with Bausch & Lomb, in whole or in part, as directed by the Commission, and shall divest the Miotics Product Assets and grant the Miotics Product Licenses within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

provided further that if Respondent has divested the Miotics Product Assets to Bausch & Lomb prior to the Order Date, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Miotics Product Assets to Bausch & Lomb (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, Respondent shall secure all consents and waivers from all Third Parties that are necessary to permit Respondent to divest the Miotics Product Assets to the Acquirer, and/or to permit the Acquirer to continue the research, Development, manufacture, sale, marketing or distribution of the Miotics Products in the Geographic Territory;

provided, however, Respondent may satisfy this requirement by certifying the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

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- C. Respondent shall provide, or cause to be provided, all Product Manufacturing Technology (including all related intellectual property) related to the Miotics Products that Respondent owns, and shall provide, or cause to be provided, all rights to all Product Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed by Respondent related to the Miotics Products, to the Acquirer in a manner consistent with the Technology Transfer Standards. Respondent shall obtain any consents from Third Parties required to comply with this provision.
- D. Respondent shall:
1. upon reasonable written notice and request from the Acquirer to Respondent, 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 and Services at Respondent's Supply Cost, for a period of time sufficient to allow the Acquirer (or the Designee of the Acquirer) to obtain all of the relevant Product Approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the finished Miotics Product independently of Respondent and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and/or necessary Components listed in the specified Respondent's Application(s) for the Product from Persons other than the Respondent or Alcon;
 2. make representations and warranties to the Acquirer that the Contract Manufacture Products and Services supplied pursuant to a Remedial Agreement meet the relevant Agency-approved specifications. For the Product(s) to be marketed or sold in the Geographic Territory, Respondent shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims,

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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 Respondent to meet cGMP. This obligation may be made contingent upon the Acquirer giving Respondent 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 Respondent under this Order;

provided, however, that Respondent 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 Respondent's responsibilities to supply the ingredients and/or Components in the manner required by this Order; provided further that this obligation shall not require Respondent to be liable for any negligent act or omission of the Acquirer or for any representations and warranties, express or implied, made by the Acquirer that exceed the representations and warranties made by Respondent 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 Miotics Product, each such agreement may contain limits on Respondent's aggregate liability resulting from the failure of the Products supplied to the Acquirer pursuant to such Remedial Agreement by Respondent to meet cGMP;

3. make representations and warranties to the Acquirer that Respondent shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure by Respondent to deliver the Contract Manufacture Products and Services in a timely manner as required by the

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Remedial Agreement(s) unless Respondent can demonstrate that its failure was entirely beyond the control of Respondent and in no part the result of negligence or willful misconduct by Respondent;

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 Miotics Product, each such agreement may contain limits on Respondent's aggregate liability for such a breach;

4. during the term of any agreement to Contract Manufacture between Respondent and the Acquirer, upon written request of the Acquirer or the 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 relevant Contract Manufacture Products and Services that are generated or created after the Closing Date;
5. during the term of any agreement to Contract Manufacture between Respondent and the Acquirer, maintain manufacturing facilities necessary to perform each of the relevant Contract Manufacture Products and Services;
6. pending FDA approval of any Miotics Product that has not yet been approved for commercial scale-up manufacturing and during the term of any agreement to Contract Manufacture between Respondent and the Acquirer, provide consultation with knowledgeable employees of Respondent and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling the Acquirer (or the Designee of the Acquirer) to obtain all Product Approvals to manufacture the Miotics Products in the same quality achieved by, or on behalf of, the

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Respondent and in commercial quantities, and in a manner consistent with cGMP, independently of Respondent, and sufficient to satisfy management of the Acquirer that its personnel (or the Designee's personnel) are adequately trained in the manufacture of the Miotics Products; and

7. not extend or renew any agreement to Contract Manufacture that becomes a Remedial Agreement, or enter into any subsequent agreement to Contract Manufacture with the Acquirer to succeed an agreement to Contract Manufacture that becomes a Remedial Agreement, without the prior approval of the Commission.

Paragraphs II.D.1. - 6., shall remain in effect until the earliest of: (1) the date the Acquirer (or the Designee(s) of the Acquirer), respectively, is approved by the FDA to manufacture the Miotics Product and able to manufacture the Miotics Products in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Alcon; (2) the date the Acquirer notifies the Commission and the Respondent of its intention to abandon its efforts to manufacture the Miotics Products; (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 has abandoned its efforts to manufacture the Miotics Product, or (4) five (5) years from the Closing Date.

E. Respondent shall:

1. submit to the Acquirer, at Respondent's expense, all Confidential Business Information;
2. deliver such Confidential Business Information to the Acquirer:
 - a. in good faith;

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- 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 Miotics 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 other than as necessary to comply with the following:
 - a. the requirements of this Order;
 - b. Respondent's obligations to the Acquirer under the terms of any Remedial Agreement; or
 - c. applicable Law;
5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer or other Persons 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 to the employees associated with business related to those Retained Products

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that are indicated for the same use as the Miotics Products.

- F. 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 Product Manufacturing Technology (including all related intellectual property) related to the Miotics Products 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, Respondent 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 Acquirer. Within five (5) days of the execution of each such release, Respondent shall provide a copy of the release to the Acquirer.
- H. Respondent shall require, as a condition of continued employment post-divestiture of the Miotics Product Assets, that each Miotics Product Core Employee retained by Respondent, the direct supervisor(s) of any such employee, and any other employee retained by Respondent 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 Miotics Products as strictly confidential, including the nondisclosure of such information to all other employees, executives or other personnel of Respondent (other than as necessary to comply with the requirements of this Order).
- I. Not later than thirty (30) days after the Closing Date, Respondent shall provide written notification of the restrictions on the use of the Confidential Business Information related to the Miotics Products by

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Respondent's personnel to all of Respondent's employees who:

1. are or were directly involved in the research, Development, manufacturing, distribution, sale or marketing of any of the Miotics Products;
2. are directly involved in the research, Development, manufacturing, distribution, sale or marketing of Retained Products that are indicated for the same use as the Miotics Products; and/or
3. may have Confidential Business Information.

Respondent 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. Respondent shall provide a copy of such notification to the Acquirer. Respondent shall maintain complete records of all such agreements at Respondent's 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. Respondent 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. Respondent shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondent's personnel.

- J. Until Respondent completes the divestiture required by Paragraph II.A., and fully transfers and delivers, or cause to be transferred and delivered, the related Product Manufacturing Technology, to the Acquirer,
 1. Respondent shall take such actions as are necessary to:

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- a. maintain the full economic viability and marketability of the business associated with the Miotics Products;
 - 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 Miotics Product Assets;
 - d. ensure the assets required to be divested are transferred and delivered to the Acquirer in a manner that does not disrupt, delay, or impair the regulatory approval processes related to the business associated with the Miotics Products;
 - e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and
2. Respondent 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 business associated with the Miotics Products.
- K. Respondent shall not join, file, prosecute or maintain any suit, in law or equity, against the Acquirer or the Miotics Product Releasee(s) for the research, Development, manufacture, use, import, export, distribution, or sale of the Miotics Product(s) under the following:
1. any Patent owned or licensed by Respondent 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 Miotics Product(s), or that claims a device relating to the use thereof;

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2. any Patents owned or licensed at any time after the Acquisition Date by Respondent that claim any aspect of the research, Development, manufacture, use, import, export, distribution, or sale of the Miotics Product(s), other than such Patents that claim inventions conceived by and reduced to practice after the Acquisition Date;

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 Miotics Products anywhere in the World for the purposes of marketing, distribution or sale within the Geographic Territory; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the Geographic Territory of the Miotics Product(s). Respondent 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 related Miotics 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 Miotics Products anywhere in the World for the purposes of marketing, distribution or sale within the Geographic Territory; or (2) the use within, import into, export from, or the supply, distribution, or sale within, the Geographic Territory of the Miotics Product(s).

- L. Upon reasonable written 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 Respondent 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 Miotics Products, if such litigation would have the

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

- M. For any patent infringement suit in which either: (1) the Respondent is alleged to have infringed a Patent of another Person prior to the Closing Date, or for such suit as the 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: the research, Development, or manufacture of the Miotics Product(s); or the use, import, export, supply, distribution, or sale of the Miotics Product(s), or (2) a Person is alleged to have infringed a Patent the rights of which are granted to the Acquirer pursuant to this Order, or for such suit as the Respondent has prepared or is preparing as of the Closing Date to prosecute, Respondent shall:
1. cooperate with the Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from Respondent in connection with obtaining resolution of any pending patent litigation involving the Miotics Product(s);
 2. waive conflicts of interest, if any, to allow Respondent's outside legal counsel to represent the Acquirer in any ongoing patent litigation involving the Miotics Product(s); and
 3. permit the transfer to the Acquirer of all of the litigation files and any related attorney work-product in the possession of Respondent's outside counsel relating to the Miotics Product(s).
- N. Respondent shall not, in the Geographic Territory:

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1. use the Trademarks related to the Miotics Products or any mark confusingly similar to such Trademarks, as a trademark, trade name, or service mark;
2. attempt to register Trademarks related to the Miotics Products;
3. attempt to register any mark confusingly similar to Trademarks related to the Miotics Products;
4. challenge or interfere with the Acquirer's use and registration of Trademarks related to the Miotics Products; or
5. challenge or interfere with the Acquirer's efforts to enforce its trademark registrations for and trademark rights in Trademarks related to the Miotics Products against Third Parties;

provided however, that this paragraph shall not preclude Respondent 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 Acquisition Date.

- O. Respondent 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 Miotics Products, a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.

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

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Respondent expeditiously complies with all of its obligations and perform all of its 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, 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 any proposed Interim Monitor, Respondent 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, 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 the Order in a manner consistent with the purposes of the Order.
- D. If an Interim Monitor is appointed, Respondent 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 Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the 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.

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3. The Interim Monitor shall serve until the date of completion by Respondent of the divestiture of all Miotics Product Assets and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of the Orders and until the earliest of:
 - a. the date the Acquirer (or its Designee(s)) is approved by the FDA to manufacture the Miotics Products and able to manufacture the Miotics Products in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Alcon;
 - b. the date the Acquirer notifies the Commission and the Respondent of its intention to abandon its efforts to manufacture the Miotics Product; or
 - c. 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 the Miotics Product;
 - d. five (5) years from the Closing Date;

provided, 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 Respondent's 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

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under the Order, including, but not limited to, its obligations related to the relevant assets. Respondent 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 Respondent's compliance with the Order.

5. The Interim Monitor 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 Interim Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
6. Respondent 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. Respondent 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 Respondent, and any reports submitted by the Acquirer with respect to the performance of Respondent's obligations under the Order or the Remedial Agreement(s). Within

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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 Respondent of its obligations under the Order;

provided, however, beginning one hundred twenty (120) days after Respondent has 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 toward obtaining FDA approval to manufacture the Miotics Products and obtaining the ability to manufacture the Miotics Products in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Alcon.

8. Respondent 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

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

- H. The 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 Respondent has not fully complied with the obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Miotics 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 Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey these assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of the Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience

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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:
 - 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,*

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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 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 the Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by 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.

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

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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 the Order to Maintain Assets in this matter.

8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
 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*, 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, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, Respondent shall assure that Respondent's counsel (including in-house counsel under appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to the Acquirer or access original documents provided to the Acquirer,

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except under circumstances where copies of documents are insufficient or otherwise unavailable, and only for the following purposes:

- A. To assure Respondent's 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 Miotics Products or assets and businesses associated with the Miotics Products;

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

provided further, however, that pursuant to this Paragraph V, Respondent shall: (1) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the Acquirer (but shall not be deemed to have violated this requirement if the Acquirer withholds such agreement unreasonably); and (2) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

VI.

IT IS FURTHER ORDERED that:

- A. Any Remedial Agreement shall be deemed incorporated into this Order.

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

VII.

IT IS FURTHER ORDERED that the purpose of the divestiture of the Miotics Products and the transfer and delivery of the related Product Manufacturing Technology and the related obligations imposed on the Respondent by this Order is:

- A. to ensure the continued use of such assets in the research, Development, and manufacture of the Miotics Products and for the purposes of the business associated with the Miotics Products within the Geographic Territory;
- B. to provide for the future use of such assets for the distribution, sale and marketing of the Miotics Products in the Geographic Territory;

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- C. to create a viable and effective competitor, that is independent of the Respondent and Alcon:
1. in the research, Development, and manufacture of the Miotics Products for the purposes of the business associated with the Miotics Products within the Geographic Territory; and
 2. in the distribution, sale and marketing of the Miotics Products in the Geographic Territory; and,
- D. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

VIII.**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. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondent has fully complied with the following: Paragraphs II.A , II.B., II.C., II.E.1.-3., II.G., II.H.1.-4., II.I., and II.K., Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent shall 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 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 Miotics Product Assets and the identity of all Persons contacted, including copies of

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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 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 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.

IX.

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

- A. any proposed dissolution of Novartis AG;
- B. any proposed acquisition, merger or consolidation of Novartis AG; 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 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 the 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 the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts,

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correspondence, memoranda and all other records and documents in the possession or under the control of the Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative(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.

XI.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the Order Date.

By the Commission.

ORDER TO MAINTAIN ASSETS

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

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by

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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 waives 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 Novartis is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its principal executive offices located at Lichtstrasse 35, CH-4056 Basel, Switzerland and the address of its United States subsidiary, Novartis Pharmaceuticals Corporation (a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware), located at 59 Route 10, East Hanover, New Jersey 07936.
2. Alcon, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Swiss Confederation, with its principal executive offices located at Bösch 69, P.O. Box 62, Hünenberg, Switzerland, and the principal offices of its United States subsidiary, Alcon Laboratories, Inc. (a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware), located at 6201 South Freeway, Fort Worth, Texas 76134-2099.
3. 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 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. “Novartis” or “Respondent” means Novartis AG, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Novartis, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition Date, the term “Novartis” shall include Alcon.
- B. “Alcon” means Alcon, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Alcon, Inc.
- C. “Commission” means the Federal Trade Commission.
- D. “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.

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- E. “Miotics Product Business(es)” means the business of the Respondent within the Geographic Territory specified in the Decision and Order related to the Miotics Products, including the research, Development, manufacture, distribution, marketing, and sale of the Miotics Products and the assets related to such business, including, without limitation, the Miotics Product Assets.
- F. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III 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 Respondent fully transfers and delivers each of the respective Miotics Product Assets to an Acquirer, Respondent shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Miotics Product Businesses, to minimize any risk of loss of competitive potential for such Miotics Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Miotics Product Businesses except for ordinary wear and tear. Respondent shall not sell, transfer, encumber or otherwise impair such Miotics Product 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 Miotics Product Businesses.
- B. Until Respondent fully transfers and delivers all of the Miotics Product Assets to an Acquirer, Respondent shall maintain the operations of the Miotics Product Businesses in the regular and ordinary course of

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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 the Miotics Product Businesses and shall use its best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; the High Volume Accounts; customers; Agencies; employees; and others having business relations with the Miotics Product Businesses. Respondent's responsibilities shall include, but are not limited to, the following:

1. providing the Miotics 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 the Miotics Product Business;
2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Miotics Product Businesses authorized prior to the date the Consent Agreement was signed by Respondent 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 Miotics Products and/or to prevent any diminution in sales of each of the Miotics Products during and after the Acquisition process and prior to the complete transfer and delivery of the related Miotics Product Assets to an Acquirer;
4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Miotics Products at the related High Volume Accounts;

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5. making available for use by each of the respective Miotics Product Businesses 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 Miotics Product Assets;
 6. providing the Miotics Product Businesses with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Miotics Product Business; and
 7. providing such support services to the Miotics Product Businesses as were being provided to such business by Respondent as of the date the Consent Agreement was signed by Respondent.
- C. Until Respondent fully transfers and delivers the Miotics Product Assets to an Acquirer, Respondent shall maintain a work force at least as equivalent in size, training, and expertise to what has been associated with the Miotics Products for the Miotics Product's last fiscal year.
- D. Until the Closing Date, Respondent shall provide all the related Miotics Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the Miotics Products consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Miotics Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent 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 Miotics Product's competitiveness.

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- E. Pending divestiture of the Miotics Product Assets, Respondent shall:
1. not use, directly or indirectly, any Confidential Business Information related to the research, Development, manufacturing, marketing, or sale of the Miotics Product(s) other than as necessary to comply with the following: (1) the requirements of the Orders; (2) Respondent's obligations to an Acquirer under the terms of any Remedial Agreement; or (3) applicable Law;
 2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer or Persons specifically authorized by the 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 Miotics Products to the employees associated with businesses related to those Retained Products that are indicated for the same use as the Miotics 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.

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- F. Not later than thirty (30) days following the Closing Date, Respondent shall provide to all of Respondent's employees and other personnel who may have access to Confidential Business Information related to the Miotics Products written notification of the restrictions on the use of such information by Respondent's personnel. Respondent 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. Respondent shall provide a copy of such notification to the Acquirer. Respondent shall maintain complete records of all such agreements at Respondent's 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. Respondent 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. Respondent shall provide the Acquirer with copies of all certifications, notifications and reminders sent to Respondent's personnel.
- G. Respondent 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 Respondent to the Acquirer under such agreement(s)), which are incorporated by reference into this Order to Maintain Assets and made a part hereof.
- H. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Miotics 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 Miotics

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Product Businesses within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Miotics Product Assets wherever located in the World except for ordinary wear and tear.

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 perform all of its responsibilities as required by the Order to Maintain Assets, the Decision and Order, and the Remedial Agreements.
- 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 any proposed Interim Monitor, Respondent 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, 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 the Orders in a manner consistent with the purposes of the Orders.
- D. If an Interim Monitor is appointed, Respondent shall consent to the following terms and conditions

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regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:

1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the 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 of completion by Respondent of the divestiture of all Miotics Products and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of the Orders and until the earliest of:
 - a. the date the Acquirer (or the Designee(s) of the Acquirer) is approved by the FDA to manufacture the Miotics Products and able to manufacture the Miotics Products in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Alcon;
 - b. the date the Acquirer notifies the Commission and the Respondent of its intention to abandon its efforts to manufacture the Miotics Products;
 - c. 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 the Miotics Products, or
 - d. five (5) years from the Closing Date.

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provided, 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 Respondent's 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. Respondent 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 Respondent's compliance with the Order.
5. The Interim Monitor 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 Interim Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
6. Respondent 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,

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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. Respondent shall report to the Interim Monitor in accordance with the requirements of this 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 Respondent, and any reports submitted by the Acquirer with respect to the performance of 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 Respondent of its obligations under the Orders;

provided, however, beginning one hundred twenty (120) days after Respondent has filed its final report pursuant to Paragraph VIII.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 obtaining FDA approval to manufacture and market the Miotics Products and obtaining the ability to manufacture and market each Miotics Products in commercial quantities, in a manner consistent with cGMP, independently of Respondent and Alcon.

8. Respondent 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.

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- 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 to Maintain Assets may be the same person 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 Respondent has fully complied with its obligations to assign, grant, license, divest, transfer, deliver or otherwise convey the Miotics Products Assets as required by Paragraph II.A. of the related Decision and Order in this matter, 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

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submitted by Respondent pursuant to Paragraph VIII of 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 Novartis AG;
- B. any proposed acquisition, merger or consolidation of Novartis AG; 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 Respondent made to its principal United States offices or headquarters address, 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 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.

Order to Maintain Assets

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 Miotics Product Assets, as required by and described in the Decision and Order, has been completed and the 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 Kovacic recused.

Analysis to Aid Public Comment

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDERS TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Novartis AG (“Novartis”) that is designed to remedy the anticompetitive effects of Novartis’ acquisition of a controlling interest in Alcon, Inc. (“Alcon”) from Nestle, S.A. The proposed Consent Agreement requires Novartis to divest its rights and assets in its injectable miotics product, Miochol-E, to Bausch & Lomb, Inc. (“B&L”).

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 Purchase and Option Agreement dated April 6, 2008, and the execution of the call option on January 4, 2010, Novartis proposes to acquire all of the outstanding shares of Alcon held by Nestle in a transaction valued at approximately \$28.1 billion. After consummating the transaction, Novartis will hold 77 percent of Alcon. Novartis also proposes to acquire the remaining 23 percent of Alcon held by public shareholders. The Commission’s Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the U.S. market for the research, development, marketing, manufacture and sale of injectable miotics. The proposed Consent Agreement will remedy the alleged violations by replacing the lost competition that would result from the acquisition in this market.

Novartis is a global manufacturer and supplier of numerous branded and generic pharmaceuticals headquartered in Basel,

Analysis to Aid Public Comment

Switzerland. Nestle is the world's largest food company, and is headquartered in Vevey, Switzerland. Among Nestle's holdings is a 52 percent stake in Alcon, which provides Nestle with a controlling interest in the company. Alcon, a global medical specialty company focused on eye care, is also a Swiss corporation, based in Hünenberg. Alcon develops, manufactures, and sells surgical devices used in surgical eye procedures, branded and generic pharmaceuticals, and over-the-counter consumer eye care products.

II. Injectable Miotics

Injectable miotics are a class of prescription pharmaceutical products that are used to induce miosis, or constriction of the pupil. Injectable miotics are used in a variety of applications, most commonly during cataract surgery. Novartis introduced its product, Miochol-E, in 1993; Alcon's product, Miostat, was launched in 1972. Though patents no longer cover the formulation of the active ingredient of either Miostat or Miochol-E, no generic versions of either product have been launched. For years, Novartis and Alcon have been the only suppliers of injectable miotics in the United States, with respective market shares of approximately 67 and 33 percent. U.S. sales of injectable miotic products in 2009 totaled \$12.4 million.

Entry into the market for the research, development, manufacture and sale of injectable miotics 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 branded drug development times and U.S. Food and Drug Administration ("FDA") approval requirements takes at least two years. Entry would not be likely because the relevant market is relatively small and in decline, so the limited sales opportunities available to a new entrant are likely insufficient to warrant the time and investment necessary to enter.

In sum, the proposed acquisition of Alcon by Novartis would create a monopoly in the market for injectable miotics. The evidence indicates that customers have benefitted from direct pricing competition between the two companies, and that the price

Analysis to Aid Public Comment

of Miostat-E is currently constrained by Miostat pricing. The reduction in the number of competitors in this market from two to one would allow the merged entity to unilaterally exercise market power and result in an increase in prices to consumers.

III. The Consent Agreement

The proposed Consent Agreement effectively remedies the proposed acquisition's anticompetitive effects in the relevant product market. Pursuant to the Consent Agreement, Novartis is required to divest certain rights and assets related to its injectable miotics product to a Commission-approved acquirer no later than ten (10) days after the acquisition. Specifically, the proposed Consent Agreement requires that Novartis divest its rights and assets related to Miochol-E to B&L.

Pursuant to the Consent Agreement, the acquirer of divested assets must receive the prior approval of the Commission. As always, the Commission's goal in evaluating a possible purchaser of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed acquirer of divested assets must not itself present competitive problems.

B&L is an eye-health company that develops, sells, and distributes products in over 100 countries. B&L is particularly well-positioned to manufacture and market Miochol-E and compete effectively in the injectable miotics market. The acquisition by B&L does not create a competitive problem in the injectable miotics market because B&L does not participate in the market. With its resources, capabilities, strong reputation, and experience marketing eye care products, specifically other cataract surgery products, B&L is expected to replicate the competition that would be lost if the proposed transaction were to proceed unremedied.

If the Commission ultimately determines after the public comment period that B&L is not an acceptable acquirer of the assets to be divested, or that the manner of the divestitures is not acceptable, the parties must unwind the sale 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

Analysis to Aid Public Comment

six months, the Commission may appoint a trustee to accomplish the divestiture.

The proposed remedy contains several provisions to ensure that the divestiture is successful. The Order requires Novartis to provide transitional services to enable the Commission-approved acquirer to successfully transfer the manufacturing from Novartis. Much of the manufacturing process for Miochol-E is performed for Novartis by third-party manufacturers. As part of the divestiture, Novartis will transfer its manufacturing arrangements to B&L. Additionally, Novartis will provide technical assistance to help B&L manufacture Miochol-E.

The Commission has appointed Karl L. Hoffman Jr. of Rondaxe Pharma (“Rondaxe”) to oversee the asset transfer and to ensure Novartis’ compliance with all of the provisions of the proposed Consent Agreement. Mr. Hoffman is a Quality Systems and Support Director at Rondaxe and has an extensive background in the pharmaceutical industry. He is a highly-qualified expert on FDA regulatory matters and currently advises Rondaxe clients on achieving satisfactory regulatory compliance and interfacing with the FDA. In order to ensure that the Commission remains informed about the status of the proposed divestiture and the transfers of assets, the proposed Consent Agreement requires Novartis and Alcon to file reports with the Commission periodically until the divestitures and transfers are accomplished.

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 Order or to modify its terms in any way.

Complaint

IN THE MATTER OF

AIR PRODUCTS AND CHEMICALS, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket No. C-4299; File No. 101 0093**Filed September 8, 2010 — Decision, October 20, 2010*

The consent order addresses allegations that Air Products and Chemicals, Inc.'s ("Air Products") acquisition of Airgas, Inc. would harm competition in five regional markets for bulk liquid oxygen and bulk liquid nitrogen. The consent order requires Air Products to divest certain assets relating to Airgas's bulk liquid oxygen and bulk liquid nitrogen business to an FTC-approved buyer within four months of its acquisition. The consent order further requires Air Products to maintain these assets' viability until they are divested. In the event Air Products is unable to divest the assets within the four month period, the Commission will appoint a trustee to oversee the divestiture.

Participants

For the *Commission*: *Jeff Dahnke, Lisa D. DeMarchi Sleight, Yolanda M. Gruendel, and Gregory P. Luib.*

For the *Respondent*: *Deborah L. Feinstein, Arnold & Porter.*

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 Air Products and Chemicals, Inc. ("Air Products"), a corporation subject to the jurisdiction of the Commission, has made an offer to acquire all of the voting securities of Airgas, Inc. ("Airgas"), 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:

Complaint

I. RESPONDENT

1. Respondent Air Products is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 7201 Hamilton Boulevard, Allentown, PA 18195.

2. Airgas is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 259 North Radnor-Chester Road, Suite 100, Radnor, PA 19087.

3. Respondent Air Products and Airgas are engaged in, among other things, the production and sale of industrial gases, including, but not limited to, bulk liquid oxygen and bulk liquid nitrogen.

II. JURISDICTION

4. Respondent Air Products and Airgas 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 “commerce” is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. THE PROPOSED ACQUISITION

5. On February 11, 2010, Air Products announced its intention to acquire all outstanding common shares of Airgas pursuant to an all-cash tender offer for approximately \$7.0 billion, including the assumption of debt (the “Acquisition”). The Airgas board of directors rejected Air Products’ tender offer. More recently, on July 8, 2010, Air Products increased its original tender offer of \$60 per share to \$63.50 per share. Airgas remains hostile to Air Products’ tender offer.

Complaint

IV. THE RELEVANT MARKETS

6. 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:

- a. bulk liquid oxygen; and
- b. bulk liquid nitrogen.

7. For the purposes of this complaint, the relevant geographic areas in which to analyze the effects of the Acquisition on the bulk liquid oxygen and bulk liquid nitrogen markets are:

- a. the Northeast;
- b. the Eastern Midwest;
- c. the Chicago-Milwaukee metropolitan area;
- d. the Southeast; and
- e. Oklahoma and surrounding areas.

V. THE STRUCTURE OF THE MARKETS

8. Respondent Air Products and Airgas are significant participants in each of the relevant markets, and each relevant market is highly concentrated, as measured by the Herfindahl-Hirschman Index ("HHI"). The Acquisition would further increase concentration levels, resulting in Air Products becoming the largest supplier of bulk liquid oxygen and nitrogen in each relevant area. In all but one of the relevant geographic markets, Air Products and Airgas are two of only five companies supplying bulk liquid oxygen and nitrogen to customers. In the fifth relevant geographic market, Air Products is the largest supplier, and the parties are two of only six suppliers of bulk liquid oxygen and nitrogen.

Complaint

VI. ENTRY CONDITIONS

9. New entry into the relevant markets would not occur in a timely manner sufficient to deter or counteract the likely adverse competitive effects of the Acquisition because it would take over two years for an entrant to accomplish the steps required for entry and achieve a significant market impact.

10. Entry into the bulk liquid oxygen and nitrogen markets is costly, difficult, and unlikely because of, among other things, the time and cost required to construct the air separation units that produce liquid oxygen and liquid nitrogen. Constructing one air separation unit large enough to be viable in the market would cost at least \$30 to \$50 million, most of which are sunk costs. Moreover, it is not economically justifiable to build an air separation unit unless a sufficient amount of the plant's capacity has been pre-sold prior to construction, either to an on-site customer or to liquid customers with commitments under contract. Such pre-sale opportunities occur infrequently and unpredictably and can take several years to secure.

VII. EFFECTS OF THE ACQUISITION

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

- a. by eliminating actual, direct, and substantial competition between Respondent Air Products and Airgas;
- b. by increasing the likelihood that Respondent Air Products would unilaterally exercise market power in the relevant markets;
- c. by enhancing the likelihood of collusion or coordinated interaction between or among the remaining firms in the relevant markets; and

Decision and Order

- d. by increasing the likelihood that consumers would be forced to pay higher prices for bulk liquid oxygen and nitrogen in the relevant geographic areas.

VIII. VIOLATIONS CHARGED

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 eighth day of September, 2010, 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 Air Products and Chemicals, Inc. (“Air Products” or “Respondent”) of the outstanding voting securities of Airgas, Inc. (“Airgas”) and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute

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an admission by Respondent that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Hold Separate and Maintain Assets and having accepted the executed 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 Air Products 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 7201 Hamilton Boulevard, Allentown, PA 18195.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent and the proceeding is in the public interest.

ORDER**I.**

IT IS HEREBY ORDERED that, as used in this Order, the following definitions, and all other definitions used in the Order to Hold Separate and Maintain Assets, shall apply:

- A. "Air Products" means Air Products, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, divisions, groups and affiliates controlled

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by Air Products (including Airgas, after the Acquisition Date) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- B. “Commission” means the Federal Trade Commission.
- C. “Acquirer” means any Person that acquires any of the Atmospheric Gases Assets or the Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable).
- D. “Acquisition Date” means the date on which Air Products acquires a majority of the Airgas Shares.
- E. “Air Products Microbulk Assets” means all of Air Products’ right, title, and interest in and to all property and assets, tangible or intangible, of every kind and description, wherever located, and any improvements or additions thereto, relating to the operation of the Air Products Microbulk 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, including any Tangible Personal Property removed from any location of the Air Products Microbulk Business after the date the Commission accepts the Consent Agreement for public comment;
 - 3. All inventories, wherever located, stored in any of the Tangible Personal Property assets at the time the Air Products Microbulk Assets are divested;
 - 4. All (a) trade accounts receivable and other rights to payment from customers of Air Products and the

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full benefit of all security for such accounts or rights to payment, (b) all other accounts or notes receivable by Air Products and the full benefit of all security for such accounts or notes and (c) any claim, remedy or other right related to any of the foregoing;

5. All agreements, contracts, leases, and consensual obligations, and all outstanding offers or solicitations made by or to Air Products to enter into any of the foregoing; *provided, however*, that if such agreement, contract, lease, obligation, or offer also relates to businesses other than the Air Products Microbulk Business, then only those portions of such agreement, contract, lease, obligation, or offer that relate to the Air Products Microbulk Business shall be included;
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 therefor or renewals thereof, to the extent transferable;
7. All intangible rights and property, including Intellectual Property, going concern value, goodwill, telephone, telecopy, and e-mail addresses and listings;
8. All data and Records, including client and customer lists and Records, vendor lists, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, correspondence and other similar documents and Records and, subject to legal requirements, copies of all personnel Records and other Records

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described in proviso (iv) of this Paragraph I.E.; *provided, however*, that if such data and Records also contain information relating to the businesses other than the Air Products Microbulk Business, then only those portions of such data and Records that relate to the Air Products Microbulk Business shall be included;

9. All insurance benefits, including rights and proceeds;
10. All claims of Air Products against third parties, whether choate or inchoate, known or unknown, contingent or noncontingent; and
11. All rights relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof.

Provided, however, that the Air Products Microbulk Assets need not include:

- (i) assets whose use is shared with or among Air Products' businesses other than the Air Products Microbulk Business unless such assets are primarily related to the operation of the Air Products Microbulk Business;
- (ii) commercial names, trade names, "doing business as" (d/b/a) names, registered and unregistered trademarks, service marks and applications using the words "Cryoease" or "Air Products;"
- (iii) all rights in internet web sites and internet domain names presently used by Air Products;
- (iv) all personnel Records and other Records that Respondent is required by law to retain; and
- (v) any part of the Air Products Microbulk Assets if not needed by an Acquirer and the Commission approves the divestiture without such assets.

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- F. “Air Products Microbulk Business” means Air Products’ business relating to the distribution, marketing, or sale of Microbulk Atmospheric Gases in North Carolina and northern Georgia.
- G. “Airgas” means a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 259 North Radnor-Chester Road, Suite 100, Radnor, PA 19087.
- H. “Airgas Microbulk Assets” means all of Airgas’s right, title, and interest in and to all property and assets, tangible or intangible, of every kind and description, wherever located, and any improvements or additions thereto, relating to the operation of the Airgas Microbulk 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, including any Tangible Personal Property removed from any location of the Airgas Microbulk Business after the date the Commission accepts the Consent Agreement for public comment;
 3. All inventories, wherever located, stored in any of the Tangible Personal Property assets at the time the Airgas Microbulk Assets are divested;
 4. All (a) trade accounts receivable and other rights to payment from customers of Airgas and the full benefit of all security for such accounts or rights to payment, (b) all other accounts or notes receivable by Airgas and the full benefit of all security for

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such accounts or notes and (c) any claim, remedy or other right related to any of the foregoing;

5. All agreements, contracts, leases, and consensual obligations, and all outstanding offers or solicitations made by or to Airgas to enter into any of the foregoing; *provided, however*, that if such agreement, contract, lease, obligation, or offer also relates to businesses other than the Airgas Microbulk Business, then only those portions of such agreement, contract, lease, obligation, or offer that relate to the Airgas Microbulk Business shall be included;
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 therefor or renewals thereof, to the extent transferable;
7. All intangible rights and property, including Intellectual Property, going concern value, goodwill, telephone, telecopy, and e-mail addresses and listings;
8. All data and Records, including client and customer lists and Records, vendor lists, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, correspondence and other similar documents and Records and, subject to legal requirements, copies of all personnel Records and other Records described in proviso (iv) of this Paragraph I.H.; *provided, however*, that if such data and Records also contain information relating to the businesses other than the Airgas Microbulk Business, then only those portions of such data and Records that

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relate to the Airgas Microbulk Business shall be included;

9. All insurance benefits, including rights and proceeds;
10. All claims of Airgas against third parties, whether choate or inchoate, known or unknown, contingent or noncontingent; and
11. All rights relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof.

Provided, however, that the Airgas Microbulk Assets need not include:

- (i) assets whose use is shared with or among Airgas's businesses other than the Airgas Microbulk Business unless such assets are primarily related to the operation of the Airgas Microbulk Business;
 - (ii) commercial names, trade names, "doing business as" (d/b/a) names, registered and unregistered trademarks, service marks and applications for the foregoing names and marks;
 - (iii) all rights in internet web sites and internet domain names presently used by Airgas;
 - (iv) all personnel Records and other Records that Respondent is required by law to retain; and
 - (v) any part of the Airgas Microbulk Assets if not needed by an Acquirer and the Commission approves the divestiture without such assets.
- I. "Airgas Microbulk Business" means Airgas's business relating to the distribution, marketing, or sale of Microbulk Atmospheric Gases in North Carolina and northern Georgia.

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- J. “Airgas Shares” means the issued and outstanding shares of common stock of Airgas on a fully diluted basis.
- K. “ASU” means air separation unit.
- L. “Atmospheric Gases” means oxygen, nitrogen, and argon.
- M. “Atmospheric Gases Assets” means all of Airgas’s right, title, and interest in and to all property and assets, tangible or intangible, of every kind and description, wherever located, and any improvements or additions thereto, relating to the operation of the Atmospheric Gases 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, including any Tangible Personal Property removed from any location of the Atmospheric Gases Business or the Airgas Microbulk Business after the date the Commission accepts the Consent Agreement for public comment;
 3. All of the ASU facilities listed in Appendix A of this Order;
 4. All inventories, wherever located, including all finished product, work in process, raw materials, spare parts and all other materials and supplies to be used or consumed by Airgas in the production of finished products;

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5. All (a) trade accounts receivable and other rights to payment from customers of Airgas and the full benefit of all security for such accounts or rights to payment, (b) all other accounts or notes receivable by Airgas and the full benefit of all security for such accounts or notes and (c) any claim, remedy or other right related to any of the foregoing;
6. All agreements, contracts, leases, and consensual obligations, and all outstanding offers or solicitations made by or to Airgas to enter into any of the foregoing; *provided, however*, that if such agreement, contract, lease, obligation, or offer also relates to businesses other than the Atmospheric Gases Business, then only those portions of such agreement, contract, lease, obligation, or offer that relate to the Atmospheric Gases Business shall be included; provided, further, that in the matter of a swap agreement, all portions of the agreement with respect to Atmospheric Gases shall be included if any portion is related to the Atmospheric Gases Business;
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 therefor or renewals thereof, to the extent transferable;
8. All intangible rights and property, including Intellectual Property, subject to an Atmospheric Gases License-Back, going concern value, goodwill, telephone, telecopy, and e-mail addresses and listings;
9. All data and Records, including client and customer lists and Records, vendor lists, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating

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guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, correspondence and other similar documents and Records and, subject to legal requirements, copies of all personnel Records and other Records described in proviso (iv) of this Paragraph I.M.; *provided, however*, that if such data and Records also relate to businesses other than the Atmospheric Gases Business, then only those portions of such data and Records that relate to the Atmospheric Gases Business shall be included;

10. All insurance benefits, including rights and proceeds;
11. All claims of Airgas against third parties, whether choate or inchoate, known or unknown, contingent or noncontingent; and
12. All rights relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof.

Provided, however, that the Atmospheric Gases Assets need not include:

- (i) assets whose use is shared with or among Airgas's businesses other than the Atmospheric Gases Business unless such assets are primarily related to the operation of the Atmospheric Gases Business;
- (ii) commercial names, trade names, "doing business as" (d/b/a) names, registered and unregistered trademarks, service marks and applications for the foregoing names and marks;
- (iii) all rights in internet web sites and internet domain names presently used by Airgas;
- (iv) all personnel Records and other Records that Respondent is required by law to retain; and

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- (v) any part of the Atmospheric Gases Assets if not needed by an Acquirer and the Commission approves the divestiture without such assets.
- N. “Atmospheric Gases Business” means Airgas’s business relating to (1) the production or refinement of Atmospheric Gases at any Airgas on-site facilities or the ASU facilities listed in Appendix A of this Order and (2) the distribution, marketing, or sale of such Atmospheric Gases (wherever located) by pipeline, from such on-site facilities, or as Bulk Atmospheric Gases; *provided, however*, that Atmospheric Gases Business does not include Airgas’s Packaged Atmospheric Gases or Microbulk Atmospheric Gases businesses.
- O. “Atmospheric Gases Employee” means, as of the Acquisition Date, (i) any full-time, part-time, or contract employee of the Atmospheric Gases Business or the Airgas Microbulk Business (or Air Products Microbulk Business, if applicable), (ii) any other person employed by Airgas whose work primarily relates to the Atmospheric Gases Business, or (iii) any other person employed by Airgas whose work primarily relates to the Airgas Microbulk Business (or employed by Air Products whose work primarily relates to the Air Products Microbulk Business, if applicable).
- P. “Atmospheric Gases License” means:
1. A worldwide, royalty-free, paid-up, perpetual, irrevocable, transferable, sublicensable, non-exclusive license under all Intellectual Property relating to operation of the Atmospheric Gases Business or the Airgas Microbulk Business (or the Air Products Microbulk Business, if applicable) other than Intellectual Property already included in the Atmospheric Gases Assets or Airgas Microbulk

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Assets (or Air Products Microbulk Assets, if applicable); and

2. Such tangible embodiments of the licensed rights (including but not limited to physical and electronic copies) as may be necessary or appropriate to enable an Acquirer to use the rights.

Q. “Atmospheric Gases License-Back” means:

1. A worldwide, royalty-free, paid-up, perpetual, irrevocable, transferable, sublicensable, non-exclusive license under any Intellectual Property that is included in the Atmospheric Gases Assets or the Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable) and is not solely related to the operation of the Atmospheric Gases Business or the Airgas Microbulk Business (or the Air Products Microbulk Business, if applicable); and
2. Such tangible embodiments of the licensed rights (including but not limited to physical and electronic copies) as may be necessary or appropriate to enable an Acquirer to use the rights.

R. “Bulk Atmospheric Gases” means Atmospheric Gases delivered in bulk liquid form (as the term “bulk” generally is defined by participants in the Atmospheric Gases industry, including by Respondent in the ordinary course of its business), typically to an on-site storage tank with a capacity greater than 2,000 liters.

S. “Confidential Business Information” means competitively sensitive, proprietary and all other business information of any kind owned by or pertaining to any business or assets specified in the relevant provisions of this Order or the Order to Hold Separate and Maintain Assets (including, but not limited to, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses,

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customer lists, customer contracts, employee lists, salary and benefits information, technologies, processes, and other trade secrets), except for any information that Respondent demonstrates (i) was or becomes generally available to the public other than as a result of a disclosure by Respondent, or (ii) 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.

- T. “Direct Cost” means the actual cost of labor, including employee benefits, materials, resources, and services plus the actual cost of any third-party charges.
- U. “Divestiture Agreement” means any purchase and sale agreement approved by the Commission between Respondent (or between a Divestiture Trustee appointed pursuant to Paragraph V of this Order) and an Acquirer to purchase all or any of the Atmospheric Gases Assets or the Airgas Microbulk Assets (or the Air Products Microbulk Assets, if applicable) including all amendments, exhibits, attachments, agreements, and schedules thereto.
- V. “Intellectual Property” means all intellectual property owned or licensed (as licensor or licensee) by Airgas or Air Products (as the case may be), in which Airgas or Air Products 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 and 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, software, technical information, data, process technology, plans, drawings and blue prints;

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and (v) all rights in internet web sites and internet domain names presently used by Airgas or Air Products.

- W. “Microbulk Atmospheric Gases” means Atmospheric Gases delivered in microbulk liquid form (as the term “microbulk” generally is defined by participants in the Atmospheric Gases industry, including by Respondent in the ordinary course of its business), typically to an on-site storage tank with a capacity greater than or equal to 230 liters and less than or equal to 2,000 liters.
- X. “Packaged Atmospheric Gases” means Atmospheric Gases delivered in packaged form (as the term “packaged” generally is defined by participants in the Atmospheric Gases industry, including by Respondent in the ordinary course of its business), typically in a gaseous cylinder, a liquid dewar, or delivered as bulk gas in a tube trailer.
- Y. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other entity.
- Z. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- AA. “Tangible Personal Property” means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles (including delivery vehicles of any kind), and other items of tangible personal property (other than inventories) of every kind owned or leased by Airgas or Air Products (as the case may be), 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.
- BB. “Transitional Assistance” means any (i) administrative services (including, but not limited to, order

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processing, shipping, accounting, and information transitioning services) or (ii) technical assistance with respect to the production, refinement, distribution, marketing, or sale of Atmospheric Gases.

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

- A. Respondent shall divest the Atmospheric Gases Assets and the Airgas Microbulk Assets at no minimum price, absolutely and in good faith, as an on-going business, no later than 120 days from the Acquisition Date, to one or more Acquirers that receive the prior approval of the Commission and in a manner that receives the prior approval of the Commission; *provided, however*, that Respondent shall divest the Air Products Microbulk Assets instead of the Airgas Microbulk Assets at the option of an Acquirer.
- B. At any time after February 15, 2011, if Respondent has not acquired a majority of the Airgas Shares, the Commission may, at its discretion, notify Respondent that it shall be required to divest the Atmospheric Gases Assets and Airgas Microbulk Assets pursuant to the following terms:
1. Respondent shall not acquire a majority of the Airgas Shares until it receives the Commission's prior approval of (a) the Acquirer(s) and (b) the manner of divestiture of the Atmospheric Gases Assets and the Airgas Microbulk Assets; and
 2. Upon obtaining such Commission approval and after acquiring a majority of the Airgas Shares, Respondent shall divest the Atmospheric Gases Assets and the Airgas Microbulk Assets at no minimum price, absolutely and in good faith, as an on-going business, no later than ten (10) days from the Acquisition Date.

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Provided, however, that Respondent shall divest the Air Products Microbulk Assets instead of the Airgas Microbulk Assets at the option of an Acquirer.

- C. If Respondent has not acquired a majority of the Airgas Shares as of one year from the date the Commission accepts the Consent Agreement for public comment (“Expiration Date”) or if Respondent withdraws its tender offer to acquire Airgas and does not have a letter of intent or agreement to purchase Airgas, Respondent shall:
1. Notify the Commission within five (5) days of withdrawal of its tender offer (“Withdrawal Date”); and
 2. Shall divest on the New York Stock Exchange absolutely and in good faith all its interest in Airgas Shares within six (6) months from the earlier of the (i) Expiration Date or (ii) Withdrawal Date.
- D. Respondent shall divest the (1) Atmospheric Gases Assets in any relevant market area (as set forth in Appendix A) to no more than one Acquirer and (2) Airgas Microbulk Assets (or the Air Products Microbulk Assets, if applicable) to the Acquirer of the Atmospheric Gases Assets located in the Southeast market (as set forth in Appendix A).
- E. The Commission may order Respondent to divest additional assets relating to Airgas’s business of distribution, marketing, or sale of Bulk Atmospheric Gases not included in the Atmospheric Gases Business as the Commission determines will ensure the divestiture of the Atmospheric Gases Assets as ongoing viable enterprises.
- F. No later than the date of divestiture of the Atmospheric Gases Assets, Respondent shall grant to an Acquirer an Atmospheric Gases License for any use in any

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business and take all actions necessary to facilitate the unrestricted use of the license.

- G. In the event that Respondent is unable to obtain any consents, licenses, certificates, registrations, permits, or other authorizations granted by:
1. Any governmental entity that are necessary to operate the Atmospheric Gases Assets or Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable), Respondent shall provide such assistance as an Acquirer may reasonably request in an Acquirer's efforts to obtain a comparable authorization; and
 2. Any other Person that are necessary to divest the Atmospheric Gases Assets or Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable), Respondent shall, with the acceptance of an Acquirer and the prior approval of the Commission, substitute equivalent assets or arrangements.
- H. At the option of an Acquirer and subject to the prior approval of the Commission, Respondent shall enter into a supply agreement, not to exceed a period of forty-eight (48) months, through which the Acquirer shall supply Respondent with Atmospheric Gases in substantially the same volumes that Airgas historically obtained from the Atmospheric Gases Assets (or relevant portions thereof) for use in its Packaged Atmospheric Gases and Microbulk Atmospheric Gases businesses (excluding the volume obtained for its Airgas Microbulk Business or the volume used by Air Products in the Air Products' Microbulk Business if the Air Products' Microbulk Assets are divested pursuant to this Order) prior to the Acquisition Date; *provided, however*, that Respondent shall not terminate its obligation under such supply agreement because of a material breach by an Acquirer, in the absence of a final order of a court of competent jurisdiction or

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arbitration proceeding (if an Acquirer agrees to arbitration).

I. At the option of an Acquirer and subject to the prior approval of the Commission, Respondent shall enter into one or more agreements to provide Transitional Assistance to an Acquirer. In such case, Respondent shall provide Transitional Assistance sufficient to enable an Acquirer to operate the divested assets and business:

1. In substantially the same manner that Airgas or Air Products (as the case may be) operated the divested assets and business prior to the Acquisition Date; and
2. At substantially the same level and quality as such services were provided by Airgas or Air Products (as the case may be) in connection with its operation of the divested assets and business prior to the Acquisition Date.

Provided, however, that Respondent shall not (i) require an Acquirer to pay compensation for Transitional Assistance that exceeds the Direct Cost of providing such Transitional Assistance or (ii) terminate its obligation to provide Transitional Assistance 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 or arbitration proceeding (if an Acquirer agrees to arbitration).

J. Respondent shall allow an Acquirer an opportunity to identify, recruit, and employ any Atmospheric Gases Employee:

1. Respondent shall (i) identify for an Acquirer each Atmospheric Gases Employee, (ii) allow an Acquirer an opportunity to interview any Atmospheric Gases Employee, and (iii) allow an Acquirer to inspect the personnel files and other

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documentation relating to any such employee, to the extent permissible under applicable laws, no later than:

- a. Twenty (20) days prior to the date of divestiture of the Atmospheric Gases Assets or Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable) and continuing thereafter for a period of ninety (90) days after the date of divestiture of the relevant assets, if Respondent divests the relevant assets pursuant to Paragraph II.A. of this Order, or
 - b. Five (5) days prior to the date of divestiture of the Atmospheric Gases Assets or Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable), or sooner, if permitted by Airgas, and continuing thereafter for a period of ninety (90) days after the date of divestiture of the relevant assets, if Respondent divests the relevant assets pursuant to Paragraph II.B. of this Order.
2. Respondent shall (i) not offer any incentive to any Atmospheric Gases Employee to decline employment with an Acquirer, (ii) remove any contractual impediments with Respondent that may deter any Atmospheric Gases Employee from accepting employment with an Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondent that would affect the ability of such employee to be employed by the Acquirer, and (iii) not otherwise interfere with the recruitment or hiring of any Atmospheric Gases Employee by an Acquirer.
 3. Respondent shall (i) vest all current and accrued pension benefits as of the date of transition of employment with an Acquirer for any Atmospheric Gases Employee who accepts an offer of

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employment from the Acquirer no later than thirty (30) days from the date Respondent divests the relevant assets and (ii) provide any Key Employee (hereinafter defined) to whom an Acquirer has made a written offer of employment with reasonable financial incentives to accept a position with the Acquirer at the time of divestiture of the relevant assets and business, pursuant to the terms set forth in Confidential Appendix B attached to this Order.

4. For a period of two (2) years after the date of divestiture of the Atmospheric Gases Assets and Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable), Respondent shall not, directly or indirectly, solicit, induce or attempt to solicit or induce any Atmospheric Gases Employee who has accepted an offer of employment with an Acquirer, or who is employed by an Acquirer, to terminate his or her employment relationship with an Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the individual's employment has been terminated by an 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.

For purposes of this Paragraph II.J. and Confidential Appendix B, "Key Employee" means any Atmospheric Gases Employee identified by agreement between Respondent and an Acquirer and made a part of a Divestiture Agreement.

- K. For a period of two (2) years from the date Respondent divests the Atmospheric Gases Assets and Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable), Respondent shall not, directly or indirectly, solicit, induce, or attempt to solicit or

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induce any Multi-Product Customer (hereinafter defined) to discontinue or reduce its purchases of Atmospheric Gases other than Packaged Atmospheric Gases from an Acquirer and purchase such products from Respondent; *provided, however*, that a violation of this provision will not occur if: (1) a customer initiates communications with Respondent regarding Atmospheric Gases purchases or (2) Respondent advertises in newspapers, trade publications, or other media in a manner not targeted specifically at customers of an Acquirer.

For purposes of this Paragraph II.K., “Multi-Product Customer” means a customer who purchased from Airgas as of the Acquisition Date both (i) Packaged Atmospheric Gases and (ii) Atmospheric Gases from the Atmospheric Gases Business or the Airgas Microbulk Business.

- L. Respondent shall comply with all terms of any Divestiture Agreement, and any breach by Respondent of any term of such agreement shall constitute a violation of this Order. 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. Respondent shall provide written notice to the Commission no later than five days after any modification of the Divestiture Agreement.

- M. The purpose of the divestiture of the Atmospheric Gases Assets and the Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable) is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time this Order becomes final and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission’s Complaint.

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

- A. Respondent shall not (i) provide, disclose or otherwise make available Confidential Business Information owned by or pertaining to the Divested Assets and Businesses (hereinafter defined) or the Air Products Microbulk Assets and Air Products Microbulk Business to any Person or (ii) use such Confidential Business Information for any reason or purpose; *provided, however*, that Respondent may disclose or use such Confidential Business Information:
1. In the course of performing its obligations or as permitted under this Order or the Order to Hold Separate and Maintain Assets;
 2. In the course of performing its obligations under any Divestiture Agreement (including any transitional services or supply agreements);
 3. In the course of complying with financial reporting requirements, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against the Divested Assets and Businesses, or as required by law; and
 4. Relating to the Air Products Microbulk Assets and the Air Products Microbulk Business in the ordinary course of business and in accordance with past practice until such time that Respondent has divested the Air Products Microbulk Assets, if applicable;

Provided, however, that Confidential Business Information relating to the Air Products Microbulk Assets and Air Products Microbulk Business shall not be subject to this Paragraph III as of the date of divestiture of the Airgas Microbulk Assets if

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Respondent divests such assets instead of the Air Products Microbulk Assets under this Order.

- B. If permitted under Paragraph III.A. of this Order, Respondent shall disclose Confidential Business Information owned by or pertaining to the Divested Assets and Businesses or the Air Products Microbulk Assets and Air Products Microbulk Business (i) only to those Persons who require such information, (ii) only to the extent such Confidential Business Information is required, and (iii) only to those Persons who agree in writing to maintain the confidentiality of such information.
- C. Respondent shall enforce the terms of this Paragraph III as to any Person other than an Acquirer of the Atmospheric Gases Assets and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph III, including training of Respondent's employees and all other actions that Respondent would take to protect its own trade secrets and proprietary information.

For purposes of this Paragraph III., "Divested Assets and Businesses" means the Atmospheric Gases Assets, Atmospheric Gases Business, Airgas Microbulk Assets, or Airgas Microbulk Business.

IV.

IT IS FURTHER ORDERED that:

- A. Prior to the Acquisition Date, Respondent may obtain Confidential Business Information owned by or pertaining to any Airgas business for the purposes of conducting customary due diligence as permitted by Airgas; *provided, however*, that:
 - 1. Respondent may not obtain Confidential Business Information owned by or pertaining to the Atmospheric Gases Business or Airgas Microbulk

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Business relating to (i) current or future information about any price plans, or price, cost, or margin information at the customer level (but may obtain aggregated, non-customer specific cost and revenue information); (ii) Strategies or Policies Related to Competition (hereinafter defined); or (iii) Cost or Price Analyses (hereinafter defined);

2. With respect to any Confidential Business Information that Respondent may obtain under this Paragraph IV.A., (i) no Person who is involved in the pricing, marketing, sale, or production of Atmospheric Gases in the United States (other than officers, directors, and counsel) shall have access to such information and (ii) any Person with access to such information shall agree in writing to maintain the confidentiality of the information.
- B. After the Acquisition Date, Respondent may obtain Confidential Business Information owned by or pertaining to businesses other than the Atmospheric Gases Business or Airgas Microbulk Business (until Respondent has divested the Air Products Microbulk Assets, if applicable) for the purposes of integration planning with respect to such other businesses; *provided, however,* that with respect to any Confidential Business Information that Respondent may obtain under this Paragraph IV.B., the Integration Clean Team (hereinafter defined) shall, until the end of the Hold Separate Period, (i) have sole access to such information (other than employees of the Hold Separate Business); (ii) agree in writing to maintain the confidentiality of the information; and (iii) not provide such information to anyone other than in aggregated or summary form to Air Products' officers, directors, and counsel.
- C. For purposes of this Paragraph IV:
1. "Integration Clean Team" means (i) third parties that Respondent has retained for the purpose of acquiring and integrating Airgas, including but not

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limited to outside legal counsel, and (ii) no more than twelve (12) Persons from Air Products, provided that in no event shall such persons have direct responsibility for pricing, marketing, sale, or production of Atmospheric Gases in the United States (except Air Products' officers, directors, or counsel);

2. "Strategies or Policies Related to Competition" means information relating to a company's current or future approach to negotiating with customers, targeting specific customers, identifying or in any other manner attempting to win customers, retaining customers, or risk of loss of customers, including but not limited to all sales personnel call reports, market studies, forecasts, and surveys which contain such information; and
3. "Cost or Price Analyses" means a formula, analysis, method, study, test, program, examination, tool, or other type of logical reasoning used to determine a product's cost or price for an identifiable individual customer.

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

- A. If Respondent has not divested all of the Atmospheric Gases Assets as required by Paragraphs II.A. or II.B. of this Order, the Commission may appoint one or more Persons as Divestiture Trustee to divest the Atmospheric Gases Assets or Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable) in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as HS Trustee pursuant to the relevant provisions of the Order to Hold Separate and Maintain Assets.

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- 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, Respondent shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.
- C. 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.
- D. Within ten (10) days after appointment of a Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and

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conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed.
2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission.
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 under this Paragraph V 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 best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made 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 entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent from among those approved by the Commission; *provided further, however*, that Respondent shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. 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 and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in

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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 shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph V.E.6., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph V.E.5. of this Order.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
8. The Divestiture Trustee shall report in writing to Respondent and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
9. Respondent or the Commission may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement required by Respondent shall not restrict the Divestiture Trustee from providing any information to the Commission.

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- F. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph V.
- G. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

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

- A. Within thirty (30) days after the earlier of (i) the Acquisition Date or (ii) February 15, 2011, and every thirty (30) days thereafter until Respondent has fully complied with the provisions of Paragraphs II.A.-C. of this Order, Respondent shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order and the Order to Hold Separate and Maintain Assets. Respondent shall include in its compliance reports, among other things that are required from time to time:
 - 1. A full description of the efforts being made to comply with this Order and with the Order to Hold Separate and Maintain Assets, including a description of all substantive contacts or negotiations relating to the divestiture and approval, and the identities of all parties contacted.
 - 2. Copies, other than of privileged materials, of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture and approval, and, as applicable, a statement that the

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divestiture(s) approved by the Commission have been accomplished, including a description of the manner in which Respondent completed such divestiture and the date the divestiture was accomplished.

- B. One (1) year after the date this Order becomes final, annually thereafter for the next nine (9) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may request, 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 and any Divestiture Agreement.

VII.

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

VIII.

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(s) 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 the Respondent, which copying

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services shall be provided by the Respondent at its expense; and

- B. To interview officers, directors, or employees of the 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 this Order becomes final.

By the Commission.

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APPENDIX A

Airgas ASUs By Relevant Market

Northeast

Bozrah, Connecticut

Eastern Midwest

Carrollton, Kentucky

Canton, Ohio

Dayton, Ohio

Chicago-Milwaukee metropolitan area

New Carlisle, Indiana

Madison, Wisconsin

Waukesha, Wisconsin

Southeast

Carrollton, Georgia

Jefferson, Georgia

Gaston, South Carolina (2 ASUs)

Rock Hill, South Carolina

Chester, Virginia

Oklahoma and surrounding areas

Mulberry, Arkansas

Lawton, Oklahoma

The Atmospheric Gases Assets shall not include any assets relating to Airgas's Atmospheric Gases Business in Hawaii.

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CONFIDENTIAL APPENDIX B

**[Redacted From 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 by Air Products and Chemicals, Inc. (“Air Products” or “Respondent”) of the outstanding voting securities of Airgas, Inc. (“Airgas”) and Respondent having been furnished thereafter with a copy of the draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

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

1. Respondent Air Products is a corporation organized, existing, and doing business under, and by virtue of,

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the laws of Delaware, with its office and principal place of business located at 7201 Hamilton Boulevard, Allentown, PA 18195.

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

ORDER**I.**

IT IS ORDERED that, as used in this Hold Separate, the following definitions, and all other definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), shall apply:

- A. “Acquisition” means the acquisition of Airgas, Inc. by Air Products.
- B. “Airgas, Inc.” means a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 259 North Radnor-Chester Road, Suite 100, Radnor, PA 19087.
- C. “Decision and Order” means (i) the Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance and service of a final Decision and Order by the Commission; and (ii) the Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission.
- D. “Divestiture Date” means, with regard to any of the Atmospheric Gases Assets or the Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable), the date on which Respondent (or a Divestiture Trustee) closes on the divestiture of those assets completely and as required by Paragraph II (or

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Paragraph V) of the Decision and Order to an Acquirer approved by the Commission.

- E. “Hold Separate” means this Order to Hold Separate and Maintain Assets.
- F. “Hold Separate Business” means Airgas, Inc.
- G. “Hold Separate Period” means the time period during which the Hold Separate is in effect, which shall begin on the Acquisition Date and terminate pursuant to Paragraph VI hereof.
- H. “HS Trustee” means the Person appointed pursuant to Paragraph II.C.1. of this Hold Separate.
- I. “Manager” means the Person appointed pursuant to Paragraph II.C.2. of this Hold Separate.
- J. “Orders” means the Decision and Order and this Hold Separate.

II.

IT IS FURTHER ORDERED that during the Hold Separate Period:

- A. Respondent shall:
 - 1. Hold the Hold Separate Business separate, apart, and independent as required by this Hold Separate and shall vest the Hold Separate Business with all rights, powers, and authority necessary to conduct its business.
 - 2. Not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business or any of its operations, or the HS Trustee, except to the extent that Respondent must exercise direction and control over the Hold Separate Business as is necessary to assure compliance with

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this Hold Separate, the Consent Agreement, the Decision and Order, and all applicable laws.

- B. Respondent shall take such actions as are necessary to maintain and assure the continued maintenance of the viability, marketability and competitiveness of the Hold Separate Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets, except for ordinary wear and tear, and shall not sell, transfer, encumber or otherwise impair the Hold Separate Business (except as required by the Decision and Order).
- C. Respondents shall hold the Hold Separate Business separate, apart, and independent of Air Products on the following terms and conditions:
 - 1. At any time after Respondent signs the Consent Agreement, the Commission shall appoint one or more Persons to serve as HS Trustee to manage the Hold Separate Business and ensure that Respondent complies with its obligations as required by this Hold Separate and the Decision and Order:
 - a. The Commission shall select the HS Trustee, subject to the consent of the Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) business days after notice by the staff of the Commission to Respondent of the identity of any proposed HS Trustee, Respondent shall be deemed to have consented to the selection of the proposed trustee.
 - b. The HS Trustee shall have the responsibility for monitoring the organization of the Hold Separate Business; supervising the management of the Hold Separate Business by the Manager; maintaining the independence of

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the Hold Separate Business; and monitoring Respondent's compliance with its obligations pursuant to the Orders, including maintaining the viability, marketability and competitiveness of the Hold Separate Business pending divestiture.

- c. No later than three (3) days after appointment of the HS Trustee, Respondent shall execute an agreement that, subject to the prior approval of the Commission, transfers to and confers upon the HS Trustee all rights, powers, and authority necessary to permit the HS Trustee to perform his duties and responsibilities pursuant to this Hold Separate, in a manner consistent with the purposes of the Decision and Order.
- d. Subject to all applicable laws and regulations, the HS Trustee shall have full and complete access to all personnel, books, records, documents and facilities of the Hold Separate Business, and to any other relevant information as the HS Trustee may reasonably request including, but not limited to, all documents and records kept by Respondent in the ordinary course of business that relate to the Hold Separate Business. Respondent shall develop such financial or other information as the HS Trustee may reasonably request and shall cooperate with the HS Trustee.
- e. Respondent shall take no action to interfere with or impede the HS Trustee's ability to monitor Respondent's compliance with this Hold Separate, the Consent Agreement or the Decision and Order or otherwise to perform his duties and responsibilities consistent with the terms of this Hold Separate.
- f. The HS Trustee shall have the authority to employ, at the cost and expense of Respondent,

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such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the HS Trustee's duties and responsibilities.

- g. The Commission may require the HS Trustee and each of the HS Trustee'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 HS Trustee's duties.
- h. Respondent may require the HS Trustee and each of the HS Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement; *provided, however*, that such agreement shall not restrict the HS Trustee from providing any information to the Commission.
- i. The HS Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the person's experience and responsibilities.
- j. Respondents shall indemnify the HS Trustee and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the HS 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 liabilities, losses, damages, claims, or expenses result from gross negligence or willful misconduct by the HS Trustee.

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- k. Thirty (30) days after the Acquisition Date, and every thirty (30) days thereafter until the Hold Separate terminates, the HS Trustee shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate and Respondent's compliance with its obligations under the Hold Separate and the Decision and Order. Included within that report shall be the HS Trustee's assessment of the extent to which the Hold Separate Business is meeting (or exceeding) its projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.
 - l. If the HS Trustee ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute HS Trustee consistent with the terms of this Hold Separate.
 - m. The HS Trustee shall serve until the day after the Divestiture Date; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
2. No later than ten (10) days after the Acquisition Date, Respondent shall appoint a Manager, approved by the HS Trustee in consultation with Commission staff, from among the current employees of the Hold Separate Business to manage and maintain the operations of the Hold Separate Business in the regular and ordinary course of business and in accordance with past practice:
 - a. The Manager shall report directly and exclusively to the HS Trustee and shall manage the Hold Separate Business independently of the management of Respondent. The Manager

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shall not be involved, in any way, in the operations of the other businesses of Respondent during the term of this Hold Separate.

- b. No later than three (3) days after appointment of a Manager, Respondent shall enter into a management agreement with the Manager that, subject to the prior approval of the HS Trustee, shall transfer all rights, powers, and authority necessary to permit the Manager to perform his duties and responsibilities pursuant to this Hold Separate, in a manner consistent with the purposes of the Decision and Order.
- c. The Manager shall make no material changes in the ongoing operations of the Hold Separate Business except with the approval of the HS Trustee, in consultation with the Commission staff.
- d. The Manager shall have the authority, with the approval of the HS Trustee, 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, the Manager, in consultation with the HS Trustee, may request Respondents to, and Respondents shall, appoint a substitute Person, which Person the Manager shall have the right to approve.
- e. In addition to Hold Separate Business employees, the Manager may, with the approval of the HS Trustee, employ such Persons as are reasonably necessary to assist the Manager in managing the Hold Separate Business.
- f. Respondent shall provide the Manager with reasonable financial incentives to undertake

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this position. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation and prevent any diminution of the Hold Separate Business's viability, marketability and competitiveness until the Divestiture Date, and as may otherwise be necessary to achieve the purposes of this Hold Separate.

- g. The HS Trustee shall be permitted, in consultation with the Commission staff, to remove the Manager for cause. Within three (3) days of such removal, Respondent shall appoint a replacement Manager on the same terms and conditions as provided in this Hold Separate. In the event that the Manager voluntarily ceases to act as a Manager, then Respondent shall appoint a substitute Manager within three (3) days on the same terms and conditions as provided in this Hold Separate.
- h. The Manager shall serve, without bond or other security, at the cost and expense of Respondent, on reasonable and customary terms commensurate with the person's experience and responsibilities.
- i. Respondent shall indemnify the Manager and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses

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result from gross negligence or willful misconduct by the Manager.

3. The Hold Separate Business shall be staffed with sufficient employees to maintain the viability and competitiveness of the Hold Separate Business. To the extent that such employees leave or have left the Hold Separate Business prior to the Divestiture Date, the Manager, with the approval of the HS Trustee, may replace departing or departed employees with persons who have similar experience and expertise or determine not to replace such departing or departed employees.
4. Respondent shall provide the Hold Separate Business with sufficient financial and other resources:
 - a. as are appropriate in the judgment of the HS Trustee to operate the Hold Separate Business as it is currently operated (including efforts to generate new business);
 - b. to perform all maintenance to, and replacements of, the assets of the Hold Separate Business in the ordinary course of business and in accordance with past practice;
 - c. to carry on existing and planned capital projects and business plans; and
 - d. to maintain the viability, competitiveness, and marketability of the Hold Separate Business.

Such financial resources to be provided to the Hold Separate Business shall include, but shall not be limited to, (i) general funds, (ii) capital, (iii) working capital, and (iv) reimbursement for any operating losses, capital losses, or other losses; *provided, however*, that, consistent with the purposes of the Decision and Order and in consultation with the HS Trustee, the Manager

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may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.

5. Respondent shall cause the HS Trustee, the Manager, and each of Respondent's employees (excluding those employed in the Hold Separate Business) having access to Confidential Business Information of or pertaining to the Hold Separate Business to submit to the Commission a signed statement that the individual will maintain the confidentiality required by the terms and conditions of this Hold Separate. These individuals must retain and maintain all Confidential Business Information of or pertaining to the Hold Separate Business on a confidential basis and, except as is permitted by this Hold Separate or the Decision and Order, such Persons shall be prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other Person whose employment involves any of Respondent's businesses or activities other than the Hold Separate Business.
6. Except for the Manager and Hold Separate Business employees, and except to the extent provided in this Hold Separate, Respondent shall not permit any other of its employees, officers, or directors to be involved in the operations of the Hold Separate Business.
7. Respondent's employees (excluding the Hold Separate Business employees) shall not receive, or have access to, or use or continue to use any Confidential Business Information of the Hold Separate Business except:
 - a. as required by law; and

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- b. to the extent that necessary information is exchanged:
- (1) in the course of consummating the Acquisition;
 - (2) in negotiating agreements to divest assets pursuant to the Decision and Order and engaging in related due diligence;
 - (3) in complying with or as permitted by this Hold Separate or the Decision and Order;
 - (4) in overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the Hold Separate Business and the integrity of the financial controls of the Hold Separate Business;
 - (5) in defending legal claims, investigations or enforcement actions threatened or brought against or related to the Hold Separate Business; or
 - (6) in obtaining legal advice.

Nor shall the Manager or any Hold Separate Business employees receive or have access to, or use or continue to use, any Confidential Business Information relating to Respondent's businesses (not subject to the Hold Separate), except such information as is necessary to maintain and operate the Hold Separate Business. Respondent may receive aggregate financial and operational information relating to the Hold Separate Business only to the extent necessary to allow Respondent to comply with the requirements and obligations of the laws of the United States and other countries, to prepare consolidated financial reports, tax returns, reports required by securities laws, and personnel reports, and to comply with this Hold

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Separate or in complying with or as permitted by the Decision and Order. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

8. Respondent and the Hold Separate Business shall jointly implement, and at all times during the Hold Separate Period maintain in operation, a system, as approved by the HS Trustee, of access and data controls to prevent unauthorized access to or dissemination of Confidential Business Information of the Hold Separate Business, including, but not limited to, the opportunity by the HS Trustee, on terms and conditions agreed to with Respondent, to audit Respondent's networks and systems to verify compliance with this Hold Separate.
 9. No later than ten (10) days after the Acquisition Date, Respondent shall establish written procedures, subject to the approval of the HS Trustee, covering the management, maintenance, and independence of the Hold Separate Business consistent with the provisions of this Hold Separate.
 10. No later than ten (10) days after the Acquisition Date, Respondent shall circulate to employees of the Hold Separate Business, and to persons who are employed in Respondent's businesses that compete with the Hold Separate Business, a notice of this Hold Separate and the Consent Agreement, in the form attached hereto as Appendix A.
- D. Respondent shall provide each Atmospheric Gases Employee with reasonable financial incentives to continue in his or her position consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Atmospheric Gases Assets and Airgas Microbulk

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Assets pending divestiture. Such incentives shall include a continuation of all employee benefits, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives as may be necessary to assure the continuation and prevent any diminution of the viability, marketability and competitiveness of the Atmospheric Gases Assets and Airgas Microbulk Assets until the applicable Divestiture Date, and as may otherwise be necessary to achieve the purposes of this Hold Separate.

- E. The purpose of this Hold Separate is to: (1) preserve the assets and businesses within the Hold Separate Business as viable, competitive, and ongoing businesses independent of Respondent until the divestiture required by the Decision and Order is achieved; (2) assure that no Confidential Business Information is exchanged between Respondent and the Hold Separate Business, except in accordance with the provisions of this Hold Separate and the Decision and Order; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) maintain the full economic viability, marketability and competitiveness of the Atmospheric Gases Assets and Airgas Microbulk Assets, and prevent the destruction, removal, wasting, deterioration, or impairment of any of the Atmospheric Gases Assets or Airgas Microbulk Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that from the date Respondent executes the Consent Agreement and during the Hold Separate Period, Respondent shall take such actions as are necessary to maintain the viability, marketability, and competitiveness of the Air Products Microbulk Business. Among other things that may be necessary, Respondent shall:

- A. Maintain the operations of the Air Products Microbulk Business in the regular and ordinary course of business and in accordance with past practice (including regular

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repair and maintenance) until either the Air Products Microbulk Assets or Airgas Microbulk Assets have been divested;

- B. Provide sufficient working capital to operate the Air Products Microbulk Business at least at current rates of operation, to meet all capital calls with respect to the Air Products Microbulk Business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities;
- C. Make available for use by the Air Products Microbulk Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the Air Products Microbulk Business;
- D. Continue, at least at their scheduled pace, any additional expenditures relating to the Air Products Microbulk Business authorized prior to the date the Consent Agreement was signed by Respondent including, but not limited to, all marketing expenditures;
- E. Use best efforts to maintain and increase sales of the Air Products Microbulk Business, and to maintain at budgeted levels for the year 2009 or the current year, whichever are higher, all administrative, technical, and marketing support for the Air Products Microbulk Business;
- F. Provide such support services to the Air Products Microbulk Business as were being provided to these businesses as of the date the Consent Agreement was signed by Respondent;
- G. Maintain a work force at least equivalent in size, training, and expertise to what has been associated with the Air Products Microbulk Business prior to the Acquisition Date;

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- H. Assure that Respondent's employees with primary responsibility for managing and operating the Air Products Microbulk Business 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; and
- I. Use best efforts to preserve and maintain the existing relationships with customers, suppliers, vendors, private and governmental entities, and others having business relations with the Air Products Microbulk Business.

IV.

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

V.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Hold Separate, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondent, Respondent shall, without restraint or interference, permit any duly authorized representative(s) 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 the Respondent, which copying services shall be provided by the Respondent at its expense; and

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

VI.

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

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after the Divestiture Date of the Atmospheric Gases Assets and Airgas Microbulk Assets (or Air Products Microbulk Assets, if applicable) required to be divested pursuant to the Decision and Order.

By the Commission.

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDER TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted from Air Products and Chemicals, Inc. (“Air Products”), subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”), which is designed to remedy the anticompetitive effects resulting from Air Products’ proposed acquisition of Airgas, Inc. (“Airgas”). Under the terms of the Consent Agreement, Air Products is required, among other things, to divest 15 air separation units (“ASUs”) and related assets currently owned and operated by Airgas in the following

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locations: (1) Bozrah, Connecticut; (2) Carrollton, Kentucky; (3) Canton, Ohio; (4) Dayton, Ohio; (5) New Carlisle, Indiana; (6) Madison, Wisconsin; (7) Waukesha, Wisconsin; (8) Carrollton, Georgia; (9) Jefferson, Georgia; (10) Gaston, South Carolina (2 ASUs); (11) Rock Hill, South Carolina; (12) Chester, Virginia; (13) Mulberry, Arkansas; and (14) Lawton, Oklahoma. With the divestiture of these ASUs and related assets, the competition that would otherwise be eliminated through the proposed acquisition of Airgas by Air Products will be fully preserved.

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 accompanying Decision and Order (“Order”).

On February 11, 2010, Air Products announced its intention to acquire all of the outstanding shares of Airgas pursuant to an all-cash tender offer for an aggregate purchase price of approximately \$7.0 billion. Consummation of this transaction is subject to acceptance of the offer by a sufficient number of the shareholders of Airgas. Airgas has repeatedly recommended that its shareholders not tender their shares, and a sufficient number of shares have not been tendered to date. It could be several months or more until the proposed acquisition is consummated, if it is consummated at all.

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 certain regional markets in the United States for the manufacture and sale of bulk liquid oxygen and bulk liquid nitrogen.

II. The Parties

Air Products is a global supplier of industrial, medical, and specialty gases for use in a variety of industries, including health

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care, technology, and energy. Air Products is the second-largest industrial gas supplier in the United States with 32 liquid atmospheric gas-producing plants throughout the United States.

Airgas is the fifth-largest industrial gas supplier in the United States. Airgas operates 16 liquid atmospheric gas-producing plants in the United States, most of which are concentrated in the Eastern United States. Airgas also is the largest U.S. distributor of packaged industrial, medical, and specialty gases and hardgoods, such as welding equipment and supplies.

III. The Products and Structure of the Markets

Both Air Products and Airgas own and operate ASUs in the United States that produce liquid atmospheric gases, including liquid oxygen and liquid nitrogen. Each gas has specific properties that make it uniquely suited for the applications in which it is used. For most of these applications, there is no viable substitute for the use of oxygen or nitrogen. Accordingly, customers would not switch to another gas or product even if the price of liquid oxygen or liquid nitrogen increased by five to ten percent.

There are three primary and distinct methods of distributing oxygen and nitrogen: (1) in packaged form (typically delivered in gaseous cylinders or liquid dewars); (2) in bulk liquid form; and (3) in gaseous form via on-site ASUs or pipelines connecting customers to nearby ASUs. Customers choose a distribution method based on the volume of gas required. Customers who use bulk liquid oxygen or nitrogen require volumes of these gases that are too large to purchase economically in cylinders, but too small to justify the expense of an on-site ASU or pipeline. Thus, even if the price of liquid oxygen or liquid nitrogen increased by five to ten percent, customers would not switch to another method of distribution.

Due to high transportation costs, bulk liquid oxygen and nitrogen may only be purchased economically from a supplier with an ASU located within 150 to 250 miles of the customer. Therefore, it is appropriate to analyze the competitive effects of the proposed acquisition in regional geographic markets for bulk

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liquid oxygen and nitrogen. The relevant geographic markets in which to analyze the effects of the proposed acquisition are (1) the Northeast (including Connecticut, Maine, Massachusetts, New Hampshire, Eastern New York, Rhode Island, and Vermont), (2) the Eastern Midwest (including Eastern Indiana, Northern Kentucky, Southeastern Michigan, Ohio, Western Pennsylvania, and Northern West Virginia), (3) the Chicago-Milwaukee metropolitan area (including the area 150 miles around Chicago), (4) the Southeast (including part of Alabama, all of Georgia, North Carolina, and South Carolina, part of Tennessee, and Southern Virginia), and (5) Oklahoma and surrounding areas (including Western Arkansas, Southeastern Kansas, Southwestern Missouri, Oklahoma, and Northeastern Texas). Because the boundaries of the relevant geographic markets at issue are largely determined by the proximity of overlapping ASUs, those geographic markets with a greater number of proximate, overlapping ASUs – for example, the Southeast market – tend to be larger in size than those markets with fewer such ASUs – for example, the Chicago-Milwaukee market.

The markets for bulk liquid oxygen and nitrogen are highly concentrated. In all but the Oklahoma market, Air Products and Airgas are two of only five companies supplying bulk liquid oxygen and nitrogen to customers. In the Oklahoma market, Air Products is the largest supplier, and the parties are two of only six suppliers of bulk liquid oxygen and nitrogen.

IV. Effects of the Acquisition

In each of the relevant markets, as a result of the proposed acquisition, a significant competitor would be eliminated, and a small number of viable competitors would remain. Certain market conditions, including the relative homogeneity of the firms and products involved and availability of detailed market information, are conducive to the firms reaching terms of coordination and detecting and punishing deviations from those terms. Therefore, the proposed acquisition would enhance the likelihood of collusion or coordinated action between or among the remaining firms in each market.

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The proposed acquisition also would eliminate direct and substantial competition between Air Products and Airgas in these areas, provide Air Products with a larger base of sales on which to enjoy the benefit of a unilateral price increase, and eliminate a competitor to which customers otherwise could have diverted their sales in markets where alternative sources of supply are already limited. The proposed acquisition, therefore, likely would allow Air Products to exercise market power unilaterally, increasing the likelihood that purchasers of bulk liquid oxygen or bulk liquid nitrogen would be forced to pay higher prices in these areas.

V. Entry

Significant impediments to new entry exist in the markets for bulk liquid oxygen and nitrogen. In order to be competitively viable in the relevant markets, an ASU must produce at least 250 to 300 tons per day of liquid product. The cost to construct a plant sufficiently large to be cost-effective can be 30 to 50 million dollars, most of which are sunk costs and cannot be recovered. Although an ASU can be constructed within two years, it is not economically justifiable to build an ASU before contracting to sell a substantial portion of the plant's capacity, either to an on-site customer or to liquid customers. On-site customers normally sign long-term contracts. Because such opportunities to contract with these customers are rare, it is uncertain whether such an opportunity would arise in the near future in any of the areas affected by the proposed acquisition. It is even more difficult and time-consuming for a potential new entrant to contract with enough liquid gas customers to justify building a new ASU. These customers are generally locked into contracts with existing suppliers that typically last between five and seven years. Even if the new entrant were able to secure enough customers to justify constructing a new ASU in any of the affected markets, the new entrant may still need to rely on incumbent suppliers to obtain liquid gases to service the new entrant's customers while the ASU was constructed. Given the difficulties of entry, it is unlikely that new entry could be accomplished in a timely manner in the bulk liquid oxygen and nitrogen markets to defeat a likely price increase caused by the proposed acquisition.

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VI. The Consent Agreement

The proposed Consent Agreement remedies the acquisition's likely anticompetitive effects in the markets for bulk liquid oxygen and bulk liquid nitrogen. Pursuant to the Consent Agreement, Air Products will divest all of the Airgas business and assets relating to the manufacture or sale of bulk liquid oxygen and nitrogen in the identified geographic markets. The Consent Agreement provides that Air Products must find a buyer for the ASUs, at no minimum price, that is acceptable to the Commission, no later than four months from the date on which Air Products consummates its acquisition of Airgas. If Air Products is unable to consummate the acquisition by February 15, 2011, however, the Commission, in its discretion, may require Air Products to seek prior approval of a buyer before Air Products can close any transaction with Airgas. This provision provides the Commission an opportunity to evaluate the continued availability of acceptable purchasers – if, for example, economic conditions were to deteriorate significantly – if the closing of the Air Products-Airgas transaction takes place after February 15, 2011.

Any acquirer of the divested assets must receive the prior approval of the Commission. The Commission's goal in evaluating possible purchasers of divested assets is to maintain the competitive environment that existed prior to the acquisition. A proposed acquirer of divested assets must not itself present competitive problems. There are a number of parties interested in purchasing the ASUs and related assets to be divested that have the expertise, experience, and financial viability to successfully purchase and manage these assets and retain the current level of competition in the relevant markets. The Commission is therefore satisfied that sufficient potential buyers for the divested bulk liquid oxygen and nitrogen assets currently exist.

If the Commission determines that Air Products has not provided an acceptable buyer for the ASUs within the required time period, or that the manner of the divestiture is not acceptable, the Commission may appoint a trustee to divest the assets. The trustee would have the exclusive power and authority to accomplish the divestiture.

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The Consent Agreement also contains an Order to Hold Separate and Maintain Assets, which will serve to protect the viability, marketability, and competitiveness of the divestiture asset package until the assets are divested to a buyer approved by the Commission.

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

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

Docket No. D-9341; File No.061 0247
Filed December 16, 2009 — Decision, October 29, 2010

The Commission issued an administrative complaint, alleging that Intel Corporation (“Intel”) illegally used its dominant market position to foreclose rivals from competing in the CPU microchip market. The complaint further alleges that Intel misled and deceived potential competitors in order to preserve its monopoly power. The consent order prohibits Intel from conditioning benefits to computer makers on their promise to purchase microchips exclusively from Intel or on their refusal to purchase microchips from others. The consent order also prohibits Intel from retaliating against computer makers if they do business with suppliers other than Intel. The consent order further requires, in part, that Intel modify its intellectual property agreements with AMD, Nvidia, and Via; offer to extend Via’s x86 licensing agreement; and disclose to software developers that Intel computer compilers discriminate between Intel and non-Intel microchips. The consent order further requires Intel to reimburse all software vendors that wish to recompile their software using a non-Intel compiler.

Participants

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For the *Respondent*: James L. Hunt, Bingham McCutchen LLP; Robert H. Cooper, Michael L. Denger, Daniel Floyd, and Joseph Kattan, PC, Gibson, Dunn & Crutcher LLP; Darren B. Bernhard and Thomas Dillickrath, Howrey LLP; Roy T. Englert, Jr., Robbins Russell Englert Orseck Untereiner & Sauber LLP; and James C. Burling, Leon Greenfield, Eric Mahr, James L. Quarles III, and Howard M. Shapiro, Wilmer Cutler Pickering Hale and Dorr LLP.

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Pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (“FTC Act”) and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Intel Corporation (“Intel”), a corporation, hereinafter sometimes referred to as “Respondent,” has engaged in a course of conduct that, considered individually or collectively, violates the provisions of said Act, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint stating its charges in that respect as follows:

THE FEDERAL TRADE COMMISSION ACT

1. The Federal Trade Commission Act “was designed to supplement and bolster the Sherman Act and the Clayton Act ... to stop in their incipiency acts and practices which, when full blown, would violate those Acts ... as well as to condemn as ‘unfair methods of competition’ existing violations” of those acts and practices.¹ The Act gives the Commission a unique role in determining what constitutes unfair methods of competition. “[L]ike a court of equity, the Commission may consider public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws.”² Examples of conduct that fall within the scope of Section 5 include deceptive, collusive, coercive, predatory, unethical, or exclusionary conduct or any course of conduct that causes actual or incipient harm to competition. Moreover, where a respondent that has monopoly power engages in a course of conduct tending to cripple rivals or prevent would-be rivals from constraining its exercise of that power, and where such conduct cumulatively or individually has anticompetitive effects or has a tendency to lead to such effects, that course of conduct falls within the scope of Section 5. Respondent may defend against such charges, however, by

¹ *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (quoting *F.T.C. v. Motion Picture Adv. Serv. Co.*, 344 U.S. 392, 394-95 (1953)). See also *F.T.C. v. Texaco*, 393 U.S. 223, 225-26 (1968).

² *F.T.C. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972). See also *F.T.C. v. Cement Inst.*, 333 U.S. 683, 693 (1948); *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966).

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proving that any actual or incipient anticompetitive effects resulting from the Respondent's course of conduct are offset by procompetitive effects, and that engaging in that course of conduct was reasonably necessary to achieve those offsetting precompetitive effects. The conduct alleged in this complaint, if proven, falls within the scope of Section 5.

NATURE OF THE CASE

2. This antitrust case challenges Intel's unfair methods of competition and unfair acts or practices beginning in 1999 and continuing through today, and seeks to restore lost competition, remedy harm to consumers, and ensure freedom of choice for consumers in this critical segment of the nation's economy. Intel's conduct during this period was and is designed to maintain Intel's monopoly in the markets for Central Processing Units ("CPUs") and to create a monopoly for Intel in the markets for graphics processing units ("GPUs").

3. Intel holds monopoly power in the markets for personal computer and server CPUs, and has maintained a 75 to 85 percent unit share of these markets since 1999. Intel's share of the revenues in these markets has consistently exceeded 80 percent, and Intel is currently not sufficiently constrained by any other CPU manufacturers, including the two other manufacturers of x86 CPUs, Advanced Micro Devices ("AMD") and Via Technologies ("Via"), or the handful of non-x86 CPU manufacturers. A number of CPU manufacturers have exited the marketplace over the last decade. Due to both Intel's conduct and high barriers to entry in the CPU markets, new entry is unlikely.

4. In 1999 after AMD released its Athlon CPU and again in 2003 after AMD released its Opteron CPU, Intel lost its technological edge in various segments of the CPU markets. Original equipment manufacturers ("OEMs") recognized that AMD's new products had surpassed Intel in terms of performance and quality of the CPU.

5. Its monopoly threatened, Intel engaged in a number of unfair methods of competition and unfair practices to block or slow the adoption of competitive products and maintain its monopoly to the detriment of consumers. Among those practices

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were those that punished Intel's own customers – computer manufacturers – for using AMD or Via products. Intel also used its market presence and reputation to limit acceptance of AMD or Via products, and used deceptive practices to leave the impression that AMD or Via products did not perform as well as they actually did.

6. First, Intel entered into anticompetitive arrangements with the largest computer manufacturers that were designed to limit or foreclose the OEMs' use of competitors' relevant products. On the one hand, Intel threatened to and did increase prices, terminate product and technology collaborations, shut off supply, and reduce marketing support to OEMs that purchased too many products from Intel's competitors. On the other hand, some OEMs that purchased 100 percent or nearly 100 percent of their requirements from Intel were favored with guarantees of supply during shortages, indemnification from intellectual property litigation, or extra monies to be used in bidding situations against OEMs offering a non-Intel product.

7. Second, Intel offered market share or volume discounts selectively to OEMs to foreclose competition in the relevant CPU markets. In most cases, it did not make economic sense for any OEM to reject Intel's exclusionary pricing offers. Intel's offers had the practical effect of foreclosing rivals from all or substantially all of the purchases by an OEM.

8. Third, Intel used its position in complementary markets to help ward off competitive threats in the relevant CPU markets. For example, Intel redesigned its compiler and library software in or about 2003 to reduce the performance of competing CPUs. Many of Intel's design changes to its software had no legitimate technical benefit and were made only to reduce the performance of competing CPUs relative to Intel's CPUs.

9. Fourth, Intel paid or otherwise induced suppliers of complementary software and hardware products to eliminate or limit their support of non-Intel CPU products.

10. Fifth, Intel engaged in deceptive acts and practices that misled consumers and the public. For example, Intel failed to disclose material information about the effects of its redesigned

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compiler on the performance of non-Intel CPUs. Intel expressly or by implication falsely misrepresented that industry benchmarks reflected the performance of its CPUs relative to its competitors' products. Intel also pressured independent software vendors ("ISVs") to label their products as compatible with Intel and not to similarly label with competitor's products' names or logos, even though these competitor microprocessor products were compatible.

11. Intel's course of conduct over the last decade was designed to, and did, stall the widespread adoption of non-Intel products. That course of conduct has limited market adoption of non-Intel CPUs to the detriment of consumers, and allowed it to unlawfully maintain its monopoly in the relevant CPU markets.

12. Having succeeded in slowing market adoption of competing CPUs over the past decade until it could catch up with competitors, Intel once again finds itself behind competitors in the GPU markets and related markets.

13. Intel has engaged in unfair methods of competition in the relevant GPU markets. Intel's conduct is specifically intended to, and does, threaten to eliminate potential competition to the CPU from GPUs and maintain Intel's monopoly in the relevant CPU markets.

14. There is also a dangerous probability that Intel's unfair methods of competition could allow it to acquire a monopoly in the relevant GPU markets.

15. The GPU markets are highly concentrated and dominated by Intel. Intel currently lags behind its competitors in both quality and innovation for both discrete GPUs (GPUs used on separate graphics cards) and integrated GPUs (GPUs integrated into computer chipsets). Intel's market share in the GPU markets is in excess of 50 percent.

16. GPUs are a threat to Intel's monopoly in the relevant CPU markets. GPUs are adding more CPU functionality with each product generation. GPU manufacturers, such as Nvidia and AMD, through its affiliate, ATI, are developing General Purpose GPUs and programming interfaces that threaten Intel's control

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over the computing platform. This General Purpose GPU computing (“GP GPU”) platform has the potential to marginalize Intel’s long-standing CPU-centric, x86-based strategy. Currently, both high-performance computing and mainstream applications and operating systems are beginning to adopt GP GPU computing functionality.

17. GPUs also could facilitate new entry or expansion in the relevant CPU markets by other firms, such as Nvidia, AMD, or Via. The need for high-end microprocessors may be reduced as more computing tasks are handled by the GPU. Some OEMs could get equivalent performance at a cheaper cost by using a lower-end CPU with a GPU microprocessor.

18. As it did in the CPU markets, Intel recognized the threat posed by GPUs and GP GPU computing and its technological inferiority in these markets and has taken a number of anticompetitive measures to combat it. These tactics include, among others, deception relating to competitors’ efforts to enable their GPUs to interoperate with Intel’s newest CPUs; adopting a new policy of denying interoperability for certain competitive GPUs; establishing various barriers to interoperability; degrading certain connections between GPUs and CPUs; making misleading statements to industry participants about the readiness of Intel’s GPUs; and unlawful bundling or tying of Intel’s GPUs with its CPUs resulting in below-cost pricing of relevant products. Although it is not a necessary element in a Section 5 case, because Intel is likely to achieve a monopoly in the relevant GPU markets and has a monopoly in the relevant CPU markets, it is likely to recoup in the future any losses it suffered as a result of selling relevant products at prices below an appropriate measure of cost.

19. These measures are intended to slow down developments in the relevant markets until Intel can catch up, and have had the effect of foreclosing competitive GPU products and slowing the development and widespread adoption of GP GPU computing.

20. Intel’s efforts to deny interoperability between competitors’ (e.g., Nvidia, AMD, and Via) GPUs and Intel’s newest CPUs reflect a significant departure from Intel’s previous course of dealing. Intel allowed, and indeed encouraged, other companies including Nvidia to develop products that

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interoperated in a nondiscriminatory manner with Intel's CPUs (and its chipsets and related connections) for the last ten years. The interoperability of these complementary products, along with the innovation and intellectual property contributions made by these companies to Intel in exchange for such interoperability, made Intel's CPUs more attractive to OEMs and customers. Indeed, Intel used other companies' technologies to enhance Intel's graphics capabilities and its monopoly power in CPUs.

21. Intel's conduct and representations created a duty to deal and cooperate with its competitors, such as Nvidia, AMD, and Via, to enhance competition and innovation for the benefit of consumers. These companies' reliance on Intel's original representations was reasonable.

22. Once Nvidia and other companies committed to working with Intel, and in some cases granted significant intellectual property to Intel, and were thus locked into Intel's strategy, Intel changed its position with these companies and used its power to harm competition.

23. Intel adopted these anticompetitive business practices when the GPU began to emerge as a potential challenge to Intel's monopoly over CPUs. Intel's refusal to allow Nvidia, AMD, and Via to interoperate freely, fully, and in a nondiscriminatory manner with its CPUs, chipsets, and related connections is an unfair method of competition and an unfair practice.

24. Intel also has bundled the price of its CPU and chipset with integrated graphics to foreclose Nvidia in some market segments, resulting in below-cost pricing of relevant products in circumstances in which Intel was likely to recoup in the future any losses that it suffered as a result of selling relevant products at prices below an appropriate measure of cost.

25. Intel's unfair methods of competition have harmed current and future competition in the relevant GPU and CPU markets.

26. These and other anticompetitive practices by Intel since 1999 allowed it to maintain its monopoly position in the relevant CPU markets and will create a dangerous possibility that Intel will obtain a monopoly in the relevant GPU markets. As a result,

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consumers today have fewer choices of CPU and GPU manufacturers than they had a decade ago, and fewer than they would have had absent this conduct.

27. The loss of price and innovation competition in the relevant markets will continue to have an adverse effect on competition and hence consumers. Absent the remedy provided herein, Intel will continue to maintain or even enhance its market power, consumers will have fewer choices, prices will be higher than they would be in competitive markets, and quality and innovation will be diminished.

28. The synergistic effect of all of Intel's wrongful conduct has and will continue to harm competition and consumers. Intel does not have legitimate or sufficient business justifications for its conduct.

RESPONDENT

29. Respondent Intel is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2200 Mission College Boulevard, Santa Clara, California 95052. Intel develops, manufactures, markets, and sells computer hardware and software products, including x86 CPUs. For the fiscal year that ended December 31, 2008, Intel reported revenues of approximately \$37 billion and profits of approximately \$5 billion. Intel's microprocessor business reported revenues in excess of \$27 billion in 2008.

30. At all times relevant herein, Intel has been, and is now, a corporation as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. For the purposes of this Complaint, "Intel" also includes its subsidiaries and affiliates.

31. The acts and practices of Intel, 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.

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RELEVANT MARKETS

32. One set of relevant product markets are CPUs for use in desktop, notebook, netbook (or nettop) computers, servers, and narrower relevant markets contained therein, including without limitation:

- a. microprocessors for servers,
- b. microprocessors for desktop computers,
- c. microprocessors for laptop or notebook computers,
- d. microprocessors for netbook computers,
- e. any of the foregoing products in this paragraph that are based on an x86 architecture,
- f. any of the foregoing products in this paragraph as intended for particular end users or any category of end users, such as enterprise customers, and
- g. any of the foregoing products in this paragraph as distributed or resold by a particular class of OEMs or distributors.

33. A CPU is a type of microprocessor used in a computer system. A CPU is an integrated circuit chip that is often described as the “brains” of a computer system. The microprocessor performs the essential functions of processing system data and controlling other devices integral to the computer system.

34. A CPU requires a chipset to communicate with other parts of the computer. The chipset operates as the computer’s nervous system, sending data between the microprocessor and input, display, and storage devices, such as the keyboard, mouse, monitor, hard drive, and CD or DVD drive.

35. Intel, Via, and AMD are the only three firms that manufacture and sell x86 microprocessors -- the industry standard for CPUs used in personal computers and servers. The x86

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microprocessor architecture is the only one capable of running either the Microsoft Windows operating system (e.g., Windows XP, Vista, or Windows 7) or Apple's current Mac operating system natively for personal computers and servers. Most purchasers do not consider computers using non-x86 microprocessors as acceptable substitutes because they cannot efficiently run the Windows operating system and compatible software.

36. A few firms produce microprocessors that are based on non-x86 microprocessor architecture. For example, IBM's Power and Sun's Sparc are used only in very high end servers and mainframes sold by those companies. These non-x86 microprocessors represent a small and diminishing niche of the relevant server CPU market. Another example of a non-x86 microprocessor architecture is ARM. ARM is used primarily in handheld devices and mobile phones. Non-x86 architectures are rarely used in mainstream personal computers or servers. Microprocessors built on non-x86 architectures do not significantly restrain Intel's monopoly power.

37. A second set of relevant product markets are GPUs (including all graphics processors, or chipsets with graphics processors regardless of industry nomenclature) for use in desktop, notebook, netbook (or nettop) computers, servers, and narrower relevant markets contained therein, including without limitation:

- a. GPUs integrated onto chipsets, and
- b. Discrete GPUs.

38. GPUs originated as specialized integrated circuits for processing of computer graphics, but as they have evolved they have taken on greater functionality. Computers may achieve faster performance by offloading other computationally intensive needs from CPUs to GPUs.

39. A GPU may either reside on a separate graphics card within a computer ("discrete GPUs") or be integrated onto the chipset. Integrated graphics solutions are usually cheaper to

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implement but are often less powerful than discrete GPUs.

40. The relevant geographic market is the world.

**INTEL HOLDS A MONOPOLY IN THE RELEVANT CPU
MARKETS AND IT IS LIKELY TO OBTAIN A MONOPOLY
IN THE RELEVANT GPU MARKETS**

41. Intel possesses monopoly power in the relevant CPU markets. Intel's unit share in the relevant markets has exceeded 75 percent in each of the years since 1999. Its share of revenue in these markets has consistently exceeded 80 percent during that time.

42. There are significant barriers to entry in all the relevant markets. These barriers include, but are not limited to: (1) product development; (2) the cost and expertise to develop manufacturing capabilities; (3) intellectual property rights; (4) establishment of product reputation and compatibility; and (5) Intel's unfair methods of competition and efforts to maintain or obtain a monopoly position in the markets.

43. The development of a commercial product for a single segment of the market, such as servers, takes years of engineering work and several hundred million dollars in sunk capital. An entrant would have to develop a product and ensure it was compatible with computer operating systems and applications software used by business and consumer users.

44. A supplier of a product in the relevant markets also requires access to cutting-edge manufacturing facilities capable of mass-producing products and of achieving the minimum scale required to operate efficiently and profitably. The cost of developing, building, and equipping a new facility is at least \$3 billion. In order to remain at the cutting-edge of process technology the manufacturer also would have to be prepared to invest another \$1 billion in each facility every two or three years. An entrant could not begin shipping products for four or more years after commencing construction of such a facility.

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45. An entrant would have to avoid infringing the patents that apply to the relevant products.

46. An entrant would need to develop a reputation for reliability once it has a commercially ready CPU or GPU and production facilities. This is a multi-year project. Buyers of computer systems and microprocessor components demand highly reliable products.

INTEL'S UNFAIR METHODS OF COMPETITION AND
DECEPTIVE PRACTICES MAINTAINED AND
STRENGTHENED INTEL'S MONOPOLY POSITION
IN THE RELEVANT MARKETS

47. Intel has engaged in a course of conduct since 1999 that, considered individually or collectively, had the tendency to hamper and exclude rivals, and to maintain, create, or enhance Intel's monopoly power in the relevant markets.

48. Intel's unfair methods of competition harmed competition in the relevant markets. Intel's methods are coercive, oppressive, deceptive, unethical or exclusionary and caused injury to competition and consumers. Intel's conduct is likely to continue to harm competition absent the relief requested herein, and violates § 5 of the FTC Act.

A. Exclusionary Conduct with OEMs and Distributors.

49. Hewlett-Packard/Compaq, Dell, IBM, Lenovo, Toshiba, Acer/Gateway, Sun, Sony, NEC, Apple, and Fujitsu are the largest OEMs in the world ("Tier One OEMs"). Tier One OEMs account for over 60 percent of the computers with CPUs in the relevant markets. Intel has prevented or limited the sale of non-Intel CPUs to these Tier One OEMs.

50. Because of Intel's actions and threats, certain Tier One OEMs reasonably feared that purchasing too many non-Intel CPUs would expose their companies to retaliation from Intel. They were susceptible to retaliation because Intel is a "must have" or essential supplier for every Tier One OEM, for several reasons. Intel is the only firm with the CPU product breadth to meet all the

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requirements and be the sole supplier to a Tier One OEM. Intel is also the only CPU supplier with the current capability to supply all or nearly all of the requirements of the largest OEMs. As a result, the Tier One OEMs could not credibly threaten to shift all or even a majority of their CPU purchases away from Intel; to the contrary, Tier One OEMs needed Intel as a primary supplier.

51. Intel took advantage of its monopoly power and induced and/or coerced certain Tier One OEMs to forgo adoption or purchases of non-Intel CPUs, or to limit such purchases to a small percentage of the sales of certain computer products. In other cases, Intel paid Tier One OEMs not to sell computers with other CPUs, such as AMD's or Via's CPUs. Intel threatened OEMs that considered purchasing non-Intel CPUs with, among other things, increased prices on other Intel purchases, the loss of Intel's technical support, and/or the termination of joint development projects.

52. When Intel was unable to compel a Tier One OEM to forgo entirely the purchase of non-Intel CPUs, Intel's strategy was to induce and coerce the OEM to forgo marketing and distribution methods for computers that contained the non-Intel CPU (referred to herein as "restrictive dealing arrangements"). For example, Intel induced OEMs to forgo advertising, to forgo branding, to forgo certain distribution channels, and/or to forgo promotion of computers containing non-Intel CPUs. To secure these restrictive dealing arrangements with OEMs, Intel threatened to withhold rebates, to withhold technical support, to withhold supply, and/or to terminate joint development projects, among other things. Tier One OEMs reasonably feared that marketing computers that contained non-Intel x86 microprocessors would expose them to retaliation from Intel. Intel monitored the OEMs' compliance with these restrictions, and in some instances presented scorecards to the OEMs, evaluating their compliance.

53. Intel offered market share or volume discounts selectively to OEMs to foreclose competition in the relevant CPU markets. First, Intel taxed OEM purchases of non-Intel CPUs through the use of market share discounts. Second, Intel also offered its CPUs at prices below an appropriate measure of cost (in sales of CPUs or in kit prices of CPUs with chipsets), or volume discounts on CPU purchases that are effectively below cost (which for

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purposes of this complaint includes average variable cost plus an appropriate level of contribution towards sunk costs), in an effort to exclude its competitors and maintain its monopoly in the relevant CPU markets. Although it is not a necessary element under a Section 5 claim, Intel as a monopolist is likely to recoup any losses that it suffered as a result of selling any of its products to certain OEMs below cost. Third, Intel gave OEMs a choice between higher prices on both contested (meaning that another CPU manufacturer was selling that product) and uncontested CPUs, or, if the OEM refrained from purchasing certain volumes of CPUs from Intel's CPU competitors, Intel offered lower prices on certain volumes of both contested and uncontested CPUs.

54. Intel used OEMs that were exclusive to Intel to discipline and punish OEMs that chose to deal with Intel's competitors. Intel gave OEMs that agreed to buy CPUs exclusively from Intel the best pricing, supply guarantees in times of shortage, and indemnification from patent liability relating to the patent litigation initiated by Intergraph against several OEMs. Intel also offered these OEMs a slush fund of hundreds of millions of dollars to be used in bidding competitions against OEMs that offered non-Intel-based computers. These payments were contingent on the OEMs purchasing CPUs exclusively or nearly exclusively from Intel. Intel's disparate treatment of these different purchasers is not justified by any savings in Intel's costs of manufacture, delivery or sale between the favored and disfavored purchasers, or any differential services performed by the favored purchasers, but rather was another anticompetitive tactic to obtain and enforce exclusive or near exclusive dealing respecting relevant products by OEMs with Intel, thus reinforcing and maintaining Intel's monopoly in the relevant CPU markets.

55. Intel's use of penalties, rebates, lump-sum and other payments across multiple products, differential pricing, and other conduct alleged in this Complaint maintained or is likely to maintain Intel's monopoly power to the detriment of competition, customers, and consumers. Intel would not have been able to continue charging comparably higher prices across its product lines but for its conduct, as alleged in this Complaint, that harmed competition.

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B. Intel Redesigned its Software to Slow Software Performance on Non-Intel CPUs.

56. Intel sought to undercut the performance advantage of non-Intel x86 CPUs relative to Intel x86 CPUs when it redesigned and distributed software products, such as compilers and libraries.

57. A compiler is software that translates the “source code,” programs written by programmers or software developers in high-level computer languages such as C++ or Fortran into “object code” (0’s and 1’s), the language understood by CPUs. Libraries are collections of code for performing certain functions that can be referred to by software programmers rather than rewriting the code each time the functions are performed.

58. For example, in response to AMD introduction of its Opteron CPU for servers in 2003, Intel became concerned about the competitive threat posed by Opteron processors. Intel then designed its compiler and libraries in or about 2003 to generate software that runs slower on non-Intel x86 CPUs, such as Opteron. This decrease in the efficiency of Opteron and other non-Intel x86 CPUs harmed competition in the relevant CPU markets.

59. To the public, OEMs, ISVs, and benchmarking organizations, the slower performance of non-Intel CPUs on Intel-compiled software applications appeared to be caused by the non-Intel CPUs rather than the Intel software. Intel failed to disclose the effects of the changes it made to its software in or about 2003 and later to its customers or the public. Intel also disseminated false or misleading documentation about its compiler and libraries. Intel represented to ISVs, OEMs, benchmarking organizations, and the public that programs inherently performed better on Intel CPUs than on competing CPUs. In truth and in fact, many differences were due largely or entirely to the Intel software. Intel’s misleading or false statements and omissions about the performance of its software were material to ISVs, OEMs, benchmarking organizations, and the public in their purchase or use of CPUs. Therefore, Intel’s representations that programs inherently performed better on Intel CPUs than on competing CPUs were, and are, false or misleading. Intel’s

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failure to disclose that the differences were due largely to the Intel software, in light of the representations made, was, and is, a deceptive practice. Moreover, those misrepresentations and omissions were likely to harm the reputation of other x86 CPUs companies, and harmed competition.

60. Some ISVs requested information from Intel concerning the apparent variation in performance of identical software run on Intel and non-Intel CPUs. In response to such requests, on numerous occasions, Intel misrepresented, expressly or by implication, the source of the problem and whether it could be solved.

61. Intel's software design changes slowed the performance of non-Intel x86 CPUs and had no sufficiently justifiable technological benefit. Intel's deceptive conduct deprived consumers of an informed choice between Intel chips and rival chips, and between Intel software and rival software, and raised rivals' costs of competing in the relevant CPU markets. The loss of performance caused by the Intel compiler and libraries also directly harmed consumers that used non-Intel x86 CPUs.

C. Intel Misrepresented Industry Benchmarks to Favor its CPUs.

62. Benchmarking is the act of executing a computer program, or a set of programs, on different computer systems, in order to assess the relative performance of those computer systems. Consumers decide on purchases, OEMs select components, and CPU producers make pricing and model number designations, based on benchmark results; ISVs rely on benchmarks as well.

63. Intel failed to disclose the effects of its software redesign on non-Intel CPUs to benchmarking organizations, OEMs, ISVs, or consumers.

64. Several benchmarking organizations adopted benchmarks that measured performance of CPUs running software programs compiled using the Intel compiler or libraries. Intel's deception affected among others, the Business Applications Performance Corporation ("BAPCo"), Cinebench, and TPC benchmarks.

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65. Intel disseminated or caused to be disseminated advertisements, including product labeling and other promotional materials, to induce consumers to purchase computers with Intel CPUs. In these advertisements, Intel promoted its systems' performance under various benchmarks, which Intel expressly or by implication represented to be accurate or realistic measures of typical or "real world" computer usage or performance.

66. In truth and in fact, the benchmarks Intel publicized were not accurate or realistic measures of typical computer usage or performance, because they did not simulate "real world" conditions, and/or overestimated the performance of Intel's product vis-à-vis non-Intel products. Therefore, the representations and omissions of material facts made by Intel as described in paragraphs 63 through 65 above, were and are false or misleading.

67. Intel publicized the results of the benchmarking to promote sales of products containing its x86 CPUs even though it knew the benchmarks were misleading. For example:

- a. On its website, Intel states: "Sysmark 2007 Preview [BAPCo's then-latest benchmark] features user-driven workloads." In truth and in fact, the workloads were not user-driven, in that they did not reflect a typical user experience, but instead were manipulated to make Intel processors perform better on the benchmark than AMD's.
- b. In its "Quick Reference Matrix Q3 2008," Intel stated that its x86 CPUs had a "27% faster productivity benchmark than the competition," based on a test against an AMD processor using SysMark 2007. In truth and in fact, the benchmark did not reliably measure productivity.
- c. Intel's website includes a White Paper called "Choosing the Right Client Computing Platform for Public Sector Organizations and Enterprises." In the document, Intel stated that the "SYSmark 2007 Preview is a benchmark test that measures the

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performance of client computing software when executing what is designed to measure real-life activities.” In truth and in fact, the benchmark was not designed to measure “real life activities,” but to favor Intel’s CPUs.

- d. In the same White Paper (written to help governments write technical specifications to purchase computer systems) Intel wrote: “With regard to notebooks, Intel recommends the use of BAPCo MobileMark 2007 or later versions. This benchmark measures the performance of a computer system . . . by running relevant real-world computer programs typically used by business users.” Intel further stated that this benchmark provides “a performance evaluation that reflects their typical day-to-day use by business users.” In truth and in fact, the benchmark did not reflect typical or day-to-day use by business users.
- e. In its “Competitive Guide” on “Quad-Core Intel Xeon Processor-based Servers vs. AMD Opteron,” Intel stated that its Quad-Core Intel Xeon 5300 Series Processor was 26 percent faster in digital content creation than AMD’s Quad-Core Opteron 2300 Series Processor based on the Cinebench benchmark. Intel also stated that its Quad-Core Intel Xeon 5400 Series Processor was 34 percent faster in digital content creation than AMD’s Quad-Core Opteron 2300 Series Processor based on the Cinebench benchmark. In truth and in fact, the benchmark did not reliably measure the speed of digital content creation.

Therefore, the representations set forth in subparagraphs (a) through (e) above were, and are, material and false or misleading.

68. Through the means described in paragraphs 63 through 65 and 67, above, Intel has represented, expressly or by implication, that:

- a. Benchmarks, such as SysMark2007 Preview, that Intel used to compare Intel CPUs to competitors’ CPUs

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were accurate and realistic measures of typical computer usage or performance;

- b. Intel's x86 CPU works 27 percent faster under typical computer usage conditions than competitive CPUs, including the AMD processor;
- c. The BAPCo MobileMark 2007 benchmark and later versions provide a reliable performance evaluation of x86 CPUs against competitive brands based on typical day-to-day use by business users; and
- d. The Cinebench benchmark provides a reliable performance evaluation of x86 CPUs against competitive brands in performance of digital content creation.

69. Through the means described in paragraphs 63 through 65 and 67, Intel has represented, expressly or by implication, that it possessed and relied upon a reasonable basis to substantiate the representations set forth in paragraph 68, at the time the representations were made.

70. In truth and in fact, Intel did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph 68 at the time the representations were made. Therefore, the representations set forth in paragraph 69 were and are false or misleading.

71. Intel's conduct as described in paragraphs 52 through 70, above, eroded the credibility and reliability of these benchmarks and the software compiled by Intel compilers to the detriment of consumers. Intel's conduct was misleading and had the purpose and effect of harming competition and thus enhancing Intel's monopoly power. Intel had a duty, arising from its conduct and statements, to disclose the complete truth, which would have eliminated most if not all of the harm to competition and consumers. Intel lacks a legitimate or sufficient business justification for its conduct.

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D. Intel Induced OEMs and Companies in Complementary Markets to Eliminate or Limit Support of Competitive CPU Products.

72. Intel paid or otherwise induced OEMs and companies in complementary markets to eliminate or limit their support of competitive CPU products.

73. For example, Intel paid ISVs to change their software designs, including by switching to use of Intel's compilers and software, to favor Intel's CPUs. As a result of Intel's inducements, they also labeled their products as compatible with Intel but intentionally omitted that they were also compatible with non-Intel CPUs.

74. Intel also prevented ISVs from promoting or otherwise engaging in co-development or joint marketing with AMD and other CPU manufacturers, by causing those ISVs to fear that Intel would withdraw its support for their products. As a result, Intel created a false impression that the ISV software was incompatible with non-Intel CPUs because Intel required that only its name (versus including other CPU manufacturers as well) be listed on the product.

INTEL'S UNFAIR METHODS OF COMPETITION IN THE RELEVANT GPU MARKETS

75. Intel, Nvidia, and ATI (a subsidiary of AMD) account for nearly all the sales of GPUs in the relevant markets. Intel holds approximately 50 percent of these markets through its sales of GPUs integrated on chipsets, with the remainder of the markets split between Nvidia and ATI.

76. There are high barriers to entry in the relevant GPU markets.

77. GPUs allow OEMs to use lower-end CPUs or fewer microprocessors for a given level of performance.

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78. Nvidia has developed GP GPUs and related programming tools that can perform many of the same functions as CPUs.

79. Nvidia's ongoing development of sophisticated GPUs and related tools poses a potential threat to Intel's monopoly position in the relevant CPU markets.

80. Manufacturers of complementary products, such as GPUs, rely on open interfaces (e.g., busses, connections, and related programming) between the CPU and the chipset, and between the chipset and the GPU. Intel dictates the interoperability of these interfaces, because it has monopoly power over the relevant CPUs.

81. These interfaces are essential for such complementary products to be used in a computer. For many years, Intel allowed unhindered accessibility to these interfaces and encouraged others to become reliant on that accessibility. However, after Nvidia, Via, AMD, OEMs, and consumers became dependent on the Intel-controlled interfaces, recently Intel has selectively cut off or hindered accessibility to enhance or obtain monopoly power in the relevant markets.

82. For example, Intel encouraged Nvidia to innovate on the Intel platform. Intel and Nvidia worked together for a number of years to ensure that Nvidia's GPUs could interoperate with Intel's CPU.

83. Intel licensed Nvidia to allow it to manufacture GPUs integrated on chipsets to be used with Intel's CPUs.

84. Intel's apparent willingness to allow Nvidia to interoperate with Intel's CPU has dissolved as it has begun to perceive Nvidia as a threat to its monopoly position in the relevant markets. Intel now has reversed its previous course of allowing Nvidia integrated GPU chipsets to interoperate with Intel CPUs, thereby foreclosing Nvidia's integrated GPU chipsets from connecting to Intel's future CPU platforms.

85. Before expressly refusing to deal with Nvidia on integrated GPU chipsets for its new family of CPUs, Intel engaged in deception by misleading Nvidia on Intel's CPU

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roadmaps, thereby greatly increasing its competitor's costs and further delaying the development of other products that would have accelerated the adoption of GP GPU computing. Intel also took steps to create technological barriers to interoperability to preclude the possibility that integrated CPU chipsets could interconnect with future Intel CPUs.

86. For discrete GPUs, Intel has created several interoperability problems, including reductions of speed and encryption, that have had the effect of degrading the industry standard interconnection with Intel's CPUs. Some of this conduct appears to have been specifically targeted at crippling GP GPU computing functionality.

87. Intel has sought to ensure that its own x86-based GP GPU computing programming tools and interfaces will become the industry standard. In order to accomplish this, Intel has disparaged non-Intel programming tools and interfaces and made misleading promises to the industry about the readiness of Intel's GP GPU hardware and programming tools.

88. Intel also bundles its CPUs with its own GPU chipsets and then prices the bundle to deter OEMs from pairing Intel CPUs with non-Intel GPUs. Intel's bundling scheme has led to significant loss of consumer choice and has no legitimate justification except to exclude competition. Moreover, it has resulted in below-cost pricing by Intel in circumstances in which Intel is likely to recoup in the future any losses that it suffered as a result of below-cost pricing.

89. Intel sells its Atom CPU bundled with a graphics chipset. Some OEMs purchased the bundle from Intel, discarded Intel's inferior graphics chipset and chose instead to use Intel's Atom CPU with the Nvidia graphics chipset. To combat this competition, Intel charged those OEMs significantly higher prices because they used a non-Intel graphics chipset or GPU. Intel would offer the bundled pricing only to OEMs that would then use the Intel chipset in the end-product and not use a competitive product.

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90. Intel's unfair methods of competition in the relevant GPU markets have specifically been used to enhance and have enhanced its monopoly position in the relevant CPU markets.

91. Intel's wrongful conduct also creates a dangerous probability that it will acquire a monopoly in the GPU markets. Intel's conduct has no legitimate or sufficient business justification and has and will continue to harm competition, innovation, and consumers, unless it is enjoined.

INTEL'S UNFAIR METHODS OF COMPETITION IN
INDUSTRY STANDARDS

92. Intel's course of anticompetitive and unfair conduct extends to its control of industry standards to hinder innovation by its CPU competitors and to maintain its monopoly power in the CPU markets. Using its dominant CPU position, Intel has manipulated the content and timing of many industry standards to advantage its own products and prevent competitors from introducing standards-compliant products prior to product introduction by Intel. Two examples of such anticompetitive conduct relate to the Universal Serial Bus host controller specification and the High Definition Content Protection ("HDCP") standard for use in DisplayPort connections between computers and display devices such as monitors and televisions. In these instances, Intel encouraged the industry to rely on standards that Intel controlled and represented that the standards would be fairly accessible. But Intel has delayed accessibility to the standards for its competitors so that Intel can gain a head start with its own products and wrongfully restrain competition. Intel's conduct has no offsetting, legitimate or sufficient procompetitive efficiencies but instead deters competition and enhances Intel's monopoly power in CPUs.

ANTICOMPETITIVE EFFECTS OF INTEL'S CONDUCT

93. The acts and practices of Intel as alleged herein have the purpose, capacity, tendency, and effect of harming competition and consumers in the relevant CPU markets. As a result, Intel's rivals and potential rivals incur higher distribution costs, face diminished sales opportunities, and secure lower revenues. Intel's conduct reasonably appears capable of making a significant

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contribution to the maintenance of its monopoly power or enabling it to achieve monopoly power in the relevant markets. Intel's monopoly power also has been buttressed by various unjustified restraints it places on licensees of its x86 intellectual property.

94. Intel's conduct adversely affects competition and consumers by, including but not limited to:

- a. causing higher prices of CPUs and GPUs and the products containing microprocessors;
- b. reducing competition to innovate in the relevant CPU and GPU markets by Intel and others;
- c. inhibiting Intel's competitors from effectively marketing their products to customers;
- d. reducing output of CPUs, GPUs, and the products containing them;
- e. raising rivals' costs of distribution of CPUs and GPUs;
- f. harming choice and competition at the OEM level and hence depriving consumers of their choice of CPUs and GPUs;
- g. reducing the incentive and ability of OEMs to innovate and differentiate their products in ways that would appeal to customers; and
- h. reducing the quality of industry benchmarking relied upon by OEMs and consumers in purchasing computers.

95. The acts and practices of Intel as alleged herein have the purpose, capacity, tendency, and effect to restrain competition unreasonably and to maintain Intel's monopoly power in the relevant markets. In addition, Intel's conduct is an illegal attempt to monopolize the relevant markets, and Intel has a dangerous probability of achieving a monopoly in these markets absent

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appropriate relief. Absent such relief, for OEMs and consumers of the relevant products, the consequences have been and likely will continue to be supracompetitive prices, reduced quality, and less innovation.

96. Intel's course of unfair methods of competition, considered individually or collectively, has harmed competition and consumers in the relevant markets. Intel's conduct has no legitimate or sufficient efficiency justification that would outweigh the anticompetitive effects of its conduct. Moreover, Intel has not used a least restrictive means to advance any legitimate goals, if any, to minimize anticompetitive effects.

FIRST VIOLATION ALLEGED

97. The allegations in paragraphs 1 through 96 above are herein incorporated by reference. Intel's acts and practices, considered individually or collectively, constitute unfair methods of competition in or affecting commerce, in violation of Section 5 of the FTC Act.

98. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

SECOND VIOLATION ALLEGED

99. The allegations in paragraphs 1 through 96 above are herein incorporated by reference. Intel has willfully engaged in anticompetitive and exclusionary acts and practices to acquire, enhance or maintain its monopoly power in the relevant markets, constituting unfair methods of competition in or affecting commerce, in violation of Section 5 of the FTC Act.

100. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

THIRD VIOLATION ALLEGED

101. The allegations in paragraphs 1 through 96 above are herein incorporated by reference. Intel has willfully engaged in anticompetitive and exclusionary acts and practices, with the

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specific intent to monopolize or maintain a monopoly in the relevant markets, resulting, at a minimum, in a dangerous probability of monopolization in the relevant markets, constituting unfair methods of competition in or affecting commerce, in violation of Section 5 of the FTC Act.

102. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

FOURTH VIOLATION ALLEGED

103. The allegations in paragraphs 56 through 96 above are herein incorporated by reference. The acts and practices of Intel, as alleged herein, constitute deceptive acts or practices in or affecting commerce, in violation of Section 5 of the FTC Act.

104. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

FIFTH VIOLATION ALLEGED

105. The allegations in paragraphs 1 through 96 above are herein incorporated by reference. The acts and practices of Intel, as alleged herein, constitute unfair acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

106. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

NOTICE

Notice is hereby given to the Respondent that September 15, 2010, at 10:00 a.m., or such earlier date as is determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time, and the Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Room 532, Washington, DC 20580, as the place, when and where a hearing will be held 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

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Commission and Clayton Acts to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

Due to the nature of the complaint, the Commission finds good cause under § 3.41(b) of the Commission's Rules of Practice for Adjudicative Proceedings to extend the timed hearing to no more than 322 hours. Each side shall be allotted no more than half of the 322 hours within which to present its (i) opening statements, (ii) in limine motions, (iii) all arguments excluding the closing argument, (iv) direct or cross examinations in either party's case, or (v) other evidence that is presented live at the hearing. Counsel supporting the complaint and Respondent's counsel shall report jointly to the Administrative Law Judge each day as to the time each party has used each hearing day.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth 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 allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under § 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time provided above shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be

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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 pre-hearing scheduling conference to be held not later than ten days after the answer is filed. The scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (and 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 discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Respondent has violated or is violating Section 5 of the FTC Act, as amended, as alleged in the Complaint, the Commission may order such relief against Intel as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Ordering Intel to cease and desist from the conduct 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 Intel.

2. An order that limits the manner in which Intel uses threats, bundled prices, quantity discounts, and other offers to encourage exclusivity or to deter competition or unfairly raise the price of its microprocessors or GPUs (including pricing conditioned on Intel getting so much of a resellers' purchases that that condition has the practical effect of foreclosing rivals from all or substantially all of that resellers' purchases, provided that pricing based purchases exceeding 60% of a resellers' historical purchases during the period the pricing is offered will be presumed to have that effect); such order may, among other things, include a

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prohibition against Intel from directly or indirectly requiring its customers to:

- a. purchase only microprocessors or GPUs that have been manufactured by Intel;
- b. purchase a minimum or fixed volume or percentage of the customer's overall CPU or GPU requirements from Intel (regardless of whether such fixed percentage relates to a product line for customers with multiple product lines or on a company-wide basis);
- c. not purchase CPUs or GPUs manufactured by a company, or by companies, other than Intel;
- d. purchase a maximum or fixed number of CPUs or GPUs manufactured by a company, or by companies, other than Intel (regardless of whether such maximum or fixed number relates to a product line for customers with multiple product lines or on a company-wide basis);
- e. purchase a maximum or fixed percentage of the customer's GPU requirements from a company, or from companies, other than Intel (regardless of whether such maximum or fixed percentage relates to a product line for customers with multiple product lines or on a company-wide basis); or
- f. comply with restraints on the manner in which customers market, advertise, promote, distribute, or sell any products containing microprocessors that have not been manufactured by Intel.

3. Prohibiting Intel from inducing, or attempting to induce, OEMs or other third parties (i.e., ISVs) to adhere to, or agree to, any of the above requirements (as listed in Paragraphs 2.a. through 2.f. of this notice) by discriminating, or threatening to discriminate, against OEMs or other third parties that fail to adhere to, or agree to, such requirements, including, but not limited to, inducing or attempting to induce OEMs or other third

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parties to adhere to, or agree to, any of such requirements by engaging in, or threatening to engage in, the following:

- a. charging OEMs or other third parties lower or higher prices for CPUs or GPUs in the relevant markets (inclusive of rebates, allowances, discounts and any other adjustment to price, including anything of value that has the same practical effect as pricing, rebates, or discounts as a means of discrimination) when such price is contingent upon a specific Intel market share or if the OEM does not use a competitive product;
- b. withholding payments and/or other compensation to OEMs unless they are exclusive or near exclusive to Intel in the relevant markets;
- c. withholding research and development funds from OEMs unless they are exclusive or near exclusive to Intel in the relevant markets;
- d. allocating OEMs or other third parties fewer CPUs during periods of shortage (actual or manufactured) depending on whether they are exclusive or near exclusive to Intel in the relevant markets;
- e. providing OEMs reduced monetary or in-kind support to market, advertise, promote, or distribute products manufactured by Intel unless they are exclusive or near exclusive to Intel in the relevant markets;
- f. giving OEMs less technical support with respect to microprocessors or GPUs unless they are exclusive or near exclusive to Intel in the relevant markets;
- g. giving OEMs less access to technical information/specifications regarding microprocessors or GPUs unless they are exclusive or near exclusive to Intel in the relevant markets; and

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- h. prioritizing the supply of microprocessors or GPUs to OEMs that are exclusive or near exclusive to Intel in the relevant markets.

4. With respect to an OEM that purchases a greater percentage share of Intel microprocessors (versus the percentage share of microprocessors bought by that OEM from another microprocessor supplier), Intel is prohibited from giving to that OEM more advantageous terms or conditions than those that are offered to another OEM whose percentage share is not as favorable to Intel. Intel is also prohibited from enforcing any terms or conditions in a way that favors a greater percentage share of microprocessors from Intel. For purposes of this paragraph, terms and conditions expressly include but are not limited to contracts, pricing, or purchase terms and conditions, and all actions described in Paragraphs 3.a. through 3.h. of this notice. *Provided, however*, it should not be a violation for Intel to offer, or its customers to accept, discounts or lower prices based solely on volume (provided that the same are in accordance with the law).

5. Prohibiting Intel from producing or distributing software or hardware that has the purpose or effect of unreasonably excluding or inhibiting competitive microprocessor or GPU products or complementary products.

6. Prohibiting Intel from pricing its microprocessors so that the incremental price to a customer of microprocessors or GPUs sold in competition with another competitor is below cost when such price includes all rebates, payments, or other price decreases on other products not in competition. Pricing will be presumed to be below cost even if it exceeds Intel's average variable cost but does not contribute to its fixed sunk costs in an appropriate multiple of that average variable cost. Pricing or sale of kit or bundled products will be presumed to be above "cost" if the "kit" or "bundle" includes an x86 product or, if it does, if, after all discounts have attributed to the competitive product(s) in the bundle, the resulting pricing is well above Intel's average variable cost plus a contribution to Intel's fixed sunk costs in an appropriate multiple of that average variable cost.

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7. Requiring that, with respect to those Intel customers that purchased from Intel a software compiler that had or has the design or effect of impairing the actual or apparent performance of microprocessors not manufactured by Intel (“Defective Compiler”), as described in the Complaint:

- a. Intel provide them, at no additional charge, a substitute compiler that is not a Defective Compiler;
- b. Intel compensate them for the cost of recompiling the software they had compiled on the Defective Compiler and of substituting, and distributing to their own customers, the recompiled software for software compiled on a Defective Compiler; and
- c. Intel give public notice and warning, in a manner likely to be communicated to persons that have purchased software compiled on Defective Compilers purchased from Intel, of the possible need to replace that software.

8. Prohibiting Intel from manufacturing or distributing computer software, hardware, or other products that impair the performance, or apparent performance, of non-Intel microprocessors or GPUs.

9. Prohibiting Intel from inducing or coercing others to design, manufacture, or sell products that impair the actual or apparent performance of non-Intel microprocessors GPUs.

10. Prohibiting Intel from making deceptive or misleading statements and omissions concerning anything (including, but not limited to, performance, roadmaps, or plans) related to the manufacturing or sale of any x86 or related product, including CPUs, GPUs, chipsets, compilers, libraries, software.

11. Requiring Intel to correct the deceptive or misleading statements and omissions it has made in the past.

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12. Prohibiting Intel from coercing or influencing benchmarking organizations to adopt benchmarks that are deceptive or misleading.

13. Prohibiting Intel from improperly inducing or coercing customers not to use a competing GPU or graphics chipset.

14. Prohibiting Intel from designing or bundling together its own software or hardware so that they unfairly discriminate between Intel and non-Intel GPUs or graphics chip or related products.

15. Prohibiting Intel from directly or indirectly, expressly or by implication or effect, conditioning any discount, rebate, or other kind of consideration or benefit in connection with an OEM's purchase of Intel microprocessors on the condition that the OEM purchase another Intel product.

16. Prohibiting Intel from charging a higher price, or directly or indirectly conditioning any discount, rebate, or any other kind of consideration or benefit based solely on the inclusion, configuration, or type of software, operating system, or other component(s) used in any product into which an Intel microprocessor is to be incorporated or on the class of customers to whom the OEM's products containing Intel components will be marketed.

17. Requiring Intel to make available technology (including whatever is necessary to interoperate with Intel's CPUs or chipsets) to others, via licensing or other means, upon such terms and conditions as the Commission may order, including but not limited to extensions of terms of current licenses.

18. Prohibiting Intel from including or enforcing terms in its x86 licensing agreements that restrict the ability of licensees to change ownership, to obtain investments or financing, to outsource production of x86 microprocessors, or to otherwise partner with third parties to expand output.

19. Requiring that, for a period of time, Intel provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of assets, including but not limited to

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intellectual property, in the relevant microprocessor markets and complementary software and hardware products.

20. Requiring that Intel, 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 product, 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 or performance of any product unless the representation is not deceptive or misleading and, at the time the representation is made, Intel possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

21. Requiring that for a period of time after the last date of dissemination of any representation covered by any ordered relief in this matter, Intel 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;
- 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; and
- d. All other documents supporting compliance with the Commission's order.

22. Prohibiting Intel from entering into, implementing, continuing, or enforcing a Contract with any Customer that requires the Customer to disclose to Respondent any plans the

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Customer may have to sell, or offer for sale, Computer Products containing a Competing Relevant Product.

23. Prohibiting Intel from suing or threatening to sue its competitors' third-party fabricators.

24. Requiring that Intel's compliance with the order be monitored for the full term of the order at Intel's expense by an independent monitor appointed by the Commission.

25. Requiring that Intel file periodic compliance reports with the Commission.

26. Any other relief appropriate to correct or remedy the anticompetitive effects in their incipency of any or all of the conduct alleged in the complaint.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, DC, this sixteenth day of December, 2009.

By the Commission, Commissioner Kovacic recused.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having heretofore issued its complaint charging the Respondent Intel Corporation with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the Respondent having been served with a copy of that complaint, together with a notice of contemplated relief and having filed its answer denying said charges; and

The Respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent Order, an admission by Respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to § 3.25(f) of its Rules, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following Order:

1. Respondent Intel Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at Mission College Boulevard, Santa Clara, California 95054.

Decision and Order

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

I.

IT IS ORDERED that for the purposes of this Order, the following definitions shall apply:

THE PARTIES

- A. “Respondent” or “Intel” means Intel Corporation, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Intel Corporation; and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. “Commission” means the Federal Trade Commission.

OTHER DEFINITIONS

- C. “AMD Patent Agreement” means the Patent Cross License Agreement between Advanced Micro Devices, Inc. and Intel Corporation dated November 11, 2009.
- D. “Benefit” means any price or non-price benefit including without limitation price discounts, marketing funds, supply, and marketing or engineering support; *provided, however*, that initiating or forbearance from initiating litigation (including without limitation any activity related to lawfully enforcing its intellectual property rights) shall not be a Benefit.
- E. “Clear(ly) and Prominent(ly)” means that 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. All disclosures, including audio and video disclosures,

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shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication containing the disclosure.

- F. “Compatible x86 Microprocessor” means a Microprocessor (i) not designed, manufactured, promoted and sold by Respondent, (ii) that is substantially binary compatible with an Intel x86 Microprocessor without using non-native execution such as emulation, (iii) to perform substantially the same functions as an Intel x86 Microprocessor in response to substantially the same input, (iv) that is designed, manufactured, promoted and sold by any entity other than Respondent (v) for use in, and that is used in, any high-volume Computer Product.
- G. “Compiler” means a computer program that converts the instructions written in a high level computer programming language into assembly language or machine code that can later be executed directly by a Microprocessor, associated libraries (whether for use with Respondent’s or any other compiler, e.g., performance libraries such as Intel Math Kernel Library, Intel Threaded Building Blocks, and Intel Integrated Performance Primitives), and associated development tools.
- H. “Compiler Customer” means any customer that has purchased from Respondent any version of any Intel Compiler or associated libraries listed in Exhibit 1 since January 1, 2003, as reflected in Respondent’s business records.
- I. “Computer Product” means any desktop, laptop, netbook, notebook, workstation or server computer; *provided, however*, that no Non-PC Product shall be a Computer Product. For clarity, any product that includes a screen with a diagonal size of seven (7) inches or greater (i) shall not automatically be considered a Computer Product and (ii) shall not be

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considered a Computer Product unless it meets this definition.

- J. “Computer Product Chipset” means one or more integrated circuits in a Computer Product that (i) alone or together electrically connect(s) directly with a Relevant Microprocessor Product to connect and allow that Relevant Microprocessor Product to exchange binary information with other Microprocessors, input/output devices, networks, or system memory (also known as main memory or DRAM); and (ii) provide(s) the primary interface between the Computer Product’s Relevant Microprocessor Product and storage (including without limitation a hard disk drive) and input devices (including without limitation a keyboard) using a non-proprietary general purpose computer system bus.
- K. “Consent Order Cost” means Respondent’s Product Cost of Sales (“PCOS”), as that term is used by Respondent in the ordinary course of business as of August 3, 2010, minus depreciation (as customarily calculated by Respondent in the ordinary course of its business). “Consent Order Cost” shall be computed as a three-quarter rolling average, using the quarter in which assembly and testing of the shipped units of the Relevant Product is completed and the two immediately following quarters. Nothing herein shall be interpreted to mean that any particular component of Consent Order Cost does or does not vary with output over any particular range of production.
- L. “Constrained Supply” means the quantity demanded exceeds supply for one or more of Respondent’s Relevant Products, presently or as forecasted by Respondent.
- M. “Customer” means an OEM, ODM or End User Customer.
- N. “Designated Intel Competitor” includes only Advanced Micro Devices, Inc. (“AMD”), Nvidia

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Corporation (“Nvidia”) and Via Technologies Inc (“Via”), or their permitted successors and assignees under the Designated Patent Agreements, each of which is a Designated Intel Competitor.

- O. “Designated Patent Agreements” means the AMD Patent Agreement, the Nvidia Patent Agreements and the Via Patent Agreements.
- P. “Designated Intel Roadmap Competitor” means Nvidia Corporation or its permitted successors and assignees under the Designated Patent Agreements.
- Q. “End User” means a person that purchases Computer Products from an OEM and is not an End User Customer or OEM.
- R. “End User Customer” means a person that purchases Relevant Products from Respondent or a Designated Intel Competitor for use in manufacturing Computer Products for its own use and that derives less than five (5) percent of its revenue from the sale of Computer Products to third parties. Any person that derives five (5) percent or more of its revenue from the sale of Computer Products to third parties shall be deemed an OEM and not an End User Customer for purposes of this Order.
- S. “Extraordinary Assistance” means financial and/or technological support of a value of more than \$50 million that (i) is not made generally available to other Customers and (ii) is intended to enable a Customer to enter into a new (for the Customer) segment or channel or to introduce a new (for the Customer) product that includes new functionality the Customer is not offering in any other product into an existing market segment or channel. *Provided, however,* that a product that merely enhances or improves existing functionality shall not be a new product.
- T. “Intel x86 Microprocessor” means a Microprocessor designed, manufactured, promoted and sold by

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Respondent that is substantially binary compatible with Respondent's x86 instruction set used in Respondent's Core 2 Microprocessor without using non-native execution such as emulation.

- U. "Mainstream Microprocessor" means any Intel x86 Microprocessor designed, manufactured, promoted and sold by Respondent for use in, and that is used in, any high-volume Computer Product, including any such Intel x86 Microprocessor sold under the Xeon, Core, Pentium, Celeron, Atom and any of their successor brands.
- V. "Mainstream Microprocessor Platform" means each combination of a Mainstream Microprocessor and Computer Product Chipset promoted by Respondent for use together in Computer Products.
- W. "Market Segment Share" means the proportion of a Customer's requirements for a Relevant Product purchased from a particular vendor.
- X. "Microprocessor" means (i) an integrated circuit (ii) that is capable of processing digital data, (iii) that act(s) as the externally generally programmable central processing unit in a Computer Product, and (iv) that performs arithmetic, logic and control flow operations.
- Y. "Non-PC Product" means any product, other than a Computer Product, including without limitation any smart phone, cell phone, tablet, Pocket PC or other consumer electronic devices. For clarity, any product that includes a screen with a diagonal size of less than seven (7) inches is a Non-PC Product regardless of whether it meets this definition of NonPC Product or not.
- Z. "Nvidia Patent Agreements" means the Patent Cross License Agreement between Nvidia Corporation and Intel Corporation dated November 18, 2004, and the Chipset License Agreement Between Nvidia

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Corporation and Intel Corporation Dated November 18, 2004.

- AA. “Original Design Manufacturer” or “ODM” means a customer of Respondent whose primary business is the design and/or manufacture of a Computer Product which is specified and eventually branded by another firm for sale.
- BB. “Original Equipment Manufacturer” or “OEM” means a customer of Respondent that manufactures and sells Computer Products and who is not an End User Customer.
- CC. “Product Roadmap” means Respondent’s formal plan of record identifying Respondent’s strategic future product plans for Mainstream Microprocessors.
- DD. “Required Interface Roadmap” means a Respondent document that identifies the internal development name of future Mainstream Microprocessors under development by Respondent and, for each, the calendar quarter within which such product is then-planned to be commercially introduced and the then-planned version of the Standard PCI Express Bus interface.
- EE. “Relevant GPU” means one or more integrated circuit(s) that: (i) is the primary graphics processing unit in a Computer Product; (ii) is capable of performing real-time graphics rendering tasks separate from that Computer Product’s Relevant Microprocessor Product; (iii) does not provide the primary interface between the Computer System’s Relevant Microprocessor Product and storage (including without limitation a hard disk drive); and (iv) does not provide the primary interface between the Computer System’s Relevant Microprocessor Product and input devices (including without limitation a keyboard). In no case shall any one or more integrated circuits that meet this definition of Relevant GPU be

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considered a Microprocessor or Computer Product Chipset under this Order.

- FF. “Relevant Microprocessor Product” means (a) any Mainstream Microprocessor and (b) any Compatible x86 Microprocessor.
- GG. “Relevant Products” means (i) Relevant Microprocessor Products and (ii) Relevant GPUs.
- HH. “Standard PCI Bus” means a chip-to-chip interconnect designed to comply with a PCI Express (PCIe) Base Specification published by the PCI-SIG.
- II. “Via Patent Agreements” means the Litigation Settlement Agreement Between Via Technologies Inc. and Intel Corporation, dated April 7, 2003, including the Microprocessor Addendum and Patent Cross License Addendum to that Agreement, and any amendments thereto.

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

- A. Respondent shall, within thirty (30) days after the date this Order becomes final, for a period of not less than six (6) years, unless pursuant to rule 2.51(c) or 3.72(b) the Commission modifies this Order to reduce the time period in any respect, include in each of its Mainstream Microprocessor Platforms an interface (“Required Interface”) to a Standard PCI Bus.
- B. Respondent may determine the version or specification of the Standard PCI Express Bus interface (e.g., PCIe Base Specification 2.1, PCIe Base Specification 3.0) that will be included in each of its Mainstream Microprocessor Platforms subject to this provision.
- C. Respondent shall not design any Required Interface to intentionally limit the performance or operation of any Relevant GPU in a manner that would render the

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Required Interface non-compliant with the applicable PCIe Base Specification.

- D. The presence of “bugs” or errata in any product that render an interface non-compliant with the relevant PCI Express (PCIe) Base Specification shall not except such an interface from the definition of Required Interface.

III.

IT IS FURTHER ORDERED that:

- A. Respondent shall, within thirty (30) days after the date this Order becomes final, offer to each Designated Intel Competitor to amend its respective Designated Intel Competitor Patent Agreement(s) in a writing executed by both parties to provide that:
1. the Designated Intel Competitor may, without breaching that agreement, disclose, to any customer of the Designated Intel Competitor or any semiconductor foundry with which the Designated Intel Competitor is negotiating regarding a foundry relationship, the Licensed Rights Portions (as defined below) of that Competitor’s Designated Patent Agreement(s), so long as the Customer or foundry agrees in writing to keep those terms confidential; and,
 2. upon written request from the Designated Intel Competitor, Respondent will confirm to any semiconductor foundry with which the Designated Intel Competitor is negotiating regarding a foundry relationship or customer of that Designated Intel Competitor the content of the Licensed Rights Portions of its respective Designated Patent Agreement(s), so long as the Designated Intel Competitor agrees that Respondent may do so without breaching its respective Designated Intel Competitor Patent Agreement(s) and so long as the

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Customer or foundry agrees in writing with Respondent to keep such content confidential.

3. As used in this Section, “Licensed Rights Portions” shall mean the following portions of the Designated Patent Agreements:
 - a. the AMD Patent Agreement, as filed by AMD with the U.S. Securities and Exchange Commission on November 17, 2009;
 - b. the following provisions of the Via Patent Agreements: Sections 2.1, 2.2, 2.3, 2.4 and 4 of the Patent Cross License Addendum, as well as any defined terms referred to, directly or indirectly, in such sections; and
 - c. the following provisions of the Nvidia Patent Agreements: Sections 3.1, 3.2, 3.3, 3.4, 4.1 and 4.2 of the Patent Cross License and Sections 3.1, 3.2, 5.1, 5.2 and 5.3 of the Chipset License Agreement, as well as any defined terms referred to, directly or indirectly, in such sections.
- B. In the event the Designated Intel Competitor undergoes a “change of control” (as defined in the relevant Designated Intel Competitor Patent Agreement) that is publicly announced or a Designated Intel Competitor otherwise notifies Respondent that it has undergone a change of control within five (5) days of such change of control:
 1. for a period of thirty (30) days from the date of the change of control, Respondent shall not initiate patent litigation against the party acquiring the Designated Intel Competitor (“Acquiring Entity”) with respect to products previously manufactured by or acquired from the Designated Intel Competitor, unless the Designated Intel Competitor and/or the

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Acquiring Entity or another entity controlled by one of them has first filed any suit against Respondent;

2. within ten (10) days from the date of the change of control, Respondent shall offer to enter into a written, reciprocal Standstill Agreement with the Acquiring Entity, such Standstill Agreement to comprise the following terms:
 - a. Respondent and the Acquiring Entity shall enter into good faith negotiations regarding the future patent relationship, if any, between them;
 - b. to facilitate those good faith negotiations, for a period of one year from the change of control, neither Respondent nor the Acquiring Entity (or any Affiliate of either of them) shall initiate patent litigation against the other or any Affiliate thereof;
 - c. the Standstill Agreement shall not act as a license or provide any patent or other intellectual property rights or defenses to any person or party, either expressly or by implication, estoppel, exhaustion, license, waiver, laches or otherwise; and
 - d. Respondent shall afford the Acquiring Entity not less than ten (10) days from receipt of Respondent's written offer to accept in writing the offered Standstill Agreement.
 - e. For purposes of this Section, "Affiliate" means any entity that is directly or indirectly controlled by, under common control with, or that controls the subject entity.

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- C. Respondent shall, within thirty (30) days after the date this Order becomes final, offer to Via to sign written amendments to the Via Patent Agreements to:
1. extend the “Capture Period” in Sections 1.4 of the Litigation Settlement Agreement between Via Technologies, Inc. and Intel Corporation dated April 7, 2003, 1.3 of the Via Patent Cross License Addendum of the same date, and 1.1 of the Via Microprocessor Addendum of the same date, to provide that the Capture Periods end on the fifteenth yearly anniversary of the Effective Date of those agreements;
 2. confirm that under the Via Patent Agreements, Via is permitted to make, use, sell or import Via Microprocessors that are compatible with the x86 instruction set but not pin compatible or bus compatible with Intel Microprocessors, including such Via Microprocessors with graphics technology designed by and supplied to Via by a third party, so long as Via does not exceed the scope of the licenses expressly granted under or otherwise breach the terms of those Agreements; and
 3. provide that Respondent shall, upon the request of Via, publicly state that Via is permitted to make, use, sell or import Via microprocessors that are compatible with the x86 instruction set but not pin compatible or bus compatible with Intel microprocessors, including such Via microprocessors with graphics technology designed by and supplied to Via by a third party, so long as Via does not exceed the scope of the licenses expressly granted under or otherwise breach the terms of those Agreements.
 4. Respondent’s written offer shall state that Via has thirty (30) days from receipt of Respondent’s written offer to accept in writing any or all of the offered amendments. The amendments shall not

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be conditioned upon any other change to the Via Patent Agreements, including, without limitation, changes to provisions concerning Via's license rights concerning Microprocessors that are not Compatible x86 Microprocessors (including any intellectual property licensed from ARM Holdings) or Via's "have made" rights.

- D. Respondent shall not breach any term of any Designated Intel Competitor Patent Agreement that provides "have made" rights to the Designated Intel Competitor.
- E. Respondent shall comply with the requirements to offer the Designated Patent Agreement amendments described herein by the listed deadlines. *Provided, however,* nothing in this Order shall confer, by implication, estoppel, exhaustion, license, waiver, laches, or otherwise, to any person or entity (other than the Commission), any license or other right under any Intel patent, copyright, mask works, trade secret, trademark or other intellectual property right.

IV.

IT IS FURTHER ORDERED that in Respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, in connection with the licensing, development, production, manufacture, marketing, promotion, purchase or sale of Relevant Products:

- A. Respondent shall not invite, enter into, implement, continue, enforce, or attempt to enter into, implement, continue or enforce, any condition, policy, practice, agreement, contract, understanding, or any other requirement that:
 - 1. conditions any Benefit to a Customer or End User on that person's agreement to use or purchase Relevant Products or Computer Product Chipsets exclusively from Respondent in any geography,

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market segment, product segment, or distribution channel;

2. conditions any Benefit to a Customer or End User on that person's agreement to limit, delay, or refuse to purchase (a) Relevant Products or Computer Product Chipsets from a supplier other than Intel or (b) Computer Products containing a Relevant Product or a Computer Product Chipset from a supplier other than Respondent;
3. conditions any Benefit to a Customer or End User based on whether that person or entity purchases, sells or launches products incorporating a Relevant Product or a Computer Product Chipset from a supplier other than Respondent;
4. denies any Benefit to a Customer or End User because of that person's design, manufacture, distribution, or promotion of products incorporating a Relevant Product or a Computer Product Chipset from a supplier other than Respondent;
5. conditions any Benefit to a Customer based on the Market Segment Share of a Relevant Product or a Computer Product Chipset that a Customer awards to Respondent or to any competitor;
6. conditions any Benefit to a Customer or End User, either formally or informally, directly or indirectly, upon a Customer's purchase or sale of (a) Mainstream Microprocessors and (b) Computer Product Chipsets in a fixed proportion where, if the entire value of the Benefit were attributed to the Mainstream Microprocessors or Computer Product Chipsets included in the bundle, the selling price of those Mainstream Microprocessors or Computer Product Chipsets, as the case may be, would be below Respondent's Consent Order Cost; or

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7. provides to a Customer or End User a discount as a flat or lump-sum payment of monies or any other item(s) of pecuniary value based upon a Customer's sales or purchases of Respondent's Relevant Products or Computer Product Chipsets reaching a specified threshold (in units, revenues, or any other measure) or otherwise reducing the price of one unit of Respondent's Relevant Products because of the purchase or sale of an additional unit of that product; *provided, however*, that Respondent may offer a discount or other items of pecuniary value based upon sales or purchases beyond a specified threshold. By way of example, Respondent may offer or provide a discount of X% on all sales in excess of Y units, but it may not offer or provide a discount of X% on all units if sales exceed Y units.
- B. *Provided, however*, that nothing in this Order shall restrict the ability of Respondent to engage in any of the following activities:
1. conditioning any Benefit not otherwise prohibited by this Order upon the agreement of a Customer or End User to utilize the Benefit as the Customer or End User agreed when seeking or agreeing to receive the Benefit (e.g., for buying or promoting specified Relevant Products, or manufacturing, selling or promoting Computer Products with agreed-upon specifications);
 2. agreeing with any Customer that the customer will not:
 - a. use the same model number for Computer Products containing a Relevant Product or Computer Product Chipset supplied by Respondent in conjunction with Computer Products containing a Relevant Product or Computer Product Chipset not supplied by Respondent;

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- b. falsely designate or label a Computer Product as containing a Relevant Product or Computer Product Chipset sold by Respondent; or
 - c. communicate in a false or deceptive manner, directly or by implication, that a Computer Product contains a Relevant Product or Computer Product Chipset supplied by Respondent.
 3. offering a Benefit, including a price discount, reasonably similar to one Respondent reasonably believes is being offered by a rival supplier; *provided, however*, that in such circumstance:
 - a. the Benefit shall be applicable only to the quantity of Relevant Products or Computer Product Chipsets that Respondent reasonably believes that the rival supplier has offered to supply;
 - b. Respondent may not condition its Benefit upon receipt of exclusivity or a minimum Market Segment Share, regardless of whether or not the rival supplier has so conditioned its offer;
 - c. Respondent may not offer the Benefit for purchases over the course of more than one year; and
 - d. Respondent may condition its bid upon the purchase of a minimum number of units under the terms of its bid.
 4. winning all of a Customer's business, so long as Respondent has not bid for more business than a Customer has asked to be bid and so long as Respondent does not engage in conduct otherwise prohibited by this Order to win the business;

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5. offering a price discount or other Benefit that otherwise complies with the requirements of this Order to an End User Customer;
6. offering price discounts to an End User if Respondent structures its offer of a discount based on the volume of Computer Products containing a Relevant Product or Computer Product Chipset manufactured by Respondent actually purchased in a given bid (e.g., \$X per-unit for the first x units; \$Y per-unit for the next y units; etc.), provided the terms are in writing. Such discounts must be based upon the End User's purchases pursuant to a single bid to acquire Computer Products and cannot be contingent on future purchases;
7. when a Relevant Product or Computer Product Chipset is in Constrained Supply, making product allocation decisions for Customers that accounted for two (2) percent or more of Respondent's sales of Relevant Product in the preceding year, provided that, in making such decisions, Respondent shall not retaliate or otherwise punish any Customer because of the extent or existence of any Customer's relationship with an Intel competitor, including without limitation whether the Customer purchases Relevant Products or Computer Product Chipsets from an Intel competitor;
8. agreeing with a Customer that the Customer will not purchase Relevant Products or Computer Product Chipsets from an Intel competitor where:
 - a. Respondent has provided Extraordinary Assistance to the Customer;
 - b. the period of such exclusivity is no longer than necessary for Respondent to achieve a return on invested capital (as that term is used and calculated by Respondent in the ordinary course of business) comparable to the return on

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invested capital of Respondent's other comparable investments and to ensure that intellectual property made available by Respondent to the Customer in connection with the provision of Extraordinary Assistance is not used in connection with Relevant Products or Computer Product Chipsets purchased by the Customer from an Intel competitor except as otherwise authorized or licensed by Respondent, but in no event longer than thirty months (or such longer time period as the Commission may approve) from the date on which the Customer's product reflecting the Extraordinary Assistance is first sold commercially;

- c. the exclusivity is limited to the new segment or channel or product;
 - d. any agreement regarding such assistance, investment and exclusivity is in writing, executed by both Respondent and the Customer, and retained by Respondent for at least ten (10) years; and
 - e. Respondent does not (i) enter into more than ten (10) such agreements over the term of this Order (or such additional agreements as the Commission may approve); and (ii) enter into more than two (2) such agreements in any twelve month period (or such additional agreements as the Commission may approve).
9. agreeing with a Customer that the Customer will maintain the confidentiality of Respondent's confidential business information disclosed to the Customer and that the Customer will use Respondent's confidential business information only in connection with Computer Products incorporating Relevant Products manufactured by Respondent; and

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10. providing to a Customer or End User a discount as a flat or lump-sum payment of monies or any other item(s) of pecuniary value based upon a Customer's sales or purchases of fewer than eleven (11) units of any Relevant Product (such as "buy ten, get one free"). This provision does not apply to sales of greater than 11 units to any one customer (for example, Intel may not use this provision to offer 10,000 free units to an OEM in return for a purchase of 100,000 units).

V.**IT IS FURTHER ORDERED** that

- A. Respondent shall not make any engineering or design change to a Relevant Product if that change (1) degrades the performance of a Relevant Product sold by a competitor of Respondent and (2) does not provide an actual benefit to the Relevant Product sold by Respondent, including without limitation any improvement in performance, operation, cost, manufacturability, reliability, compatibility, or ability to operate or enhance the operation of another product; *provided, however,* that any degradation of the performance of a competing product shall not itself be deemed to be a benefit to the Relevant Product sold by Respondent. Respondent shall have the burden of demonstrating that any engineering or design change at issue complies with Section V. of this Order.
- B. *Provided, however,* that the fact that the degradation of performance of a Relevant Product sold by a competitor of Respondent arises from a "bug" or other inadvertent product defect in and of itself shall not constitute a violation of Section V.A.(1) Respondent shall have the burden of demonstrating that any such degradation of performance was inadvertent.

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

- A. Respondent shall use reasonable efforts to ensure that any Product Roadmap that it discloses to any person will be, at the time it is disclosed, accurate and not misleading. When Respondent discloses a Product Roadmap to a third party, Respondent shall use reasonable efforts to respond accurately to any inquiries regarding changes in that Product Roadmap received from that third party during the one (1) year following such disclosure.
- B. No later than the first (1st), second (2nd), third (3rd) and fourth (4th) annual anniversaries of the date on which this Order becomes final, Respondent shall provide to each Designated Intel Roadmap Competitor a Required Interface Roadmap that will include the future Mainstream Microprocessor Platforms with a Required Interface that Respondent then-plans to introduce commercially before the fifth (5th) annual anniversary of this Order:
1. Respondent shall use reasonable efforts to ensure that the Required Interface Roadmap provided is, at the time it is provided, accurate and not misleading; and
 2. Respondent shall use reasonable efforts to respond accurately to any reasonable number of inquiries (no more than one per calendar quarter) received on or before the fourth annual anniversary of this Order from a Designated Intel Roadmap Competitor regarding any material changes to the information provided on a Required Interface Roadmap previously provided to that Designated Intel Roadmap Competitor in compliance with this Order.
 3. *Provided, however,* that Respondent may condition the receipt of any Required Interface Roadmap

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upon (i) the recipient's execution of a written non-disclosure agreement to maintain the confidentiality of the Required Interface Roadmap and/or (ii) the receipt of a certification from the Designated Intel Roadmap Competitor stating that such Competitor is developing a Relevant GPU that is intended to connect, and would be capable of connecting, to a Mainstream Microprocessor via a Required Interface.

- C. Except for the Required Interface Roadmaps required by this Order, Respondent may decline to provide Customers and other entities with Product Roadmaps, updates to Product Roadmaps, and/or pre-release engineering product samples based on any lawful business considerations not otherwise prohibited by this Order, including the customer's or other entity's ability and desire to provide marketing, design, engineering, or other insight or assistance concerning such Product Roadmap information and/or product samples.

VII.

IT IS FURTHER ORDERED that in Respondent's activities, directly or indirectly, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, in connection with the licensing, development, production, manufacture, marketing, promotion, purchase, sale, application engineering, or customer support of Compilers:

- A. Within ninety (90) days of the date on which this Order becomes effective, Respondent shall Clearly and Prominently inform its Compiler Customers on its web site, documentation, and compiler presentations that relate to compiler performance or optimizations that:
1. Intel's Compiler may or may not optimize to the same degree for non-Intel microprocessors for optimizations that are not unique to Intel microprocessors. These optimizations include SSE2, SSE3, and SSSE3 instruction sets and other

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optimizations. Intel does not guarantee the availability, functionality, or effectiveness of any optimization on microprocessors not manufactured by Intel. Microprocessor-dependent optimizations in this product are intended for use with Intel microprocessors.

- B. Respondent shall not misrepresent, or assist others in misrepresenting, expressly or by implication, the level of optimizations available in its Compilers for Compatible x86 Microprocessor.
- C. By the time of the next Compiler release, including update releases, but no later than six (6) months from the date on which this Order becomes final and on an ongoing basis, Respondent shall Clearly and Prominently provide the following disclosures in its product documentation (whether in paper form or on an internet site), marketing literature, and promotional literature, where optimizations are discussed, including but not limited to any descriptions of compiler optimization options such as those in user manual tables or in descriptions of library dispatching mechanisms.
 - 1. If an Intel Compiler optimizes for any Intel x86 Microprocessor for instruction sets that are common to Compatible x86 Microprocessors, such as SSE, SSE2, SSE3, and SSSE3 instruction sets, but does not do so equally for Compatible x86 Microprocessors, Intel must Clearly and Prominently disclose that fact, including identifying the specific instruction sets implicated.
 - 2. If other optimizations which could run on both Intel x86 Microprocessor and Compatible x86 Microprocessors are reserved for Intel x86 Microprocessors, Respondent must Clearly and Prominently disclose that optimizations not specific to Intel microarchitecture are reserved for Intel x86 Microprocessors.

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- D. Within ninety (90) days of the date on which this Order becomes final, Respondent shall implement, and shall notify its Compiler Customers that it has implemented, a program to reimburse Compiler Customers who (i) have detrimentally relied on Intel representations as to Compiler availability, functionality or effectiveness when using an Intel Compiler to compile code to be executed on a Compatible x86 Microprocessor and (ii) decide to recompile using a Compiler not developed or sold by Respondent (the “Intel Compiler Reimbursement Program”). Such a notification must include a link to or a copy of this Order and specifically reference this Section VII of the Order in the notification. The features of the Intel Compiler Reimbursement Program shall include the following:
1. Reimbursement shall be made based upon documented costs of such recompilation (including without limitation testing, distribution, or direct communications with customers) provided by the customer;
 2. Respondent’s total obligation to provide reimbursements under this section shall not exceed ten (10) million dollars;
 3. Respondent shall hold all applications to the Compiler Reimbursement Fund for six (6) months after Respondent’s notification to customers of the Compiler Reimbursement Program. If requests for reimbursement that comply with the requirements of Section VII.D of the Order received in the first six (6) months after Respondent’s notification to customers of the Compiler Reimbursement Program exceed ten (10) million dollars, customers shall be reimbursed from the Compiler Reimbursement Program on a pro rata basis.
 4. All requests for reimbursement from the Compiler Reimbursement Fund that comply with Section VII.D of the Order shall otherwise be reimbursed on

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a first-come first-served basis until the fund is exhausted;

5. Respondent may condition reimbursement upon receipt of a declaration from the customer asserting that it has relied upon Respondent's representations, describing the representations upon which the customer relied, and attesting to the accuracy of and basis for the recompilation reimbursement amount requested;
 6. Respondent may condition reimbursement upon a release of claims by the customer for any damages or other relief relating to Respondent's representations or to the recompilation; and
 7. Respondent may terminate the program once ten (10) million dollars has been reimbursed to customers under the program or two (2) years after announcement of the program, whichever comes first.
- E. Respondent shall not represent, in any manner, expressly or by implication, that its Compiler provides the same or superior performance than any other competing Compiler unless the representation is true and non-misleading, and, at the time of making such representation, Respondent possesses and relies upon competent and reliable evidence sufficient to substantiate that the representation is true. For purposes of this Part, competent and reliable evidence means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons and are generally accepted in the profession to yield accurate and reliable results.

VIII.

IT IS FURTHER ORDERED that in Respondent's activities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, in connection with the marketing and promotion of Relevant Microprocessor Products (including

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promotion on Respondent's website, in advertisements or in other promotional material):

- A. Whenever Respondent (i) makes a claim comparing the performance of a Mainstream Microprocessor and a Compatible x86 Microprocessor, or (ii) makes any claim that references the performance of a Mainstream Microprocessor on any benchmark, Respondent shall Clearly and Prominently make the following disclosure:

Software and workloads used in performance tests may have been optimized for performance only on Intel microprocessors. Performance tests, such as SYSmark and MobileMark, are measured using specific computer systems, components, software, operations and functions. Any change to any of those factors may cause the results to vary. You should consult other information and performance tests to assist you in fully evaluating your contemplated purchase, including the performance of that product when combined with other products.

- B. *Provided, however,* that where the form of the promotion does not reasonably allow inclusion of this language (such as in an audiovisual advertisement or on a retail tear sheet that is too small to allow inclusion of this language in a font size that would be readable), Respondent may instead Clearly and Prominently make the following disclosure: "For more complete information about performance and benchmark results, visit www.intel.com/benchmarks," which website shall contain the disclosure set forth in paragraph VIII.A. above.
- C. *Provided further, however,* that with respect to Respondent's website at www.intel.com, Respondent shall be deemed to have satisfied the requirements of this paragraph VIII if:
1. Respondent Clearly and Prominently displays the disclosure set forth in paragraph VIII.A. on

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www.intel.com/benchmarks and http://www.intel.com/sites/sitewide/en_US/termsfuse.htm or successor pages to these pages in future versions of Intel's website; and

2. Respondent Clearly and Prominently displays the disclosure set forth in paragraph VIII.B on <http://www.intel.com/performance/>, http://www.intel.com/performance/resources/benchmark_limitations.htm, http://www.intel.com/performance/resources/perf_doc.htm, and <http://www.intel.com/technology/product/index.htm>, or successor pages to these pages in future versions of Intel's website.

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

- A. At any time after this Order becomes final, and for the limited purpose of assisting the Commission in monitoring and enforcing Respondent's compliance with Order Paragraphs II., IV.A.6., IV.A.7, IV.B.6-8, V., VI., VII., and VIII., including the definitions of all included terms (hereafter "Technical Consultant Provisions"), the Commission may appoint one or more Technical Consultants, subject to the consent of Respondent whose consent shall not be unreasonably withheld. The Commission shall submit the name, background, expertise and fee structure of any proposed Technical Consultants to Respondent and shall identify the Technical Consultant Provisions for which the Technical Consultants' services are sought by the Commission. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Technical Consultants within ten (10) days after notice by the Commission's staff, Respondents shall be deemed to have consented to the selection of the proposed Technical Consultant.
- B. Respondent shall, not later than ten (10) days after appointment, execute an agreement with any Technical

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Consultant that, subject to the approval of the Commission, and consistent with this Paragraph, provides, among other things, that the Technical Consultant shall act in a fiduciary capacity for the benefit of the Commission. Any Technical Consultants appointed by the Commission shall serve without bond or surety at the expense of Respondent on such reasonable and customary terms and conditions as the Commission may set and as provided in the agreement. If the Commission determines that a Technical Consultant has ceased to act or failed to perform its obligations diligently, the Commission may appoint a substitute Technical Consultant in the same manner as provided in this Paragraph.

1. *Provided, however,* that, pursuant to any agreements with any Technical Consultants, Respondent shall not be required to pay, for the duration of this Order, a total of more than two (2) million dollars to all Technical Consultants.
 2. *Provided further, however,* and for the avoidance of doubt, that Respondent's own expenses in responding to any requests for information, documents, and access, as elsewhere required by this Order, shall not be considered to be payments to Technical Consultants.
- C. Respondent shall expeditiously provide, subject to any demonstrated legally recognized privilege, any information requested by the Commission's staff. If requested by the Commission's staff, Respondent shall provide, subject to any demonstrated legally recognized privilege, and as otherwise permitted by law, any Technical Consultant 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 related to Respondent's compliance with the Technical Consultant Provisions. Any reports, information, or documents received by the Commission related to the Technical Consultant

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Provisions may be shared with appointed Technical Consultants at the Commission's discretion.

- D. Respondent may require any Technical Consultants and any of the Technical Consultant's consultants, engineers, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement and to certify that there are no conflicts of interests based on past or present representations. Provided however, such agreement shall not restrict the Technical Consultant from providing any information to the Commission. Technical Consultants will in all other respects be subject to the same ethical obligations as any other Commission consultant.
- E. The Commission may, among other things, require each Technical Consultant, and any consultants, engineers, 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 Technical Consultant's duties.
- F. *Provided, however,* that nothing in this Paragraph shall prevent the Commission from retaining the services of any Technical Consultant, for any purpose, pursuant to any separate contract or agreement between the Commission and such Technical Consultant.

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

- A. Within sixty (60) days of 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.
- B. One (1) year after the date this Order becomes final, and annually for the following six (6) years on the

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anniversary of the date this Order becomes final, as well as at 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 this Order. Among other information that may be required, Respondent shall include in all reports all communications between Respondent and any Designated Intel Competitor that are received during the reporting period regarding compliance with provisions of this Order.

XI.

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 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 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 Respondent, who may have counsel present, regarding such matters.

XII.

IT IS FURTHER ORDERED that Respondent shall retain, for a period of five (5) years, all written contracts with any customer for the purchase and sale of Intel Relevant Products.

Decision and Order

XIII.

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 without limitation assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

XIV.

IT IS FURTHER ORDERED that unless indicated otherwise, the provisions of this Order shall terminate ten (10) years from the date on which this Order becomes final.

By the Commission.

Decision and Order

EXHIBIT 1**Intel Compilers and Associated Libraries**

Intel Fortran Compiler for Linux

Intel Fortran Compiler for Windows

Intel C++ Compiler for Linux

Intel C++ Compiler for Windows

Intel C++ Compiler for Mac OS X

Intel® Compiler Suite Professional Edition for Windows

Intel® Compiler Suite Professional Edition for Linux

Intel® C++ Compiler Professional Edition for Windows

Intel® Visual Fortran Compiler Professional Edition for Windows

Intel® Visual Fortran Compiler Professional Edition for Windows with IMSL

Intel® C++ Compiler Professional Edition for Linux

Intel® Fortran Compiler Professional Edition for Linux

Intel® C++ Compiler Professional Edition for Mac OS X

Intel® Fortran Compiler Professional Edition for Mac OS X

Intel® C++ Compiler Professional Edition for QNX Neutrino RTOS

Intel® Application Software Development Tool Suite for Intel Atom™ Processor

Intel® Embedded Software Development Tool Suite for Intel Atom™ Processor

Decision and Order

EXHIBIT 1

Intel Parallel Studio

Intel Parallel Composer

Intel Cluster Toolkit Compiler Edition for Linux

Intel Cluster Toolkit Compiler Edition for Windows

Intel runtime libraries

Intel® Integrated Performance Primitives (Intel® IPP) for
Windows

Intel® Integrated Performance Primitives (Intel IPP) for Linux

Intel® Math Kernel Library (Intel® MKL) for Windows

Intel® Math Kernel Library (Intel MKL) for Linux

Intel® Threading Building Blocks (Intel® TBB) for Windows

Intel® Threading Building Blocks (Intel TBB) for Linux

Intel® Threading Building Blocks (Intel TBB) for Mac OS X

Intel Math Libraries

Intel MPI Library for Linux

Intel MPI Library for Windows

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“Commission” or “FTC”) accepted for public comment an Agreement Containing Consent Order (“Proposed Consent Order”) with Intel Corporation (“Intel”) to resolve an Administrative Complaint issued by the Commission on December 16, 2009.¹ The Complaint alleged that Intel unlawfully maintained its monopoly in the relevant CPU markets, and sought to acquire a second monopoly in the relevant graphics markets, using a variety of unfair methods of competition. Consumers were harmed by Intel’s conduct, which resulted in higher prices, less innovation, and less consumer choice in the relevant markets. Consumers were also harmed by Intel’s deceptive disclosures related to its compilers, which violated both competition and consumer protection principles. The Proposed Consent Order will bring immediate relief in the relevant markets and puts Intel under Commission Order.

As described in detail below, the Proposed Consent Order has two fundamental goals. First, it seeks to undo the effects of Intel’s past restraints on competition by enhancing the ability of AMD, NVIDIA, Via, and others to compete effectively with Intel. To that end, the Proposed Consent Order seeks: 1) to make it easier for AMD, NVIDIA, and Via to use third-party foundries to manufacture products (to enable them to better match Intel’s manufacturing advantages) (Section III.A.); 2) to give AMD, NVIDIA, and Via flexibility to secure modifications of change of control provisions in their Licensing Agreements with Intel (Section III.B); 3) to extend Via’s intellectual property license (Section III.C); and 4) to provide assurances to manufacturers of complementary and peripheral products that they will be able to

¹ The Complaint was brought under Section 5 of the Federal Trade Commission Act, which “was designed to supplement and bolster the Sherman Act and the Clayton Act ... to stop in their incipiency acts and practices which, when full blown, would violate those Acts ... as well as to condemn as ‘unfair methods of competition’ existing violations” of those acts and practices. *F.T.C. v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966) (quoting *F.T.C. v. Motion Picture Adv. Serv. Co.*, 344 U.S. 392, 394-95 (1953)); see also *F.T.C. v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (1986). In addition, the Commission has the jurisdiction under Section 5 to challenge “unfair or deceptive acts or practices in or affecting commerce . . .”

Analysis to Aid Public Comment

connect their devices to Intel's CPUs (Section II). These provisions compel Intel to make certain offers; they do not compel a third party to accept them. The goal is to require Intel to open the door to renewed competition, not to force a third party to take any particular action.

Second, the Proposed Consent Order is designed to protect the ability of customers and existing and future Intel competitors to engage in mutually beneficial trade, while prohibiting Intel from using certain practices to deter or thwart such trade. The Proposed Consent Order therefore prohibits Intel from engaging in: 1) certain pricing practices that could allow Intel to exclude competitors while maintaining high prices to consumers (Section IV.A.); 2) predatory design that disadvantages competing products without providing a performance benefit to the Intel product (Section V); and 3) deception related to its product road maps, its compilers, and product benchmarking (Sections VI, VII, and VIII).

The Proposed Consent Order is for settlement purposes only and is tailored to remedy the effects of Intel's specific conduct in the market context in which that conduct took place. The purpose of the Commission's Order is not punitive but rather remedial.² Intel's adherence to the specific provisions will not insulate it from future Commission scrutiny or enforcement action if its conduct otherwise violates the antitrust laws. That is, the Proposed Consent Order does not operate as a safe harbor for Intel. The Commission can not only challenge (and seek civil fines for) Order violations, but also has authority to challenge any practice not prohibited by the Proposed Consent Order (including, but not limited to, any pricing practice or design change that harms competition) in a potential future legal challenge. The prohibitions and standards utilized in the Proposed Consent Order do not necessarily reflect the applicable legal standards under the Sherman Act, Clayton Act, or the FTC Act; indeed, the legal standards applicable to some of these practices remain unsettled by the Supreme Court and the federal courts of appeal. The

² As a general rule, the Commission's statutory authority is designed to remedy conduct going forward as opposed to punishing past conduct. For example, the Commission does not have the authority to levy fines for antitrust violations.

Analysis to Aid Public Comment

Commission expressly reserves the right to challenge Intel's future anticompetitive conduct if it has reason to believe that, considered in context, the effect of Intel's conduct is to enable it to increase or maintain power over price, output, or non-price competition in any market in which it is a participant. Furthermore, the Commission has the authority to monitor and determine whether the Commission has reason to believe that Intel has not strictly complied with all of the provisions of this Proposed Consent Order (including, but not limited to, the obligation to negotiate a license in good faith after a change of control of AMD, NVIDIA, or Via). The Commission expressly reserves its right to exercise this authority as well.

The Proposed Consent Order has been placed on the public record for 30 days for comments. Comments received during this period will become part of the public record. After 30 days, the Commission will review the Proposed Consent Order and comments received and will decide whether it should withdraw from the Proposed Consent Order or make final the Order contained in the Agreement. The purpose of this analysis is to invite and facilitate public comment concerning the Proposed Consent Order.

I. The Commission's Complaint

The Federal Trade Commission voted 3-0 to issue an Administrative Complaint against Intel on December 16, 2009. Intel is a Delaware corporation with its principal place of business in Santa Clara, California. Intel develops, manufactures, markets, and sells computer hardware and software products, including x86 CPUs and graphics processors. The Complaint alleged that Intel engaged in a course of conduct over a ten-year period that was designed to, and did, stall the widespread adoption of non-Intel products. That course of conduct allowed Intel to unlawfully maintain its monopoly in the relevant CPU markets through means other than competition on the merits and created a dangerous probability that Intel would acquire a monopoly in the relevant GPU markets.

First, the Complaint alleges that Intel maintained its monopoly in the markets for x86 CPUs for desktops, notebooks, and servers,

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as well as smaller relevant markets, by engaging in a course of conduct that foreclosed or limited the adoption of non-Intel x86 CPUs. The CPU of a computer system processes data and controls other devices in the system, acting as the computer's "brains." The x86 CPU architecture and instruction set is the industry standard for CPUs used in notebooks, desktops, workstations, and volume servers.³ The Complaint alleges a variety of relevant markets tied to the x86 CPU architecture including an overall x86 market. The non-x86 CPU alternatives did not constrain Intel's monopoly during the relevant time period.

Intel's only significant competitor in the relevant x86 CPU markets is AMD, based in Sunnyvale, California. AMD mounted serious challenges to Intel's position in 1999 when it released its Athlon x86 CPU and again in 2003 when it released its Opteron x86 CPU. The only other firm that sells x86 CPUs is a small Taiwanese firm, Via Technologies. A fourth firm, Transmeta, sold a small number of x86 CPUs in the notebook market but exited the market in 2006.

Over the last decade, Intel's share of the overall x86 CPU market (desktop, notebook, and server) has consistently exceeded 65 percent; its share of the x86 CPU desktop market has consistently exceeded 70 percent; and its share of the x86 CPU notebook market has consistently exceeded 80 percent. Intel's monopoly position in these markets is partially protected by significant barriers to entry, including reputation, scale economies, intellectual property rights, costs associated with building and operating large manufacturing facilities, and research and development costs. These legitimate barriers to entry make vigorous enforcement of the competition laws all the more important. The Proposed Order is designed to ensure that Intel cannot blunt entry and expansion by raising barriers in the relevant markets using means other than competition on the merits.

³ There are a handful of alternative CPU architectures that are used in very high-end servers or handheld devices. However, these alternatives did not compete in the notebook, desktop, workstation, or volume server x86 CPU markets during the relevant time period.

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Second, the Complaint also challenges Intel's unfair methods of competition in the Graphics Processing Unit ("GPU", also referred to as "graphics") markets. GPUs originated as specialized processors for generating computer graphics. In recent years, GPUs have become increasingly sophisticated as computing graphics have grown in importance. GPUs have also evolved to take on more functionality. GPUs are increasingly performing computations traditionally performed by the CPU, allowing OEMs to use lower-end CPUs or fewer microprocessors for a given level of performance. As a result, GPUs are creating better products at lower prices for consumers.

The graphics market is highly concentrated with high barriers to entry. Intel competes in the graphics market with NVIDIA and AMD/ATI. Intel makes and sells graphics processors that are either integrated into chipsets or directly onto the CPU. NVIDIA and AMD/ATI sell both graphics processors integrated into chipsets as well as discrete graphics cards. NVIDIA has been at the forefront of developing GPU functionality beyond merely graphics applications. The growth of NVIDIA's General Purpose GPU ("GP-GPU") computing allegedly threatened to undermine Intel's x86 CPU monopoly. The Complaint alleges that Intel engaged in behavior, other than competition on the merits, to marginalize NVIDIA and slow the adoption of GP-GPU computing.

A. Unfair and Exclusionary Commercial Practices in the Relevant CPU Markets

The Complaint alleges that Intel engaged in a variety of unfair methods of competition to foreclose or limit the adoption of non-Intel x86 CPUs by the world's largest original equipment manufacturers ("OEMs"). The largest original equipment manufacturers ("Tier One OEMs") include Hewlett-Packard/Compaq, Dell, IBM, Lenovo, Toshiba, Acer/Gateway, Sun, Sony, NEC, Apple, and Fujitsu, which combined account for more than 60 percent of all personal computer sales and are the only suppliers qualified to fulfill certain needs of large business buyers. Tier One OEMs provide a crucial distribution channel for any manufacturer of CPUs, chipsets or GPUs. Tier One OEMs supply high volume sales with the concomitant substantially

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reduced distribution cost. In three respects, Intel's conduct foreclosed significantly non-Intel x86 CPU suppliers from selling product to Tier One OEMs.

First, Intel induced certain Tier One OEMs to forgo adoption or purchases of non-Intel CPUs. When Intel failed to prevent an OEM from adopting non-Intel CPUs, it sought to limit such purchases to a small percentage of the sales of certain computer products. The Complaint alleges, for example, that Intel entered into *de facto* exclusive dealing arrangements and market-share deals with those Tier One OEMs that agreed to limit their purchases of AMD or Via products. Tier One OEMs that purchased all or nearly all of their CPU requirements from Intel received large rebates and lump-sum payments from Intel, as well as guarantees of supply during supply shortages. In other cases, Intel paid Tier One OEMs not to sell computers with non-Intel CPUs, such as AMD's, Transmeta's or Via's CPUs. The Complaint alleges that these arrangements did not represent competition on the merits, were designed to minimize pass-through of rebates to consumers, and that Intel entered into these arrangements to block or slow the adoption of competitive products by the Tier One OEMs and thereby maintain its monopoly.

Second, Intel threatened OEMs that considered purchasing non-Intel CPUs with, among other things, increased prices on other Intel purchases, the loss of Intel's technical support, and/or the termination of joint development projects.

Third, Intel sought to induce OEMs to limit advertising and branding, and to forgo advantageous channels of distribution for computers that contained non-Intel CPUs. For example, Intel induced OEMs to forgo advertising, branding, certain distribution channels, and/or promotion of computers containing non-Intel CPUs. To secure these restrictive dealing arrangements with OEMs, Intel threatened to withhold rebates, technical support, supply, and/or to terminate joint development projects, among other things.

These practices severely limited the number of instances in which OEMs selling non-Intel-based PCs competed directly against OEMs selling Intel-based PCs, especially in servers and in

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commercial desktops and notebooks. When an OEM selling Intel-based PCs competed against OEMs selling AMD-based PCs, Intel often had to sell CPUs at competitive prices. When such competition was eliminated, Intel could sell CPUs at supra-competitive prices. Consequently, it was able simultaneously to charge above-competitive prices and at the same time to exclude its rivals, resulting in both higher prices and fewer choices for consumers. In addition, Intel's retroactive quantity discounts were of a type that could readily disguise effective below-cost pricing, which would, under the circumstances, present a strong risk of predatory effects.

This effectively allowed Intel to compete by raising the effective prices of AMD's and Via's products rather than lowering the effective prices of its own. It did this by effectively imposing a penalty on any customers who purchased from Intel's rivals. Intel's market share discounts and retaliatory practices described above all had this effect, constituting an effective increase to the rival's price. The end result was that Intel could make a rival's actual low prices look very costly to customers without Intel's needing to reduce its own prices or expand its own output.

B. Compiler and Benchmark Deception

The Complaint alleges that Intel's failure to fully disclose the changes it made to its compilers and libraries beginning in 2003 violated both competition and consumer protection provisions of Section 5 of the FTC Act.

A compiler is a tool used by software developers to write software. The compiler translates the "source code" written in high-level computer languages into 0's and 1's that can be run as software on consumers' computers. Intel's compilers compete with Microsoft's compilers, open-source compilers, and others. Intel's compiler is used by developers of high-performance applications.

The Complaint alleges that AMD's Athlon CPU, released in 1999, and its Opteron CPU, released in 2003, equaled, and in some segments surpassed, Intel's technology. Intel introduced a

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new version of its compiler shortly before AMD released its Opteron CPU. The compiler features introduced by Intel in 2003 effectively slowed the performance of software written using Intel's compilers on non-Intel x86 CPUs such as Opteron. To the unknowing public, OEMs, and software vendors, the slower performance of non-Intel-based computers when running certain software applications was mistakenly attributed to the performance of non-Intel CPUs.

The Complaint also alleges that the direct impact of Intel's deceptive disclosures was on independent software vendors and developers that used Intel's compiler to write software. They were unaware of the changes in the Intel compiler that would impact the performance of their software when it ran on non-Intel-based computers. The Complaint alleges Intel intentionally misrepresented the cause of the performance differences and whether it could be solved.

Intel's deceptive disclosures related to its compiler redesign were compounded by the adoption of industry standard benchmarks that included software compiled using Intel's compiler. Benchmarks are performance tests that compare attributes of competing CPUs. Industry standard benchmarks are used by OEMs and consumers to judge performance of competing CPUs. Intel failed to disclose to benchmarking organizations the effects of its compiler redesign on non-Intel CPUs. Several benchmarking organizations adopted benchmarks that measured performance of CPUs by running software programs compiled using the Intel compiler. The software compiled using Intel's compiler skewed the performance results in Intel's favor. Intel promoted its systems' performance under such benchmarks as realistic measures of typical or "real world" computer performance. The benchmarks were not accurate or realistic measures of typical computer performance and they overstated the performance of Intel's products as compared to non-Intel products.

The Complaint alleges Intel's deceptive disclosures related to its compiler contributed to Intel's maintenance of its monopoly power. For example, AMD's CPU performance advantages were muted by Intel's compiler. Intel's deception distorted the competitive dynamic and harmed consumers. The Complaint also

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alleges that Intel's failure to disclose was a deceptive act or practice.

Among the harms to consumers caused by Intel's deceptive conduct was the harm to the credibility and reliability of industry benchmarks. Industry benchmarks are important tools for consumers to make informed purchasing choices. Informed consumer choice is a basic building block of competition.

C. Unfair and Exclusionary Conduct to Suppress GPU Competition

Intel worked with NVIDIA for a number of years to ensure that NVIDIA's GPUs could interoperate with Intel CPUs, and licensed NVIDIA to allow it to manufacture Intel-compatible chipsets with integrated graphics (also referred to as "chipsets with integrated GPUs"). The Complaint alleges that Intel began to perceive NVIDIA as a threat in both the market for chipsets with integrated graphics and the market for CPUs. The Complaint further alleges that Intel took a number of actions to blunt the competitive threat posed by NVIDIA. For example, Intel denied NVIDIA the ability to produce integrated chipsets that would be compatible with Intel's next generation CPUs. In doing so, the Complaint alleges that Intel misled NVIDIA on Intel's "roadmaps" or product plans, causing NVIDIA to waste resources and crucial time researching and designing integrated chipsets when, in fact, Intel allegedly had no intention of permitting NVIDIA integrated chipsets to interoperate with Intel's next generation of x86 microprocessors. This increased NVIDIA's costs and delayed the development of other products that would have increased competition in both the market for chipsets and the market for CPUs. The Complaint also alleges that Intel took steps to create technological barriers to preclude non-Intel integrated chipsets from interconnecting with future Intel CPUs. The Complaint further alleges that Intel bundled its CPUs with its own integrated chipsets and then priced the bundle to punish OEMs for buying non-Intel integrated chipsets.

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II. Terms of the Proposed Consent Order

The touchstone of the Proposed Consent Order is the protection of consumers and competition. Thus, the Proposed Consent Order provides structural relief designed to restore the competition lost as a result of Intel's past conduct, and injunctive relief that prevents Intel from engaging in future unfair methods of competition. The injunctive relief would prohibit Intel, when faced with new competitive threats, from engaging in the exclusionary and unfair conduct alleged in the Complaint. These provisions are designed to open the door to fair and vigorous competition in the relevant markets, leading to lower prices, more innovation, and more choice for consumers. The immediacy of this relief is particularly important in these rapidly changing markets.

The Complaint did not seek to strip Intel of its x86 monopoly, which was in large measure gained by innovation and associated intellectual property rights. Rather, the Proposed Consent Order is designed to undo the effects of Intel's anticompetitive conduct and prevent its recurrence, by restoring as much as possible the competitive conditions that would have prevailed absent the anticompetitive behavior and by ensuring that the doors to competition remain open. The Proposed Consent Order clarifies and extends AMD's and Via's rights to the x86 technology. The injunctive relief in the Proposed Consent Order is thus particularly important today to ensure that AMD's new CPU products can have a fair test in the marketplace on the merits and that Via more quickly has the clear path it needs to design and produce its next generation of CPU products. The Complaint did not seek to fine or penalize Intel for its conduct because the Commission lacks that authority for violations of the antitrust laws.

A. Section II of the Proposed Consent Order

Section II of the Proposed Consent Order requires Intel to maintain an open PCI Express ("PCIe") Bus Interface on all of its CPU platforms for six years. The PCIe bus is an industry standard bus used to connect peripheral products such as discrete GPUs to the CPU. A bus is a connection point between different components on a computer motherboard. The PCIe bus serves a critical function on the Intel platform. Intel's commitment to

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maintain an open PCIe bus will provide discrete graphics manufacturers, such as NVIDIA and AMD/ATI, and manufacturers of other peripheral products, assurances that their products will remain viable and thus maintain their incentives to innovate -- including the continued development of alternative computing architectures such as General Purpose GPU computing. Intel's commitment extends to high performance computing platforms that have been at the forefront of General Purpose GPU computing. The Commission recognizes the importance of the continued development of this potential alternative computing architecture.

The Commission recognizes that it may be difficult to forecast the future of innovation in these markets. The CPU and GPU markets are dynamic, and technology may be very different in three or four years. The Commission has the authority to reduce the number of years Intel must maintain the PCIe bus on any of its CPU platforms. For example, the Commission may reduce the commitment if the market has moved away from PCIe and it no longer serves a gateway function to Intel's CPU.

Section II.C of the Proposed Consent Order prohibits Intel from limiting the performance of the PCIe bus in a manner that would hamper graphics performance or GP-GPU compute functionality of discrete GPUs. The provision would assure NVIDIA, AMD/ATI, and other potential manufacturers of products that would use the PCIe bus that they will be able to connect to Intel CPUs in both mainstream and high-performance computers in the future, and that the performance of their products will not be degraded by Intel. These assurances will also allow NVIDIA and others to continue developing GP-GPU computing as a complement to the processing power of the CPU.

B. Intel Assurances on Third Party Foundry Rights

Section III.A of the Proposed Consent Order would require Intel to allow AMD, NVIDIA, and Via to disclose relevant "have made" rights under their respective licensing agreements with Intel to foundries and customers. The Proposed Consent Order would further require Intel to confirm to any foundry or customer that AMD, NVIDIA, and Via licenses confer such "have made"

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rights. “Have made” rights allow AMD, NVIDIA, and Via to contract out manufacturing to third parties. Absent Intel’s assurances and disclosures, customers and foundries might be deterred from making or selling the products of these competitors when they are, in fact, licensed, based upon unwarranted fear of being sued by Intel for infringement. These disclosures will help eliminate any uncertainty surrounding the rights of AMD, NVIDIA, and Via to use third party foundries to manufacture x86 microprocessors or other products under their respective cross licenses.

C. Change of Control Modifications to Current License Agreements with AMD, NVIDIA, and Via

Section III.B of the Proposed Consent Order would require Intel to offer to modify the change of control terms in Intel’s intellectual property licenses with AMD, NVIDIA, and Via. The Commission is concerned that Intel’s past conduct has weakened AMD and Via – Intel’s only x86 competitors. This provision seeks to ensure that these existing competitors can partner with third parties to create a more formidable competitor to Intel.

The existing change of control terms in licensing agreements potentially limit the ability of AMD, NVIDIA, and Via to take part in a merger or joint venture, or to raise capital. The provisions in the Proposed Consent Order are designed to allow AMD, NVIDIA, and Via to enter into a merger or joint venture with a third party, or to otherwise raise capital, without exposing itself to an immediate patent infringement suit by Intel. In the event that AMD, NVIDIA, or Via undergo a change of control, these provisions prohibit Intel from suing for patent infringement for 30 days. Furthermore, Intel must offer a one-year standstill agreement during which the acquiring party and Intel would not sue each other for patent infringement while both parties enter into good faith negotiations over a new license agreement.

The Commission takes seriously Intel’s commitment under these provisions in the Proposed Consent Order. The Commission has authority under the Order to evaluate and determine whether Intel in fact engages in good faith negotiations and the Commission will be able to enforce the Proposed Consent Order if Intel does not negotiate in good faith. In the event the

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change of control terms are invoked, the Commission will carefully scrutinize Intel's conduct and take action, if appropriate.

D. Via x86 Licensing Agreement Extension and Assurances

Section III.C of the Proposed Consent Order requires Intel to offer a five year extension to its cross-license with Via. The extension of the cross license guarantees that Via has the opportunity to continue competing in the x86 CPU market until at least 2018. Section III.C also requires Intel to confirm that Via may lawfully make, sell, and import x86 products without violating the Intel license. This disclosure is designed to eliminate uncertainty surrounding Via's right to compete in the relevant x86 CPU markets through 2018.

The extension of the Via license agreement, coupled with the modifications to the change-of-control provisions in Section III.B, open the door to a potential joint venture or acquisition of Via and its x86 license by a strong and well financed entrant to the x86 markets.

E. Commercial Practices Provisions

The prohibitions in Section IV.A of the Proposed Consent Order address Intel's commercial practices. These provisions are specifically designed to protect competition, not any one competitor. The Proposed Consent Order protects competition in the markets for CPUs (including CPUs with integrated graphics), chipsets, and GPUs. In contrast, Intel's settlement with AMD in November 2009 only protected AMD from certain exclusionary practices and did not extend to GPUs or chipsets.

The rationale for extending the prohibitions to all chipsets is two-fold. First, Intel's CPUs and chipsets are sold on a one-to-one basis. That is, an Intel chipset will only work with an Intel CPU. Thus, an agreement to purchase chipsets exclusively from Intel means that an OEM must purchase CPUs exclusively from Intel. Likewise, an OEM's agreement to purchase 95 percent of its chipsets from Intel means that an OEM will purchase at least 95 percent of its CPUs from Intel. Second, extending the Proposed Consent Order to chipsets also protects competition in

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the market for chipsets. The Commission recognizes that chipsets still play an important role in platform innovation. The provisions are designed to protect the development of new competitive options that may emerge from this market.

1. Prohibitions on Commercial Practices

The Proposed Consent Order prohibits Intel from engaging in seven enumerated sales practices in the CPU, chipset, and GPU markets. Section IV.A prohibits Intel from offering benefits to OEMs, original design manufacturer (“ODMs”), or End Users in exchange for assurances that the customers will refrain from dealing with Intel’s competitors. “Benefit” is broadly defined and includes not only monetary consideration but also encompasses access to technical information, supply, and technical and engineering support. Section IV.A also prohibits Intel from punishing its customers by withholding benefits from those that purchase from non-Intel suppliers of CPUs, chipsets, and GPUs.

Section IV.A.1 would prohibit Intel from conditioning a benefit on an OEM’s, ODM’s, or End User’s agreement to purchase a CPU, chipset, and/or GPU exclusively from Intel in any geographic area (e.g., the United States), market segment (e.g., servers, workstations, commercial desktops, etc.), product segment (e.g., multi-processor servers, high-end desktops, etc.), or distribution channel. For example, the Proposed Consent Order would prohibit Intel from conditioning a benefit on an OEM’s agreement to purchase CPUs for servers exclusively from Intel.

Section IV.A.2 would prohibit Intel from conditioning a benefit on an OEM’s, ODM’s, or End User’s agreement to limit, delay, or refuse to purchase a CPU, chipset, and/or GPU from a non-Intel supplier. For example, Intel would be prohibited from conditioning a benefit to an OEM on that OEM’s agreement to delay the introduction of a computer product incorporating a non-Intel product.

Sections IV.A.3 and IV.A.4 address threats to retaliate against an OEM, ODM, or End User for doing business with a non-Intel supplier. Section IV.A.3 would prohibit Intel from conditioning a benefit on whether an OEM, ODM, or End User purchases, sells, or launches a CPU, chipset, and/or GPU from a non-Intel supplier.

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For example, Intel could not condition a benefit on an OEM's agreement to cancel a launch of a Personal Computer that includes a non-Intel GPU. Section IV.A.4 prohibits Intel from withholding a benefit from an OEM, ODM, or End User if it designs, manufactures, distributes, or promotes a product incorporating a non-Intel CPU, chipset, and/or GPU. For example, Intel could not withhold a benefit from an OEM because that OEM participated in an AMD launch event.

Section IV.A.5 would prohibit Intel from directly or indirectly conditioning a benefit on the share of CPUs, chipsets, and/or GPUs that the OEM or End User purchases from Intel. For example, Intel could not condition a benefit on an OEM's agreement to purchase at least 95 percent of its CPU requirements for commercial desktops from Intel. Nor could Intel condition a benefit on an OEM's agreement to purchase no more than 5 percent of its CPU requirements for commercial desktops from a non-Intel supplier. In a market such as this one, where the most realistic mode of competition by competitors to a monopolist involves their selling initially modest quantities to direct buyers who also buy large quantities from the monopolist, such conditioning can amount to a tax on the growth of such competition, and can enable the monopolist to sustain high prices at the same time as it limits competition and decreases consumer choice.

Section IV.A.6 would prohibit Intel from bundling the sales of its CPUs with its chipsets when the effective selling price of either piece of the bundle is below Intel's Product Cost. Intel's Product Cost is based on data maintained in the ordinary course of business by Intel, is represented to be used by Intel for business decisions, and is significantly higher than its average variable cost. The provision is based on the standard articulated by the Ninth Circuit in *PeaceHealth* and is administrable using that standard and the Product Cost data. This provision is designed to target specific conduct alleged in the Complaint. For example, the Complaint alleges that Intel bundled the sale of its Atom x86 CPU and chipset in such a way that the effective selling price of the chipset was below cost, in an effort to foreclose third party vendors of chipsets. The provision does not reflect an endorsement or adoption of *PeaceHealth* by the Commission as

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the applicable legal test for bundling practices. The Commission expressly retains the right to pursue independent claims against Intel or any alleged monopolist under Section 2 of the Sherman Act or Section 5 of the FTC Act based on a different legal standard such as (by way of example), the standard articulated by the *en banc* decision in the Third Circuit's *LePage's* case.⁴

Section IV.A.7 would prohibit Intel from offering lump sum payments to an OEM, ODM, or End User for reaching a particular threshold of purchases from Intel. For example, Intel would be prohibited from offering an OEM a \$100 million rebate once it purchases 5 million x86 CPUs. The retroactive nature of these payment structures can disguise implicitly below-cost pricing that can unfairly exclude equally efficient competitors and smaller entrants, resulting in a loss of competition and harm to consumers. Intel, however, would not be precluded from offering volume discounts on incremental purchases above a particular threshold. For example, Intel could offer an OEM a price of \$100 for each CPU up to 1 million units and a price of \$90 for each CPU in excess of 1 million units. However, Intel would not be permitted to offer a price below Product Cost for the excess units. The Commission will carefully scrutinize Intel's implementation of this provision to ensure it does not price its products in such a way that forecloses competition.

2. Exceptions to the Commercial Practices Prohibitions

The exceptions to the prohibitions in Section IV.A are designed to allow Intel to offer competitive pricing and enter into other procompetitive deals with OEMs, ODMs, and End Users. These exceptions permit conduct that may truly benefit consumers while still preventing Intel from engaging in the type of anticompetitive behavior identified in the Complaint. Nothing in these exceptions, however, would prevent the Commission from pursuing independent claims against Intel under Section 2 of the Sherman Act or Section 5 of the FTC Act if Intel engages in practices that do not violate the Proposed Consent Order but are

⁴ Compare *LePage's, Inc. v. 3M Co.*, 324 F.3d 141, 155, 162 (3d Cir. 2003) (*en banc*) with *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008).

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nonetheless exclusionary or unfair and result in harm to consumers.

Under Section IV.B.1, Intel is not prohibited from conditioning a Benefit on sales terms that are not expressly prohibited by the Order. For example, Intel could offer a discount to an OEM for a CPU with the condition that it is used in a laptop with a screen size of less than 9 inches.

Under Section IV.B.2, Intel is not prohibited from agreeing with an OEM, ODM, or End User customer that the customer will use distinct model numbers for Intel and non-Intel-based products. Similarly, Intel can agree with its customers that the customer will not falsely label a product based on non-Intel parts as based on Intel parts. The provision allows Intel and OEMs to use naming schemes that are intended to avoid customer confusion. For example, Intel could agree with an OEM that a specific laptop model would be branded Laptop-100A if it uses an AMD CPU and Laptop-100B if it uses an Intel CPU. However, this provision would not allow Intel to condition benefits on an OEM's agreement not to market or brand a product, which is explicitly prohibited by IV.A.3 and IV.A.4.

Under Section IV.B.3, Intel is not prohibited from meeting terms or benefits it "reasonably believes" are being offered by a rival supplier. This section does not immunize the offering of more favorable terms and conditions than those offered by the competitor, *i.e.*, predatory pricing. In addition, this exception is limited in that Intel's offer must be limited to the quantity of the competitive offer; it cannot be conditioned on exclusivity or share of the OEM's or end user's business, and it must be limited to less than a year. Intel may condition its bid upon the purchase of a minimum number of units. For example, if Intel reasonably believes that a rival supplier is offering to sell 10,000 CPUs for \$90 to an OEM, it can offer to meet that price so long as the OEM agrees to purchase at least 9,000 CPUs.

Sections IV.B.4 and IV.B.5 simply make explicit what is already implicit in the Proposed Consent Order. Under Section IV.B.4., Intel would not violate the Proposed Consent Order merely because it wins all of an OEM's business, so long as it has

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not engaged in other conduct prohibited by the Order. The fact that an OEM purchases a Relevant Product or Chipset exclusively from Intel would not automatically support a violation of the Proposed Consent Order. Under Section IV.B.5, Intel would not violate the Proposed Consent Order if it engaged in conduct not explicitly prohibited by the Proposed Consent Order.

Under Section IV.B.6, Intel is not prohibited from offering volume discounts directly to purchasers of computers in bidding situations. Intel's offers must be in writing and must be responsive only to single bids and not contingent on future purchases.

Section IV.B.7 would permit Intel to make supply allocation decisions during times of shortage so long as it does not use that process to retaliate against an OEM that is using non-Intel CPUs, chipsets, or GPUs. For example, Intel could not withhold chipset supply from an OEM to punish that OEM for using AMD CPUs.

Section IV.B.8 would allow Intel to enter into no more than ten exclusive agreements over the next ten years when it provides an OEM with "extraordinary assistance" under certain circumstances. The Commission recognizes that Intel has worked with OEMs and other customers to create innovative products that have benefitted consumers. The Commission wants to ensure that Intel has the opportunity to continue to invest monies in projects with OEMs and other customers to support future innovations. Intel, like any other firm, will only invest in research and development if it achieves a return on that investment. Section IV.B.8 recognizes that in "extraordinary" circumstances Intel should be able to negotiate exclusivity for a specific product in which it has invested research and development resources with an OEM or other customer. At the same time, the Commission is wary of creating a loophole to the Proposed Consent Order that can be exploited by Intel to eviscerate the prohibitions in Section IV.A. Thus, this provision is carefully limited.

First, Intel's "extraordinary assistance" to an OEM must be valued at greater than \$50 million and must not be made generally available to all customers. For example, the payment cannot simply take the form of marketing funds that are given to several OEMs but instead must be a unique offer to a particular OEM.

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Second, the “extraordinary assistance” must be intended to enable a customer to develop new and innovative products or sponsor an OEM’s entry into a new market segment where the OEM did not previously compete. For example, a payment of \$50 million to an OEM in return for that OEM’s agreement to use Intel’s newest CPU in its laptop lines would not qualify as “extraordinary assistance.” Third, in return for investing in new product development with a particular OEM, Intel may ask for a period of limited exclusivity of no more than 30 months to recoup its investment. Fourth, Intel would only be able to seek exclusivity for the specific segment or specific product in which it has offered the “extraordinary assistance.” For example, if Intel offered “extraordinary assistance” to an OEM to develop a new server it could only seek exclusivity for that particular product line, it could not seek exclusivity for other servers or other computer products manufactured by that OEM. Fifth, any agreement regarding “extraordinary assistance” must be in writing and include the terms of the assistance, investment, and exclusivity. Finally, Intel would not be permitted to enter into more than 10 arrangements that meet this limited exception over the 10-year duration of the Proposed Consent Order. Exclusive dealing is harmful to the extent that it forecloses an important distribution channel; well-justified exclusive dealing with (on average) just one or two of the Tier 1 OEMs is unlikely to do so.

Section IV.B.9 allows Intel to insist that a Customer maintain the confidentiality of Intel’s confidential business information.

Section IV.B.10 allows Intel to offer buy ten, get one free promotions to its smaller customers. The exception is literally limited to sales of fewer than 11 products. For example, Intel would not be allowed to multiply such an offer a thousand-fold. Thus, this exception would not allow Intel to offer an OEM the opportunity to buy 10,000 units and get 1,000 free.

F. Prohibition on Explicit Predatory Design

Section V of the Proposed Order would prohibit Intel from designing or engineering its CPU or GPU products to solely disadvantage competitive or complementary products. This provision addresses allegations in the Complaint that Intel

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engaged in predatory innovation by cutting off competitors' access to its CPUs and slowing down various connections to the CPU. The Proposed Consent Order would be violated if a design change degrades performance of a competitive or complementary product and Intel fails to demonstrate an actual benefit to the Intel product at issue. For example, Intel could not introduce a design change in its CPU that degrades the performance of a competitive GPU unless it could demonstrate that the design change resulted in an *actual* benefit to Intel's CPU. The benefit must be real – not simply a theoretical benefit. Nor can the benefit to Intel be simply the fact that the competitive product is rendered less attractive by the design change (and thus enhances the competitive position of Intel's product).

The burden is on Intel to demonstrate that any engineering or design change complies with the terms of Section V. However, Section V does not require proof that a design change was made to intentionally harm competitive or complementary products, or was otherwise anticompetitive, nor does Section V require a balancing test that would weigh the anticompetitive harms against the benefits of a particular Intel design change; it is sufficient that there be actual benefits. A balancing test would be appropriate in a legal challenge to an Intel design change under Section 5 of the FTC Act or Section 2 of the Sherman Act. As noted earlier, the Commission retains the authority to challenge any Intel design changes that are not prohibited by this provision of the Proposed Consent Order.

G. Assurances on the Accuracy of Intel Roadmaps

The provisions in Section VI address allegations in the Complaint that Intel misrepresented its roadmap to the detriment of competition. Section VI.A would prohibit Intel from disclosing inaccurate or misleading roadmaps for the 10-year duration of the Proposed Consent Order and would require Intel to respond, and do so truthfully, to any inquiries regarding potential roadmap changes for one year after it discloses its roadmap. Section VI.A does not require that Intel disclose its roadmap in the first instance; rather, it places conditions on disclosure in the event that Intel does so. Section VI.B would require Intel to disclose to NVIDIA, on an annual interval, what bus interfaces its platforms will use through 2015.

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Together, these provisions address allegations in the Complaint that Intel misled third parties concerning its interface roadmap. Reliable disclosure of Intel's interface roadmap will help to eliminate uncertainty about the availability of connections and interoperability with Intel platforms. With reliable roadmap information, competitors that design, manufacture, or sell products that rely on interconnections with Intel platforms will be able to make informed and confident decisions about resource allocation and research and development efforts. Similarly, Intel customers that receive Intel roadmaps will be able to count on the continuing accuracy of those roadmaps and develop products based on combinations of Intel and non-Intel parts. The provisions would help give NVIDIA, AMD/ATI, and other potential manufacturers of products that would interconnect with Intel's platform, assurances that they will be able to connect with the CPU in the future and will also allow continuing development of GP-GPU computing.

H. Compiler Disclosures

Section VII would require Intel to take steps to prevent future misrepresentations related to its compilers and libraries, which are used by software developers to write software and make it work efficiently. Intel's compilers and libraries, however, may generate different software code depending on the vendor of the CPU on which software is running. For example, when the software code runs on an Intel-based computer, it may use certain optimizations such as advanced instruction sets or faster algorithms. However, when that same software code runs on a non-Intel-based computer that has the same optimizations, it may not use those optimizations. Intel's compilers and libraries thus may disable functionality and performance available on non-Intel CPUs. The disclosure requirements in Section VII provide software developers with non-misleading information regarding the extent to which Intel's compilers and libraries optimize differently for different vendors' CPUs. These disclosures allow software developers to make more informed decisions about their use of Intel compilers and libraries, such as whether to investigate the types of optimizations disabled on non-Intel CPUs, whether to use any methods to override the code dispatch mechanisms in

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Intel compilers and libraries, and whether to use Intel compilers and libraries at all.

Section VII applies to Intel “Compilers,” which includes all Intel compilers, runtime libraries supplied with those compilers, and other libraries supplied by Intel for use with Intel and non-Intel compilers. Libraries are pre-compiled code or sample code provided to software developers for use in their programs. Because Intel could implement CPU vendor-based code dispatching in either compilers or in libraries, the disclosures required in Section VII must apply to both.

Section VII.C of the Proposed Order requires Intel to inform its customers when and how its compilers and libraries optimize for Intel processors but not for non-Intel processors that are capable of using such optimizations. If Intel’s compilers or libraries optimize for a standard instruction, such as SSE3, only for Intel CPUs but not for compatible AMD or Via CPUs, even in some circumstances, Intel must clearly and prominently disclose the extent to which the standard instruction set is not used and which instruction set is used instead. Section VII.C would also require Intel to disclose when its compiler performs other optimizations only on Intel CPUs but disables the same features on other CPUs that support the features.⁵

Intel also would be required under Section VII.D to notify its customers and implement an Intel Compiler Reimbursement Program that includes a \$10 million reimbursement fund from which Intel would reimburse customers who relied on Intel’s statements regarding its compilers or libraries for the costs associated with recompiling their software using non-Intel compiler or library products. A customer seeking to use the Intel Compiler Reimbursement program must describe an Intel statement on which it relied to ensure that the program is used by customers who were misled by Intel’s disclosures.

Section VII.E of the Proposed Consent Order prevents Intel from making claims about the performance of its compiler unless

⁵ Although compiler users will not know which precise optimizations are not available on non-Intel CPUs, they will be on notice that their compiler will not fully optimize for non-Intel CPUs.

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Intel has substantiated that those claims are true and accurate using accepted analytical methods. This prohibition seeks to prevent Intel from claiming, without substantiation, that its compiler and libraries are superior to other available compilers and libraries. Intel may not claim to have superior compilers and libraries for AMD CPUs, when other products, such as the GNU C Compiler (GCC) or AMD's Core Math Library (ACML) have better performance in some circumstances. This prohibition is particularly important regarding Intel's representations about performance of its compilers on non-Intel CPUs. This section ensures that Intel will provide the appropriate disclosures when it makes performance claims about its compilers and libraries.

I. Benchmark Disclosures

Section VIII would require Intel to make disclosures concerning the reliability and relevance of performance claims based on benchmarks. The provision requires Intel to notify any customers, whether hardware manufacturers or end consumers, that the performance tests may have been optimized only for Intel CPUs. Intel must make disclosures whenever it makes performance claims comparing its CPUs to competitors' processors and whenever it relies on a benchmark. The provision requires disclosures in all advertising or marketing materials that include performance claims, including presentations, audio-visual advertisements, and in prominent locations regarding performance on Intel's web site. The required disclosure will inform consumers and OEMs that certain benchmarks may not provide accurate performance comparisons with non-Intel CPUs. The provision will encourage consumers and OEMs to use benchmark results carefully and rely on multiple benchmarks in order to get accurate performance information about CPUs. The provision will thus help provide for more informed purchasing decisions.

J. Compliance Terms

Sections IX through XIII of the Proposed Consent Order contain reporting, access, and notification provisions that are common in the Commission's orders, and are designed to allow the Commission to monitor compliance with the Proposed Consent Order. Section IX permits the Commission to appoint

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Technical Consultants to assist in assessing Intel's compliance with several provisions of the Proposed Consent. Such consultants are warranted in light of the technical nature of the products at issue and the potential complexity of some compliance issues, including cost accounting, microprocessor design, and software design. Intel would be required to pay for the Technical Consultants, up to a total of \$2 million during the ten-year period of the Proposed Consent Order.

Section X would require Intel to submit to the Commission a written plan explaining what Intel has done and will do to ensure compliance with the Proposed Consent Order. Intel would also be required to submit annual reports for six years explaining how it has complied with the Proposed Consent Order. Intel would be required, in these reports, to submit to the Commission any communications Intel receives from its customers regarding compliance with the Proposed Consent Order, including complaints that it is violating the Proposed Consent Order.

Sections XI and XII would require Intel, for the next five years, to retain its written sales contracts and to allow the Commission access to Intel's records and employees. Section XIII would require Intel to notify the Commission at least thirty days prior to changes in corporate structure that would impact Intel's compliance provisions, such as Intel being purchased by another company or Intel creating or purchasing corporate subsidiaries.

Paragraph XIV provides that the Proposed Consent Order shall terminate ten (10) years after the date it becomes final.

Concurring Statement

**STATEMENT OF CHAIRMAN LEIBOWITZ AND
COMMISSIONER ROSCH**

After a multi-year investigation, extensive discussions within the Commission – including an unprecedented four Commission meetings – and multiple meetings with Intel Corporation (“Intel”) and other interested parties, the Commission has voted unanimously to challenge an alleged course of conduct undertaken by Intel. Broadly speaking, the complaint alleges that Intel fell behind in the race for technological superiority in a number of markets and resorted to a wide range of anticompetitive conduct, including deception and coercion, to stall competitors until it could catch up. If the allegations in the complaint are true, Intel’s actions over a period of years and continuing up until today have diminished competition and harmed consumers.

The complaint challenges Intel’s conduct as an unfair method of competition, both in violation of the Sherman Act and also as a “stand-alone” violation of Section 5 of the FTC Act, i.e. as an unfair method of competition independent of the Sherman Act.¹ We focus this statement on the stand-alone Section 5 unfair method of competition claim because liability under that standard has the potential to protect consumers while at the same time limiting Intel’s susceptibility to private treble damages cases.

Despite the long history of Section 5, until recently the Commission has not pursued free-standing unfair method of competition claims outside of the most well-accepted areas, partly because the antitrust laws themselves have in the past proved flexible and capable of reaching most anticompetitive conduct. However, concern over class actions, treble damages awards, and costly jury trials have caused many courts in recent decades to limit the reach of antitrust. The result has been that some conduct harmful to consumers may be given a “free pass” under antitrust jurisprudence, not because the conduct is benign but out of a fear that the harm might be outweighed by the collateral consequences created by private enforcement. For this reason, we have seen an increasing amount of potentially anticompetitive conduct that is

¹ Federal Trade Commission Act, 15 U.S.C. § 45. The complaint also includes a claim that Intel’s conduct constituted an unfair act or practice in violation of Section 5.

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not easily reached under the antitrust laws, and it is more important than ever that the Commission actively consider whether it may be appropriate to exercise its full Congressional authority under Section 5.

It has been understood for many years that Section 5 extends beyond the borders of the antitrust laws, and its broad reach is beyond dispute. Indeed, that broad authority is woven into the very framework of the Commission itself. When Congress passed the Federal Trade Commission Act in 1914, it specifically decided to create an agency that has broad jurisdiction to stop unfair methods of competition, and it balanced that broad authority by limiting the remedies available to the Commission.

Congress enacted Section 5 in light of court decisions whose reach had limited the effectiveness of the Sherman Act in contravention of Congressional intent.² Thus, Section 5 was clearly a Congressional effort to bolster enforcement and provide protection for competition and consumers beyond the parameters of the Sherman Act. In fact, the Court's *Sperry & Hutchinson* holding regarding the broad sweep of Section 5 authority was based in part on the clear legislative history of the statute. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-44 (1972). For example, Senator Cummins, one of the bill's main proponents, was asked on the Senate floor "why, if unfair competition is in restraint of trade, [are we] attempting to add statute to statute and give a further remedy for the violation of the [Sherman Act]?" Senator Cummins replied that the concept of "unfair competition" seeks:

to go further [than "restraints of trade"] and make some things offenses that are not now condemned by the antitrust law. That is the only purpose of Section 5 – to make some things punishable, to prevent some things, that can not [sic] be punished or prevented under the antitrust law.³

² See generally, *Rambus, Inc.*, Dkt. No. 9302, slip op. at 2-5 (Aug. 2, 2006) (concurring statement of then Commissioner Leibowitz), available at <http://www.ftc.gov/os/adjpro/d9302/060802rambusconcurringopinionofcommissionerleibowitz.pdf>.

³ 51 CONG. REC. 12,454 (1914) (statement of Sen. Cummins).

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Echoing this point, he later described Section 5 as a new substantive law that would involve the Commission in activities beyond the enforcement of antitrust law.⁴ Many other legislators similarly expressed their intent and understanding that Section 5 would extend beyond the Sherman Act. *See, e.g.*, 51 CONG. REC. 14,333 (1914) (statement of Sen. Kenyon, remarking that the proposed federal trade commission “can take hold of matters that not in themselves are sufficient to amount to a monopoly or to amount to restrain [sic] of trade”); 51 CONG. REC. 14,329 (1914) (statement of Sen. Nelson, stating that the FTC Act “can be used in a lot of cases where there is no trust or monopoly”); 51 CONG. REC. 12,135 (1914) (statement of Sen. Newlands, observing that although “[a]ll agree that while the Sherman law is the foundation stone of our policy on [appropriate business conduct], additional legislation is necessary”).

Of course, even though the Commission has broad authority under Section 5, the Commission is well aware of its duty to enforce Section 5 responsibly. We take seriously our mandate to find a violation of Section 5 only when it is proven that the conduct at issue has not only been unfair to rivals in the market but, more important, is likely to harm consumers, taking into account any efficiency justifications for the conduct in question. Section 5 is clearly broader than the antitrust laws, but it is not without boundaries, and the Commission will clearly describe and stay within those boundaries if this case comes before it to review.

Finally, the Commission recognizes that lengthy trials create uncertainty in the marketplace, and that this uncertainty has the potential to be particularly disruptive given the rapid pace of innovation in high-technology markets. In addition, Intel itself has a legitimate interest in seeing this matter resolved quickly. The Commission is fully committed to a speedy resolution of this action. We are bringing this case under the Commission’s recently adopted Part 3 rules of practice, and we expect that a trial on the merits will begin within nine months, and a Commission decision will be issued within twenty months. This schedule is substantially more rapid than the far lengthier process usually followed in federal court antitrust litigation.

⁴ *Id.* at 12,613 (statement of Sen. Cummins).

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**CONCURRING AND DISSENTING STATEMENT OF
COMMISSIONER ROSCH****I.**

I concur in the issuance of a Section 5 complaint challenging an alleged course of conduct by Intel Corporation (“Intel”) to maintain monopoly power in the markets for central processing units (“CPUs”) in computers and at least near-monopoly power in markets for computer graphics products. In accordance with Section 5, I have concluded that there is reason to believe that the alleged course of conduct occurred and that issuance of a pure Section 5 complaint challenging that alleged conduct would be in the public interest. *See* 15 U.S.C. § 45(b) (authorizing the Commission to file a complaint where (1) it has “reason to believe” an antitrust violation has occurred, and (2) where “it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public”). The Supreme Court has held that Section 5 is broader than the Sherman or Clayton Acts, which can be enforced by both private and public plaintiffs. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972). However, the reach of Section 5, like any other statute, is not unlimited. I think the Commission can and should define those limitations as they apply to this case.

In my view, there are four considerations that warrant the application of Section 5 here. First, this is not a case where harm to competition can easily be segregated from harm to competitors. The markets alleged in this case and Intel’s alleged position in those markets are extraordinarily concentrated: the CPU markets are duopoly markets in which Intel and Advanced Micro Devices (“AMD”) are the only meaningful participants; the graphics products markets are likewise highly concentrated markets in which Intel, AMD, and Nvidia Corporation (“Nvidia”) are the only meaningful competitors. Significantly, Intel has monopoly power in the CPU markets and near-monopoly power in the computer graphics product markets and, judging from the allegations in the complaint, the entry barriers surrounding these markets are remarkably high. Under those unique circumstances, the oft-repeated admonition that the Sherman and Clayton Acts protect competition, not competitors, and the federal courts’ attendant disinclination to protect competitors in cases brought

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under those statutes, do not fit well. If the firm with monopoly or near-monopoly power (here, allegedly Intel) engages in an exclusionary and unjustifiable course of conduct that hurts its only competitor in the CPU markets (here, allegedly AMD) or its only two competitors in the computer graphics product markets (here, allegedly AMD and Nvidia), given the uncommonly high entry barriers, that exclusionary conduct harms competition too, by inhibiting those rivals from constraining the exercise of monopoly power.

Second, although Intel's alleged conduct led to higher prices in the CPU markets, that alleged conduct can still be within the Commission's Section 5 powers even if Intel cannot be said to have caused price increases. To be sure, most conventional Section 2 cases alleging monopoly maintenance or attempted monopolization rise or fall on proof of higher prices – if for no other reason than that kind of injury is easiest to measure. But that is not the only kind of consumer injury with which a law enforcement agency like the Commission should be concerned. The Commission must also be concerned with whether a course of conduct by a firm with monopoly power reduces consumer choice by reducing alternatives. That is true whether the “consumer” suffering the reduction in choice is an original equipment manufacturer (“OEM”) or an end user of computer equipment that buys equipment from the OEM. Thus, if and to the extent that an exclusionary course of conduct by a firm with monopoly power results in that less measurable form of consumer injury, Section 5 is the most appropriate vehicle for the analysis, and the Commission, with its expertise and experience, is the most appropriate plaintiff to make that determination.

Third, the complaint here alleges that Intel engaged in an exclusionary course of conduct. That is a claim with clearly identifiable elements that most logically resides in the Commission's Section 5 authority. Simply put, in my view it is improper to slice and dice each constituent part of the alleged course of conduct to determine whether it, standing alone, had the purpose or effect to hinder competition and injure consumers in violation of Section 2: the constituent parts did not stand alone, and both their effects on Intel's few alleged rivals and their consequent impact on consumer choice can only be assessed by

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examining the effects of Intel's alleged course of conduct as a whole. Although a number of courts have disparaged "course of conduct" claims made under Section 2 as mere "monopoly broth" claims or claims that "0 plus 0 plus 0 equal 1," that militates in favor of the Commission exercising its discretion and expertise to use Section 5 to reach such a course of conduct. Indeed, under those circumstances, a Section 5 "course of conduct" claim may be viewed much as the "invitation to collude" cases that the Commission has pursued as pure Section 5 cases in order to reach conduct that the Sherman Act may not otherwise reach. Lest there be any misunderstanding, Intel must be given the opportunity to show that any injury to competition or to consumers was offset by efficiencies that it reasonably could have achieved only by engaging in the conduct causing those consequences. But that defense does not justify altogether eschewing a course of conduct claim under Section 5.

Fourth, I believe that Intel's intent here is relevant in assessing its liability. The Second Circuit, for example, has held that a respondent's state of mind is not only relevant, but must be taken into account, to determine whether the respondent's conduct constitutes an "unfair method of competition" under Section 5. *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 138-40 (2d Cir. 1984). Properly read, I think that *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), holds that such an intent would be relevant in a Section 2 case. *Id.* at 610-11 (defendant's practices "support[ed] an inference that [the defendant] was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival"). Yet some Section 2 cases have said that an analysis of the defendant's intent is irrelevant in a Section 2 case. Indeed, it can be argued that the Commission's antitrust expertise and experience makes it a more dispassionate and superior judge of that evidence than a lay jury in a Section 2 case.

II.

Although I concur in the issuance of a complaint based on pure Section 5 claims, I respectfully dissent insofar as the complaint also contains Section 2 "tag-along" claims. To be clear, my reasons for doing so are not based on the fact that I lack

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a “reason to believe” that a Section 2 violation has occurred; instead, I dissent from the addition of the Section 2 claims on public policy grounds.

First, I see no advantage to adding the Section 2 claims. To be sure, there is favorable Section 2 case law that supports each constituent part of the course of conduct that is pled. More specifically, there is Section 2 case law condemning the use of loyalty discounts and kit pricing by a firm with monopoly power, *LePage’s Inc. v. 3M*, 324 F.3d 141, 154-57, 162-63 (3d Cir. 2003) (en banc); *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2009 U.S. App. LEXIS 23765, *6-8 (9th Cir. Oct. 28, 2009); the use of deception by such a firm, *United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001) (en banc); refusals to deal, *Aspen Skiing Co.*, 472 U.S. at 603-10, including refusals to license by such a firm, *Image Tech. Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1216, 1218-20 (9th Cir. 1997); raising rivals’ costs, *United States v. Delta Dental*, 943 F. Supp. 172, 179-82 (D.R.I. 1996) (most favored nations clause case brought under the Sherman Act, albeit Section 1); and product degradation by such a firm, *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1369-72 (Fed. Cir. 1998). Indeed, there is authority in the Section 2 case law for a course of conduct claim. *Microsoft Corp.*, 253 F.3d at 78; *Caldera, Inc. v. Microsoft Corp.*, 72 F. Supp. 2d 1295, 1318 (D. Utah 1999). But there is no reason why that case law cannot be invoked to support a Section 5 course of conduct claim where the Commission alleges that a course of conduct by a firm with monopoly power constitutes an “unfair method of competition.”

Second, it cannot be said that including the Section 2 claims (as opposed to a clearly defined Section 5 course of conduct claim) means that the outcome of this litigation will provide more predictability to the business community by somehow providing better notice of the type of conduct that the antitrust laws preclude. *See Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980) (rejecting the use of Section 5 where it would “blur” Sherman Act distinctions that were “well-forged”); *DuPont*, 729 F.2d at 138-39 (expressing concern that application of Section 5 might upset settled antitrust principles and thus lead to unpredictability); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980) (same). Intel maintains that the Section 2

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case law respecting these constituent elements of its alleged course of conduct is favorable to it. If and to the extent that is true, it cannot be said that the relevant Section 2 case law is settled and predictable. A well-defined Section 5 course of conduct claim can provide just as much guidance.

Third, and most importantly, the collateral consequences of including any Section 2 claims are very unfavorable for both Intel and the Commission. Intel currently faces the treble damage suits filed by the New York Attorney General under Section 2 in the United States District Court in Delaware in addition to a number of Section 2 treble damage class actions that have been filed there. The Commission should not enable those plaintiffs to free ride off of the Commission's work. Nor should it put itself in a position where an unfavorable outcome in those cases may be cited against it. Neither of those consequences can occur if the Commission proceeds solely under Section 5: the Delaware treble damage actions cannot proceed under Section 5 because only the Commission has the power to enforce Section 5. Indeed, it can be argued that where, as here, private litigation is pending under Section 2, as a matter of policy the Commission should not spend public resources on a duplicate claim.

Beyond that, as my colleagues, Chairman Leibowitz and more recently Commissioner Kovacic have pointed out, the Supreme Court has steadily been "shrinking" the ambit of the Sherman Act both procedurally and substantively. *See, e.g., Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-61 (2007); *Credit Suisse Sec. (USA) v. Billing*, 551 U.S. 264, 281-82 (2007). By all accounts, these changes are, partially at least, due to the Court's concern about the Sherman Act's application by juries and generalist federal district courts. Regardless of whether one shares that concern about private Sherman Act enforcement, it is undeniable that this jurisprudence "slops over" to public enforcement. That is so because insofar as the federal agencies prosecute their cases under the Sherman Act, they must proceed under the same statutes that private plaintiffs invoke. That consequence, however, can be

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minimized – if not avoided altogether – if the Commission proceeds under Section 5 alone. Thus, although I have also concluded that there is reason to believe that the alleged conduct also violates Section 2 the Sherman Act, I have concluded that insofar as this case proceeds on the basis of any Sherman Act “tag-along” claims, the Commission acts contrary to the public interest.

Complaint

IN THE MATTER OF

THE COCA-COLA COMPANYCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket No. C-4305; File No.101 0107**Filed November 3, 2010 — Decision, November 3, 2010*

The consent order addresses allegations that The Coca-Cola Company's ("Coca-Cola") acquisition of its largest bottler, Coca-Cola Enterprises, and an exclusive license from Dr. Pepper Snapple Group, Inc. ("DPSG") would eliminate competition in the U.S. branded concentrate and branded direct-store-delivered carbonated soft drink markets and increase the likelihood that Coca-Cola could unilaterally exercise market power and facilitate coordinated interaction in the industry. Further, the consent order addresses concerns that the acquisition will provide Coca-Cola with access to DPSG's marketing plans by requiring Coca-Cola to establish a "firewall" to ensure that its access to Dr. Pepper's commercially sensitive information is limited. The consent order further requires Coca-Cola to give the Commission 45 days' advance notice of subsequent acquisitions of its franchised bottlers that are licensed to distribute DPSG products.

Participants

For the *Commission*: *Michelle Fetterman, Jill M. Frumin, and Samuel Sheinberg.*

For the *Respondent*: *Elaine Ewing and Mark Leddy, Cleary Gottlieb Steen & Hamilton LLP; Abbott B. (Tad) Lipsky, Jr., Latham & Watkins LLP; and Jonathan Jacobson, Wilson Sonsini Goodrich & Rosati.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Respondent The Coca-Cola Company ("TCCC"), a corporation, has entered into agreements to acquire the outstanding voting securities of one its independent bottlers, Coca-Cola Enterprises Inc. ("CCE"), and subsequently obtained a license agreement to continue to produce and distribute

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carbonated soft drink brands of Dr Pepper Snapple Group, Inc. (“DPSG”), that bottler CCE has produced and distributed, and that the agreements violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the agreements and terms of such agreements, when consummated or satisfied, would violate Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENT THE COCA-COLA COMPANY

1. Respondent TCCC is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1 Coca-Cola Plaza, Atlanta, Georgia 30313.

2. TCCC is a beverage company that includes Coca-Cola North America (“CCNA”), the company’s North American operating company. TCCC produces the concentrate (or flavor ingredient) for the TCCC carbonated soft drink beverage brands that are distributed by its independent bottlers. One of those independent bottlers is CCE. Some of TCCC’s carbonated soft drink brands distributed by CCE are Coke, Diet Coke, and Sprite.

3. TCCC in 2009 had net revenues of about \$31 billion. Most of TCCC’s revenues are based on concentrate sales.

4. TCCC 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 Federal Trade Commission Act, 15 U.S.C. § 44.

II. THIRD PARTY DR PEPPER SNAPPLE GROUP, INC.

5. DPSG is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5301 Legacy Drive, Plano, Texas 75024.

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6. Among other things, DPSG produces concentrate for the DPSG carbonated soft drink beverage brands that are marketed, distributed, and sold by independent bottlers. One of those independent bottlers is CCE. Some of the DPSG carbonated soft drink brands distributed by CCE, in at least some territories, are Dr Pepper, Canada Dry, Schweppes, and Squirt.

7. DPSG in 2009 had net revenues from the sales of all products of about \$5.5 billion. In 2009, DPSG's net sales in the United States and Canada of carbonated soft drink concentrate were about \$1.5 billion.

8. DPSG 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 Federal Trade Commission Act, 15 U.S.C. § 44.

III. COCA-COLA ENTERPRISES INC.

9. CCE is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2500 Windy Ridge Parkway Suite 700, Atlanta, Georgia 30039.

10. CCE is the largest independently owned bottler of the carbonated soft drink brands of TCCC. CCE's North American business contributed 70% of CCE's total sales in 2009 of about \$21 billion. CCE accounts for approximately 75% of the United States sales of TCCC's brands of bottled and canned carbonated soft drinks and about 14% of the United States sales of DPSG's brands of carbonated soft drinks.

11. The geographic areas or territories in which CCE is licensed to distribute the carbonated soft drink brands of TCCC include all or a portion of 46 states and the District of Columbia. The principal geographic areas or territories in which CCE is licensed to distribute some of the carbonated soft drink brands of DPSG include North Texas (Dallas/Fort Worth area); Southern California; Northern California; New York; Arizona; New Mexico; and Nevada.

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IV. TCCC'S ACQUISITION OF CCE

12. On or about February 25, 2010, TCCC entered into an agreement to acquire 100% of CCE's North American operations. Following the acquisition, TCCC will create a new organization known as Coca-Cola Refreshments USA, Inc. ("CCR"), that will take on the bottling and distribution functions previously performed by CCE.

13. At the time of the agreement, TCCC held about a 34% equity interest in CCE.

14. Under the terms of the license agreements that DPSG (or its predecessor companies) entered into with CCE, a change of ownership of the bottler would, depending on the brand and/or territory involved, either automatically trigger the termination of the license or require that DPSG consent to the acquisition of the license by the bottler's new owner.

15. The proposed acquisition by TCCC of 100% of CCE's North American assets would give TCCC control over CCE. This prospective change in control is the kind of change in ownership of CCE that, upon consummation, would either trigger the automatic termination clause of the license agreement with DPSG or require that DPSG consent to the change.

16. For brand Dr Pepper, DPSG did not consent to the transfer to TCCC of the licenses held by CCE. For certain other DPSG brands, the proposed change in ownership of CCE would, upon consummation of the ownership change, automatically terminate the DPSG licenses.

V. TCCC'S ACQUISITION OF DPSG LICENSES

17. On or about June 7, 2010, in anticipation of the termination of the DPSG-CCE agreement upon the acquisition by TCCC of CCE, TCCC and DPSG entered into an agreement for TCCC, upon acquiring CCE, to obtain a license to distribute the Dr Pepper and Canada Dry carbonated soft drink brands of DPSG in the former CCE territories. The license agreement will be

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signed by Dr Pepper-Seven Up, Inc. (“DPSU”), an operating company of DPSG, and CCR.

18. The DPSG-CCR license agreement provides, among other things, that (a) CCR will acquire the exclusive right to sell and distribute the Dr Pepper and Canada Dry carbonated soft drink brands in CCE territories, (b) the license agreement will have a term of twenty (20) years, with a provision that it be “automatically renewed for additional twenty (20) year successive periods” for “no additional payments,” (c) CCR will acquire a non-exclusive right to produce the Dr Pepper and Canada Dry carbonated soft drink brands in the CCE territories, and (d) TCCC will pay DPSG \$715 million.

19. Pursuant to the DPSG-CCR license agreement, CCR and DPSG entered into additional, associated terms, whereby CCR has undertaken performance obligations to, among other things, (a) distribute the Dr Pepper brand in all classes of trade based on certain TCCC brands; (b) grow the Dr Pepper brand based in some measure on certain sales criteria of other bottlers; and (c) advertise, promote, and market the Dr Pepper brand and provide sales support for such promotions, based in some measure on CCR’s advertising, promotions, and marketing of certain TCCC brands.

20. The DPSG-CCR license agreement will not provide adequate safeguards against the access by TCCC to competitively sensitive and confidential information regarding DPSG carbonated soft drink brands provided to CCR by DPSG pursuant to the license.

VI. TRADE AND COMMERCE

A. Relevant Product Markets

21. The relevant product markets in which to assess the effects of the license between DPSG and CCR and the associated performance terms are (a) branded, direct-store-delivered carbonated soft drinks and (b) the branded concentrate used to produce branded, direct-store-delivered carbonated soft drinks.

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B. Relevant Geographic Markets

22. The relevant geographic markets in which to assess the effects of the DPSG-CCR license agreement and the associated performance agreement terms are (a) in the branded concentrate relevant product market, the United States as a whole, and (b) in the branded, direct-store-delivered carbonated soft drinks product market, local areas in the CCE territories.

C. Conditions of Entry

23. Entry into each relevant market would not be timely, likely, or sufficient to prevent or mitigate any anticompetitive effect.

24. Effective (price constraining) entry requires that branded carbonated soft drinks be delivered by direct-store delivery. There are generally only three bottlers in the local carbonated soft drink markets that have exclusive rights to distribute their branded carbonated soft drink products, and they do so by direct-store delivery. Bottlers operate under flavor restrictions imposed upon them by concentrate companies TCCC, DPSG, and PepsiCo, Inc. The bottlers therefore are not permitted to carry the new brand of an existing flavor without first dropping the brand of that flavor that they carry. For the cola flavor, the bottlers licensed by TCCC and PepsiCo, Inc., are required to carry Coke and Pepsi, respectively, and no other cola- flavored carbonated soft drink.

25. There is no market for branded concentrate other than for the production of branded carbonated soft drinks.

D. Market Structure

26. Each relevant market is very highly concentrated, whether measured by the Herfindahl-Hirschman Index (“HHI”) or by two-firm and four-firm concentration ratios.

27. The carbonated soft drink brands of TCCC and DPSG are the first and second choices for a substantial number of consumers.

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VII. Effects of the Acquisition

28. TCCC's access to competitively sensitive confidential information provided by DPSG to CCR in furtherance of the DPSG-CCR license agreement, or the use by CCR of competitively sensitive information passed to it by DPSG in furtherance of the DPSG-CCR license agreement, may substantially lessen competition in the relevant markets in some or all of the following ways,

- a. by eliminating direct competition between TCCC and DPSG,
- b. by increasing the likelihood that TCCC may unilaterally exercise market power or influence and control DPSG's prices, and
- c. by increasing the likelihood of, or facilitating, coordinated interaction;

each of which may result in higher prices to consumers.

VIII. VIOLATIONS CHARGED

29. TCCC's access to competitively sensitive confidential information of DPSG, provided in furtherance of the DPSG-CCR license agreement entered into between Respondent TCCC and DPSG for the sale and distribution by CCR of DPSG's brands of carbonated soft drinks, could lead to anticompetitive conduct and constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and upon consummation, would constitute a 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this third day of November, 2010, issues its Complaint against Respondent TCCC.

By the Commission, Commissioner Ramirez recused.

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The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by The Coca-Cola Company (“TCCC”), of the North American soft drink bottling business of Coca-Cola Enterprises, Inc. (“CCE”), and the subsequent proposed acquisition and associated agreements for TCCC to acquire rights to produce, distribute, market, and sell some of the carbonated soft drink brands of Dr Pepper Snapple Group, Inc. (“DPSG”), that had been distributed by CCE and TCCC, and TCCC (hereinafter sometimes referred to as “Respondent”) having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“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 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 Decision and Order (“Order”):

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1. Respondent TCCC is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at One Coca-Cola Plaza, Atlanta, GA 30313.
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, the following definitions shall apply:

- A. “TCCC” or “Respondent” means The Coca-Cola Company, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by TCCC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; after the Acquisition, TCCC includes the North American soft drink bottling business of CCE acquired in the Acquisition.
- B. “CCE” means Coca-Cola Enterprises Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by CCE, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Acquisition” means the acquisition by TCCC of the North American soft drink bottling business of CCE.
- D. “Additional Firewalled TCCC Personnel” means those employees that are identified and approved pursuant to Paragraph II.C. of this Order

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- E. “Bottler” means an entity licensed by a Concentrate Company to produce, distribute, market, price, and sell carbonated soft drink products under the brands of that Concentrate Company.
- F. “Bottler Functions” means the following activities, and no others, of a Bottler, which are typical of a Bottler that no Concentrate Company owns or has a controlling interest in: (1) purchasing concentrate from one or more Concentrate Companies for use in the production of carbonated soft drinks, (2) producing carbonated soft drinks, (3) marketing, advertising, promoting, distributing, pricing, and selling carbonated soft drinks, (4) implementing the marketing, advertising, and promotional programs of the Concentrate Company, (5) determining and coordinating the amount or timing of funding of retail-related promotions of carbonated soft drinks for that retailer’s operations for the brands of carbonated soft drink products of more than one Concentrate Company, and (6) formulating and engaging in marketing, advertising, or promotional activities for the brands of carbonated soft drink products of more than one Concentrate Company within the Territories or across geographic areas broader than the Territories; *provided, however*, that no Concentrate-Related Functions are included in Bottler Functions. For the avoidance of doubt, for purposes of this Order, Bottler Functions include those of TCCC as a Bottler.
- G. “Commission” means the Federal Trade Commission.
- H. “Concentrate Company” means a company that formulates concentrate for the production of carbonated soft drink products and other beverages and sells the concentrate to Bottlers. For the avoidance of doubt, for purposes of this Order, TCCC and DSPG are Concentrate Companies.

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- I. “Concentrate-Related Functions” means the activities of a Concentrate Company that are typical of a Concentrate Company operating separately from and independently of any Bottler in which it may have an interest, including: (1) setting the price of the concentrate sold by the Concentrate Company and selling that concentrate, (2) making decisions with respect to formulating and introducing new brands and flavors to offer to Bottlers, (3) making decisions with respect to introducing new flavors and package sizes of existing brands, (4) formulating and designing marketing and advertising programs of the Concentrate Company, and (5) determining whether, to what extent, and when the Concentrate Company will fund Promotional Activities. For the avoidance of doubt, for purposes of this Order, Concentrate-Related Functions include those of TCCC.
- J. “DMA” means the Designated Market Areas or geographic areas defined by Nielsen Media Research Company.
- K. “DPSG” means Dr Pepper Snapple Group, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5301 Legacy Drive, Plano, Texas 75024.
- L. “DPSG Beverages” means carbonated soft drink products sold by TCCC in the United States under the DPSG brands and all package sizes and flavors sold under those brands, including fountain sales; DPSG Beverages also includes any new sizes and flavors introduced by DPSG and carried by TCCC in the Territories.
- M. “DPSG Bottler Functions” means (1) Bottler Functions related to DPSG Beverages, and (2) DPSG Freestyle Functions.

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- N. “DPSG Commercially Sensitive Information” means all information provided, disclosed, or otherwise made available by DPSG to TCCC relating to DPSG Beverages that is not in the public domain, including but not limited to information related to the research, development, production, marketing, advertising, promotion, pricing, distribution, sales, or after-sales support of DPSG Beverages; DPSG Commercially Sensitive Information includes (1) DPSG Information Relating to Concentrate-Related Functions and (2) DPSG Information Relating to Bottler Functions.
- O. “DPSG Concentrate-Related Functions” means Concentrate-Related Functions related to DPSG Beverages.
- P. “DPSG Freestyle Functions” means the manufacture, sale, and supply of Freestyle Machine cartridges made from DPSG Beverage concentrate.
- Q. “DPSG Freestyle Information” means DPSG Commercially Sensitive Information Relating To DPSG Freestyle Functions.
- R. “DPSG Information Relating to Bottler Functions” means DPSG Commercially Sensitive Information Relating To DPSG Bottler Functions; with the exception of DPSG Information Relating to Bottler Functions that is DPSG Freestyle Information, DPSG Information Relating to Bottler Functions includes no more than the type of information that DPSG provided to its Bottlers in the Territories prior to the Acquisition; *provided, however,* that DPSG Information Relating to Bottler Functions may not necessarily include all such information.
- S. “DPSG Information Relating to Concentrate Functions” means DPSG Commercially Sensitive Information relating to DPSG Concentrate-Related Functions.

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- T. “DPSG Information Relating to Independent DPSG Promotions” means DPSG Commercially Sensitive Information relating to planned Promotional Activities for DPSG Beverages that are separate from and independent of planned Promotional Activities for TCCC Beverages.
- U. “DPSG National Accounts” means:
1. those retailers that sell DPSG Beverages in the Territories (or those retailers that do not sell DPSG Beverages in the Territories but that DPSG is calling on to persuade them to sell DPSG Beverages in the Territories) to which DPSG makes account calls in support of the DPSG Beverages sold by TCCC in the Territories; and
 2. those retailers that sell DPSG Beverages in Freestyle Machines (or those retailers that do not sell DPSG Beverages in Freestyle Machines but that DPSG is calling on to persuade them to sell DPSG Beverages in Freestyle Machines) to which DPSG makes account calls in support of the DPSG Beverages sold in Freestyle Machines.
- V. “Freestyle Machine” means TCCC’s proprietary Freestyle™ fountain machine.
- W. “Legal or Regulatory Functions” means activities necessary to comply with financial or other regulatory requirements, obtain or provide legal advice, or otherwise comply with applicable laws and regulations, including this Order.
- X. “License Transaction” means:
1. the agreement between TCCC and DPSG containing a license to produce, distribute, market, price, and sell DPSG Beverages in the United States, the form of which TCCC and DPSG agreed upon on June 7, 2010; and

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2. the Freestyle Participation Agreement in the form of which TCCC and DPSG agreed upon on June 7, 2010.
- Y. "MSA" means the Metropolitan or Micropolitan Statistical Areas or geographic areas defined by the U.S. Office of Management and Budget.
- Z. "Management Documents" means all electronic and computer files and written, recorded, and graphic materials of every kind, including copies of documents that are not identical duplicates of the originals, that were written by, addressed to, or delivered to, officials with managerial, oversight, or reviewing responsibilities.
- AA. "Monitor" means the person appointed by the Commission pursuant to Paragraph III. of this Order.
- BB. "National Accounts Sales Team" means the TCCC Bottling Operations Personnel who (1) call on DPSG National Accounts and (2) determine and formulate the level and timing of Promotional Activities in support of TCCC Beverages sold by TCCC in the Territories that do not include DPSG Beverages.
- CC. "Promotional Activities" means price and non-price promotions, in-store displays, and newspaper inserts.
- DD. "Relating To" means discussing, analyzing, summarizing, describing, or constituting, but not merely referring to.
- EE. "TCCC Beverages" means TCCC brands of carbonated soft drink products and all package sizes and flavors thereof; TCCC Beverages shall not include DPSG Beverages.
- FF. "TCCC Bottling Operations Personnel" means the persons, functions, or positions of or within TCCC that satisfy all of the criteria described in Paragraph II. of

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this Order; “TCCC Bottling Operations Personnel” as of the date the Agreement Containing Consent Order is executed shall include, but not be limited to, the names, functions, or positions described in Appendix A to this Order (“List”) and all people who report (directly or indirectly) to such names, functions, or positions; the List shall indicate those who have limited access under paragraph II.A; all changes to the TCCC Bottling Operations Personnel shall be in accordance with the procedure described in Paragraph II. of this Order.

- GG. “Territories” means, for each brand, those territories shown in Appendix B.

II.

IT IS FURTHER ORDERED that:

- A. TCCC shall use DPSG Commercially Sensitive Information only under the following conditions:
1. the DPSG Commercially Sensitive Information consists only of DPSG Information Relating to Bottler Functions;
 2. the DPSG Commercially Sensitive Information is provided, disclosed, or otherwise made available only to TCCC Bottling Operations Personnel or to Additional Firewalled TCCC Personnel;
 3. TCCC Bottling Operations Personnel shall include only those persons, functions, or positions that:
 - a. are responsible for Bottler Functions or Legal or Regulatory Functions only; *provided, however,* that persons, functions, or positions included within “TCCC Bottling Operations Personnel” because they are responsible for Legal or Regulatory Functions shall have access to and use of such DPSG Commercially Sensitive Information only to the extent such

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information is necessary to perform such Legal or Regulatory Functions;

- b. are not responsible for Concentrate-Related Functions, and if any such person, function, or position reports (directly or indirectly) to a person responsible for Concentrate-Related Functions, that person, function, or position shall not disclose, provide, or otherwise make available DPSG Commercially Sensitive Information to the person responsible (directly or indirectly) for Concentrate-Related Functions; and
 - c. do not receive bonus or other tangible benefits related to the marginal sale of TCCC Beverages as a disproportionate benefit to any bonus or tangible benefit related to the marginal sale of DPSG Beverages;
4. an executed non-disclosure agreement and a statement attesting that he or she has received a copy of this Order, will comply with its terms, and will take all reasonable steps to assure that employees that report to him or her will comply with its terms:
- a. shall be submitted to the staff of the Commission by each person specifically identified in Appendix A no later than twenty (20) days after Respondent executes the Agreement Containing Consent Order; and
 - b. by each TCCC Bottling Operations Personnel who replaces any of those specifically identified in Appendix A or who are given responsibilities comparable to those people specifically identified in Appendix A no later than ten (10) days after assuming those responsibilities;

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5. the DPSG Commercially Sensitive Information is used only in connection with DPSG Bottler Functions, or solely for the purpose of Legal or Regulatory Functions;
 6. the DPSG Commercially Sensitive Information is used only in the Territories; *provided, however*, that with respect to DPSG Information Relating to Bottler Functions that is DPSG Freestyle Information, such information may be used anywhere in the United States;
 7. the DPSG Commercially Sensitive Information is not used in connection with Concentrate-Related Functions in any way, such prohibition to include but not be limited to using the information even if the DPSG Commercially Sensitive Information is not itself revealed;
 8. all DPSG documents and copies of documents reflecting or containing DPSG Commercially Sensitive Information (whether in the form provided by DPSG or in a form created by TCCC) are maintained as confidential until the earlier of five (5) years or when DPSG Commercially Sensitive Information becomes public through no act of TCCC; and
 9. DPSG Information Relating to DPSG Independent Promotions shall not be provided to the National Accounts Sales Team any time prior to the disclosure of such information to any Bottler other than TCCC.
- B. TCCC shall change the TCCC Bottling Operations Personnel only pursuant to the following procedures:
1. replacing or adding individuals who report (directly or indirectly) to the people, functions, or positions specifically identified in Appendix A shall be in accordance with the usual and customary business practices of TCCC;

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2. replacing any of the people specifically identified in Appendix A or re-organizing functions or positions specifically identified in Appendix A shall be in accordance with the usual and customary business practices of TCCC after notification to the Monitor;
 3. adding new functions or positions that are not specifically identified in Appendix A shall require prior notification to the Monitor and staff of the Federal Trade Commission in accordance with the following:
 - a. the staff shall have ten (10) days from notification to consider the proposed change; and
 - b. if the staff does not object, in writing including its reasons for objecting, to the change within ten (10) days of its notification, TCCC shall be permitted to make the change.
- C. TCCC shall disclose DPSG Commercially Sensitive Information to Additional Firewalled TCCC Personnel only under the following conditions:
1. such Additional Firewalled TCCC Personnel:
 - a. are employees or agents of TCCC; and
 - b. are approved by DPSG, receive only the limited information approved by DPSG, for the time period approved by DPSG, all according to the procedure described in ¶ I.C.2. of the Order, below.
 2. TCCC shall comply with the following procedure in connection with Additional Firewalled TCCC Personnel:

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- a. TCCC shall submit the name, position, and function of any proposed Additional Firewalled TCCC Personnel to DPSG, the Monitor, and Commission staff, together with a statement of the reasons for the need to include such person, the specific DPSG Information Relating to Bottler Functions that is necessary to be shared, and the time period during which the information is intended to be shared;
 - b. DPSG shall notify TCCC, the Monitor (if so appointed), and Commission staff within twenty (20) days whether or not it objects to the proposal;
 - c. if DPSG does not object within twenty (20) days of receiving notification of the proposal, TCCC shall notify the Commission staff;
 - d. if Commission staff does not object, in writing including its reasons for objecting, within ten (10) days of its notification that DPSG does not object, the person shall be an Additional Firewalled TCCC Personnel; and
 - e. TCCC must obtain from each Additional Firewalled TCCC Personnel an executed non-disclosure agreement and a statement attesting that he or she has received a copy of this Order and will comply with its terms.
- D. TCCC shall develop and implement procedures with respect to DPSG Commercially Sensitive Information, with the advice and assistance of the Monitor, to comply with the requirements of this Order.
1. such procedures shall assure, without limitation, that DPSG Commercially Sensitive Information is:
 - a. disclosed only if it is DPSG Information relating to Bottler Functions;

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- b. disclosed only to TCCC Bottling Operations Personnel or to Additional Firewalled TCCC Personnel;
 - c. used solely for DPSG Bottler Functions or Legal or Regulatory Functions in the Territories, or with respect to DPSG Information Relating to Bottler Functions that is DPSG Freestyle Information anywhere in the United States; and not for Concentrate-Related Functions; and
 - d. maintained confidentially;
2. such procedures shall include, without limitation:
- a. monitoring compliance;
 - b. enforcing compliance with appropriate remedial action in the event of non-compliant use or disclosure;
 - c. distributing information regarding the procedures annually to all employees of TCCC associated with its carbonated soft drink products; and
 - d. requiring that the TCCC Bottling Operations Personnel and the Additional Firewalled TCCC Personnel comply with the requirements of this Order.

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

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

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- B. The Commission shall select the Monitor, subject to the consent of TCCC, which consent shall not be unreasonably withheld. If TCCC 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 TCCC of the identity of any proposed Monitor, TCCC shall be deemed to have consented to the selection of the proposed Monitor.
- C. Not later than ten (10) days after the appointment of the Monitor, TCCC shall execute an agreement that, subject to the prior approval of the Commission, confers upon the Monitor all the rights and powers necessary to permit the Monitor to monitor TCCC's compliance with the requirements of this Order.
- D. If a Monitor is appointed by the Commission, TCCC 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 TCCC's compliance with the requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the underlying purpose of this Order and in consultation with the Commission. In carrying out its functions, the Monitor is authorized (among other appropriate things) to provide specific information to Commission staff as to whether:
 - a. DPSG Commercially Sensitive Information provided to TCCC is DPSG Information Relating to Bottler Functions;
 - b. DPSG Information relating to Bottler Functions is conveyed only to TCCC Bottling Operations

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Personnel or to Additional Firewalled TCCC Personnel; and

- c. DPSG Information Relating to Bottler Functions that is conveyed to the TCCC Bottling Operations Personnel or to Additional Firewalled TCCC Personnel is used solely for the purpose of carrying out DPSG Bottler Functions or Legal or Regulatory Functions.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Monitor shall serve until five (5) years after the License Transaction is effective; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purpose of this Order.
4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to TCCC's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to TCCC's compliance with its obligations under this Order. TCCC 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 TCCC's compliance with this Order.
5. The Monitor shall serve, without bond or other security, at the expense of TCCC, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of TCCC, such consultants, accountants, attorneys and other representatives and assistants as are reasonably

Decision and Order

necessary to carry out the Monitor's duties and responsibilities.

6. TCCC shall indemnify the Monitor and hold the Monitor harmless against all losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.
7. TCCC shall report to the Monitor in accordance with the requirements of this Order. The Monitor shall evaluate the reports submitted to the Monitor by TCCC. Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by TCCC of its obligations under this Order.
8. TCCC may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Monitor (and its representatives) from providing any information to the Commission.
9. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.

Decision and Order

10. In the event the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.
11. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

IV.

IT IS FURTHER ORDERED that, for the term of this Order, if TCCC intends to acquire a Bottler that is licensed to distribute TCCC Beverages anywhere in the United States and is also licensed to distribute DPSG Beverages in geographic areas outside of the Territories (“To-Be-Acquired Bottler”), TCCC may use DPSG Commercially Sensitive Information relating to the specific brand or brands in the geographic areas covered by the To-Be-Acquired Bottler’s license for the DPSG Beverages, after TCCC’s acquisition of the To-Be-Acquired Bottler, as long as TCCC complies with the obligations of Paragraph II.A. 1. - 5., and 7. - 9. of this Order, and satisfies the following additional conditions:

- A. TCCC shall comply with the obligations of this Order with respect to that DPSG Commercially Sensitive Information;
- B. For acquisitions of To-Be-Acquired Bottlers that are subject to Section 7A of the Clayton Act, 15 U.S.C. § 18a (“HSR Act”), TCCC shall also comply with the reporting and waiting obligations of the HSR Act and the rules promulgated thereunder, 16 C.F.R. § 800 et seq.;
- C. For acquisitions of To-Be-Acquired Bottlers that are not subject to the HSR Act:

Decision and Order

1. TCCC shall provide at least forty-five (45) days' advance written notification of the acquisition to the staff of the Commission, such notification to include:
 - a. the name, headquarters address, telephone number, and name of contact person of the To-Be-Acquired Bottler;
 - b. a description of the proposed acquisition and the assets to be acquired, and the acquisition price;
 - c. a copy of all existing and draft licenses and performance obligations entered into or anticipated to be entered into between DPSG, Respondent, and/or the To-Be-Acquired Bottler;
 - d. a description of the geographic areas in which the To-Be-Acquired Bottler is licensed, and in which TCCC is anticipated to be licensed, to produce, distribute, market, price, or sell TCCC Beverages, and, to the extent TCCC has such information, a description of the geographic areas in which the To-Be-Acquired Bottler is licensed to produce, distribute, market, price, or sell DPSG Beverages;
 - e. the date each license or anticipated license was, or is expected to be, entered into between DPSG, Respondent, and/or the To-Be-Acquired Bottler with respect to:
 - (1) TCCC Beverages and
 - (2) DPSG Beverages;
 - f. for the most recent 12-month period and for each MSA, DMA, city, or other geographic area in which the To-Be-Acquired Bottler

Decision and Order

bottles, distributes, or sells TCCC Beverages and/or DPSG Beverages,

(1) for any and all carbonated soft drinks:

(a) all Nielsen, IRI, or similar data with respect to that MSA, DMA, city, or other geographic area; and

(b) all market share information, written or otherwise, with respect to that MSA, DMA, city, or other geographic area,

that TCCC has, and

(2) for the most recent 12-month period for which TCCC has such information, sales in units (in constant case equivalents) and dollars, of

(a) TCCC Beverages, by brand, of the To-Be-Acquired Bottler, and

(b) concentrate, by brand, to the To-Be-Acquired Bottler;

g. all documents Relating To communications between TCCC, DPSG, and the To-Be-Acquired Bottler with respect to the acquisition of the To-Be-Acquired Bottler, the DPSG Beverage licenses, expected licenses, or performance obligations; and

h. all Management Documents Relating To the proposed acquisition;

2. Early termination of the 45-day period described in Paragraph IV.C.1. may be requested and, where appropriate, granted by letter from the Director of the Bureau of Competition; and

Decision and Order

3. If, after notification of the proposed transaction (including the information specified in Paragraph IV.C.1. a. - h.), representatives of the Commission make a written request for additional information or documentary material with respect to the acquisition of the To-Be-Acquired Bottler, TCCC shall respond expeditiously and submit all such additional information and documentary material and certify substantial compliance with the request;

provided, however, that a determination that TCCC has complied with the obligations contained in this Paragraph IV. in connection with its acquisition of a To-Be-Acquired Bottler shall not be construed as a determination by the Commission, or its staff, that the acquisition of the To-Be-Acquired Bottler does or does not violate any law enforced by the Commission; and provided further that nothing contained herein shall preclude the Commission or its staff from investigating the acquisition or proposed acquisition by TCCC of any Bottler, including a To-Be-Acquired Bottler, and seeking any relief available under any statute enforced by the Commission.

V.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after this Order becomes final, TCCC 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. TCCC shall include in its report, among other information that may be required, a list of all Bottlers of TCCC Beverages that, at the time of submission of the list, also bottle DPSG Beverages; for each such Bottler, TCCC shall list:
 - a. each brand of TCCC Beverages that such Bottler is licensed to distribute, together with a description of the geographic areas in which each brand is licensed to be distributed; and

Decision and Order

- b. each brand of DPSG Beverages that such Bottler is distributing anywhere in each county within each geographic area described in Paragraph V.A.1.a. to the extent that TCCC has this information or can obtain it from industry publications to which it subscribes.
 2. TCCC shall at the same time also provide a copy of its report concerning compliance with this Order to any Monitor that may have been appointed.
- B. One (1) year after this Order becomes final, annually for the next nineteen (19) years on the anniversary of that date, and at other times as the Commission may require:
 1. TCCC 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 this Order;
 2. TCCC shall also include in each of its annual reports:
 - a. any changes to the list of Bottlers of TCCC Beverages submitted under Paragraph IV.A. of this Order, including any deletions, additions, or other changes; and
 - b. for all To-Be-Acquired Bottlers acquired by TCCC during the previous year, a description of the geographic areas in which the To-Be-Acquired Bottler is licensed to produce, distribute, market, price, or sell each DPSG Beverage.

VI.

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

Decision and Order

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

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 TCCC made to its principal United States offices, registered office of its United States subsidiary, or headquarters address, TCCC shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during business office hours of TCCC 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 TCCC related to compliance with this Order, which copying services shall be provided by TCCC at the request of the authorized representative(s) of the Commission and at the expense of TCCC.
- B. The opportunity to interview officers, directors, or employees of TCCC, who may have counsel present, related to compliance with this Order.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate on November 3, 2030.

By the Commission, Commissioner Ramirez recused.

Decision and Order

APPENDIX A

APPENDIX A**TCCC's Bottling Operations Personnel****(Dated as of September 16, 2010)**

CEO, Coca-Cola Refreshments USA, who at the time of the closing of the Acquisition will be Steve Cahillane:

- The CEO will be responsible for all bottler operations.
- The CEO, all of his direct reports, and the entire organization below them, will be part of the TCCC Bottling Operations, referred to as "Coca-Cola Refreshments USA" ("CCR") by Respondent; none will have Concentrate-Related Functions.
- CCR will be responsible for executing third-party brand distribution agreements in accordance with applicable information firewall requirements.
- The CEO will report to the CEO of TCCC (who at the time of the closing of the Acquisition is Muhtar Kent).

Position in Commercial Leadership, who at the time of the closing of the Acquisition will be Julie Francis:

- This position will be responsible for channel and customer strategies across all U.S. geographies, channels, and routes to market.
- This position will have responsibility for pricing, planning, and trade management capabilities and for capabilities in areas such as category management, sales execution, and e-commerce.
- This position will report directly to the CEO, CCR.

Position in National Retail Sales, who at the time of the closing of the Acquisition will be Mel Landis:

- This position will lead strategic relationships with national customers, serving as the lead representative of the Coca-Cola System with these key customers.
- This position will have customer management responsibilities across all categories and routes to market for bottle/can and fountain packaging.
- This position will report directly to the CEO, CCR.

Position in National Foodservice and On-Premise, who at the time of the closing of the Acquisition will be Chris Lowe:

- This position will be responsible for beverage solutions and sales, including strategic customer account management, with all national and regional Foodservice customers, across all beverage categories and package forms.
- This position will report directly to the CEO, CCR.

Decision and Order

APPENDIX A

Position in Regional Sales, who at the time of the closing of the Acquisition will be Glen Walter:

- This position will execute national, regional, and local Foodservice and Retail customer plans across multiple U.S. regions.
- This position will develop and execute regional and local programs to serve customers needs.
- This position will report directly to the CEO, CCR.

Position in Coca-Cola Refreshments Canada, who at the time of the closing of the Acquisition will be Kevin Warren:

- This position will be responsible for sales and operations leadership of business across all of Canada.
- This position will report directly to the CEO, CCR.

Position in Customer Care, who at the time of the closing of the Acquisition will be Michelle Guswiler:

- This position will lead customer contact centers, which manage product orders/issue resolution, equipment installation and servicing, parts fulfillment, and consumer inquiries/issue resolution.
- This position will provide strategic leadership, supply chain expertise, and support to key customer account teams.
- This position will report directly to the CEO, CCR.

Position in Product Supply System, who at the time of the closing of the Acquisition will be Brian Kelley:

- This position will lead the operations for all brands and packages, across all routes to market, including manufacturing, procurement, transportation, warehouse and direct store delivery.
- This position will lead efforts in areas such as quality, safety, environmental sustainability, and operational excellence.
- This position will operate the Odwalls business.
- This position will report directly to the CEO, CCR.

Position in Business Transformation Office (BTO), who at the time of the closing of the Acquisition will be Steve Jones:

- This position will steward business integration activities and the execution of integration plans after the close of the Acquisition.
- This position will manage transformational projects that fall outside ongoing business activities.
- This position will report directly to the CEO, CCR.

Decision and Order

APPENDIX A

Position in Finance, who at the time of the closing of the Acquisition will be Duane Still:

- This position will be accountable for overall financial stewardship, including centralized management and financial reporting, financial planning and forecasting, and report-to-record activities.
- This position will lead real estate activities and CCR business planning.
- This position will report directly to the CEO, CCR.

Position in Human Resources, who at the time of the closing of the Acquisition will be Laura Miller:

- This position will develop and execute human resource strategies and will lead development and implementation for all human resource initiatives and processes.
- This position will identify solutions for organizational capabilities, required competencies and skills, and future strategic objectives.
- This position will report directly to the CEO, CCR.

Position in Information Technology, who at the time of the closing of the Acquisition will be Tom Miller:

- This position will streamline and consolidate information technology applications across the North American business and ensure maintenance of a sustainable business system platform.
- This position will report directly to the CEO, CCR.

Position in Legal, who at the time of the closing of the Acquisition will be Ben Garren:

- This position will provide legal support and oversight of legal services.
- This position will report directly to the CEO, CCR.

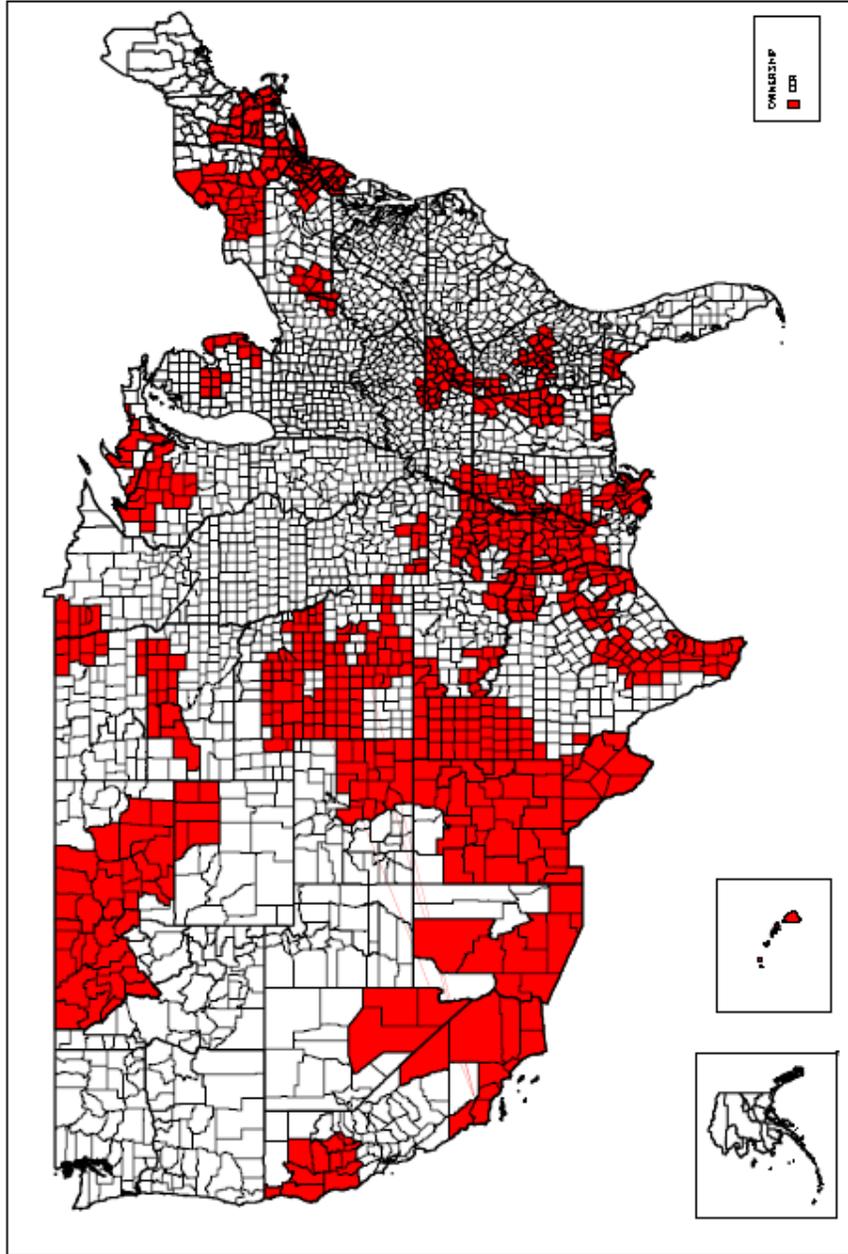
Position in Public Affairs and Communications, who at the time of the closing of the Acquisition will be Sonya Soutus:

- This position will be responsible for the development and execution of stakeholder engagement, communication, media, and government relations strategies and campaigns.
- This position will lead efforts in partnership with Marketing and business operations to support and enable growth while protecting and enhancing the reputation of TCCC and its brands.
- This position will report directly to the CEO, CCR.

Decision and Order

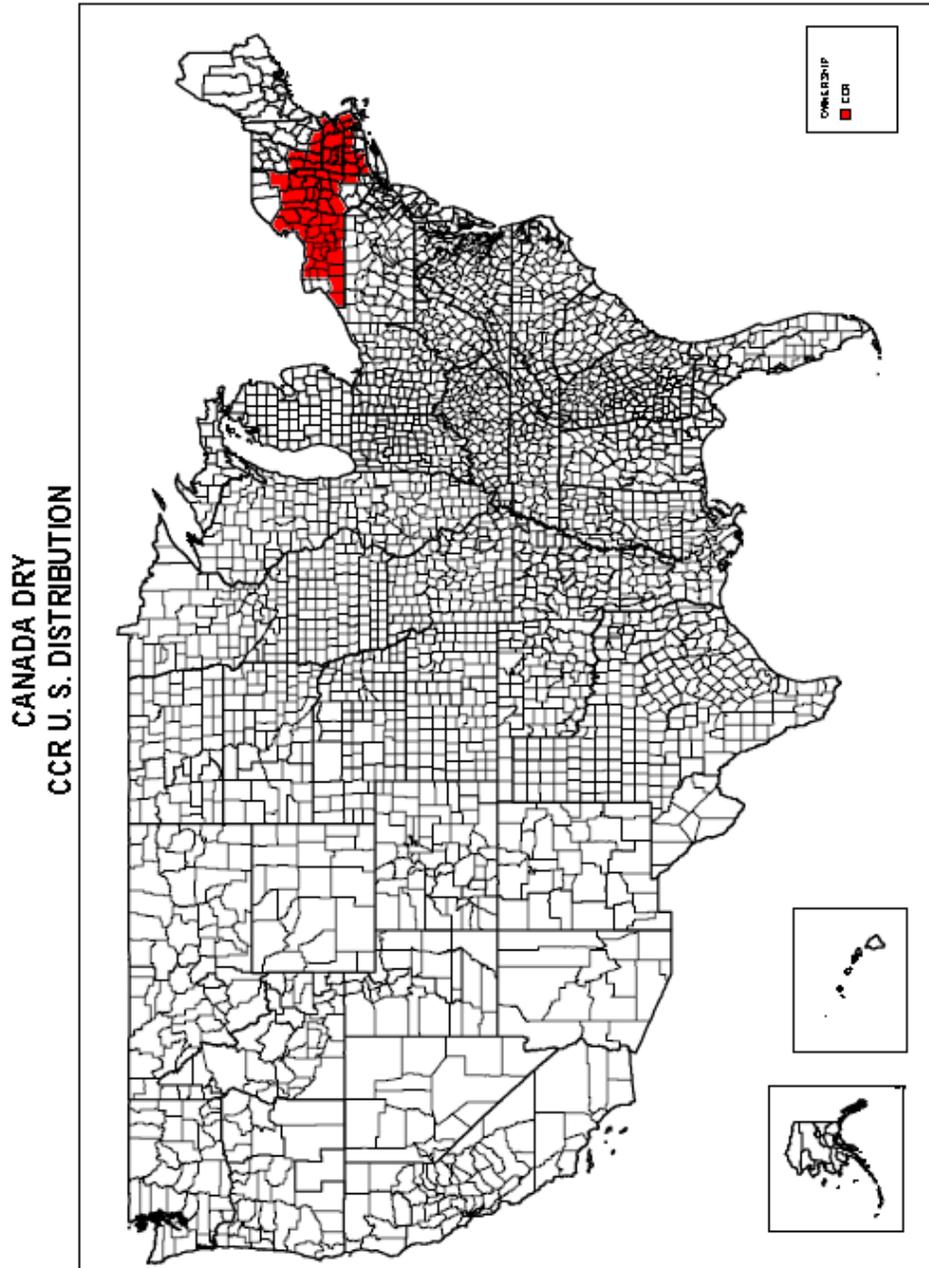
APPENDIX B

**DR PEPPER
CCR U.S. DISTRIBUTION**



Decision and Order

APPENDIX B



Analysis to Aid Public Comment

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDER TO AID PUBLIC COMMENT****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order from Respondent The Coca-Cola Company (“TCCC”) to address concerns in connection with TCCC’s acquisition of its largest bottler and the subsequent exclusive license from Dr Pepper Snapple Group, Inc. (“DPSG”), to bottle, distribute, and sell the Dr Pepper, Diet Dr Pepper, and Canada Dry carbonated soft drink brands of DPSG in certain territories. The Consent Agreement, among other things, requires that TCCC limit the persons within the company who have access to the commercially sensitive confidential information that DPSG may provide to TCCC to carry out the distribution functions contemplated by the license.

The DPSG-TCCC license agreement followed TCCC’s announced proposed acquisition of the North American business of its largest bottler, Coca-Cola Enterprises Inc. (“CCE”). CCE is licensed by TCCC and DPSG to bottle and distribute many of their carbonated soft drink brands. Following the acquisition, TCCC, through its subsidiary Coca-Cola Refreshments U.S.A., Inc. (“CCR”), will take on the bottling and distribution functions previously performed in the United States by CCE.

The Complaint alleges that TCCC’s access to DPSG’s commercially sensitive confidential marketing and brand plans, without adequate safeguards to ensure that TCCC will not misuse the information, could lead to anticompetitive conduct that would make DPSG a less effective competitor and/or facilitate coordination in the industry. The proposed Consent Agreement remedies this concern by limiting access to the DPSG commercially sensitive information to TCCC employees who perform traditional carbonated soft drink “bottler functions” formerly performed by CCE and not permitting access to TCCC employees involved in traditional “concentrate-related functions.”

Analysis to Aid Public Comment

II. Respondent The Coca-Cola Company

TCCC is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1 Coca-Cola Plaza, Atlanta, Georgia 30313. It is the world's largest soft drink company and makes or licenses more than 3,000 drinks under 500 brand names in 200 countries. In 2009, TCCC's worldwide revenues from the sale of all products were about \$31 billion.

III. Licensor Dr Pepper Snapple Group, Inc.

DPSG is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 5301 Legacy Drive, Plano, Texas 75024. Among other things, DPSG produces the concentrate for the DPSG carbonated soft drink brands that are distributed by its bottlers. Some of these brands are Dr Pepper, Diet Dr Pepper, Crush, Canada Dry, Schweppes, Vernor's, A&W Root Beer, 7-UP, RC Cola, Sunkist, and Squirt. In 2009, DPSG's net sales were about \$5.5 billion, and its United States net sales of carbonated soft drink concentrate were about \$1.1 billion. Dr Pepper Seven Up, Inc., will sign the license with TCCC.

IV. The Bottler**A. Coca-Cola Enterprises Inc.**

CCE 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 2500 Windy Ridge Parkway Suite 700, Atlanta, Georgia 30039. It is the largest TCCC bottler in North America, spanning 46 states and the District of Columbia. In 2009, CCE's sales of carbonated soft drinks totaled about \$21 billion. CCE's North American business operations contributed 70% of this revenue. CCE accounts for about 75-80% of TCCC's North America bottler-distributed volume, and TCCC products represent over 90% of CCE's total volume.

Analysis to Aid Public Comment

V. The Transactions**A. The Bottler Acquisition**

On February 25, 2010, TCCC reached an agreement with CCE to acquire the North American assets of CCE for \$12.3 billion. At the time of the agreement, TCCC owned about 34% of CCE. Post-acquisition, the North American operations of CCE will be subsumed within a new organization known as Coca-Cola Refreshments USA, Inc. (“CCR”). CCR’s business will comprise CCE’s current North American operations, and CCR also will have responsibility for the supply chain for still beverages and juices, fountain/Freestyle, and national key customer management. Post-acquisition, Coca-Cola USA will manufacture and supply concentrate and engage in consumer brand marketing and innovation with respect to new drinks and brands.

B. The DPSG-TCCC License Agreement

Following the agreement to acquire CCE, TCCC sought a license to continue to bottle and distribute the DPSG brands that CCE had distributed. (The DPSG license held by CCE was terminated by DPSG as a result of the proposed acquisition.) In the DPSG-CCR license agreement, TCCC agreed to bottle and distribute DPSG’s Dr Pepper brand products and Canada Dry products in the former CCE territories, where CCE had been producing and distributing these products. TCCC agreed to pay DPSG \$715 million for a non-exclusive license to produce and an exclusive, twenty-year¹ license to distribute and sell those brands.

Under the license agreement, CCR has agreed, among other things to, (a) distribute the Dr Pepper brand in all classes of trade based on certain TCCC brands; (b) grow the Dr Pepper brand based in some measure on certain sales criteria of other bottlers; and (c) advertise, promote, and market the Dr Pepper brand and provide sales support for such promotions, based in some measure on CCR’s advertising, promotions, and marketing of certain TCCC brands.

¹The license agreement is for an initial term of twenty (20) years, with automatic renewal for additional twenty (20) year periods, unless terminated pursuant to its terms.

Analysis to Aid Public Comment

C. The DPSG-CCR Freestyle Agreement

TCCC also will give Dr Pepper access to TCCC's new proprietary "Freestyle" fountain dispensing equipment. The Freestyle machine has a footprint comparable to a traditional lever-based fountain dispenser, but it allows users to create more than 120 custom-flavored beverages. DPSG values the Freestyle Participation Agreement at approximately \$115 million.

VI. The Proposed Complaint

The Commission's Complaint alleges that TCCC and DPSG are direct competitors in the highly concentrated and difficult to enter (a) branded concentrate and (b) branded direct-store-delivered carbonated soft drink markets. The concentrate market is national, and the branded soft drink markets are local. Total United States sales of concentrate is about \$9 billion, and total United States sales of carbonated soft drinks, measured at retail, is about \$70 billion.

To carry out the distribution activities currently undertaken by the bottler and contemplated under the license agreement, DPSG will need to provide commercially sensitive confidential information about its marketing plans to CCR, the newly created TCCC bottler subsidiary. DPSG currently provides this sort of information to CCE in order for it to perform its bottler or distribution functions. The Commission is concerned that TCCC's access to this information could enable it to use the information in ways that could impair DPSG's ability to compete and ultimately injure competition by weakening a competitor or facilitating coordination in the industry. The Complaint alleges that TCCC's access to DPSG's confidential information could eliminate competition between TCCC and DPSG, increase the likelihood that TCCC may unilaterally exercise market power, and facilitate coordinated interaction in the industry.

Analysis to Aid Public Comment

VII. The Proposed Consent Order

Under the proposed Consent Order, to remedy the alleged competitive concern associated with access to the DPSG commercially sensitive confidential information, TCCC will be required to set up a “firewall” to ensure that persons at TCCC who may be in a position to use the DPSG commercially sensitive information in ways that may injure DPSG and/or facilitate coordination will not be allowed access to such information. Persons at TCCC who are assigned to perform traditional “bottler functions”– the kinds of functions that CCE have historically performed for DPSG – will be permitted access to the DPSG information. Persons responsible for “concentrate-related functions”– the kinds of functions that TCCC engaged in as a competitor of DPSG when both had their brands distributed by CCE – will not be permitted access to the DPSG information.

The proposed Consent Agreement provides for the appointment of a monitor to assure TCCC’s compliance with the Consent Order. The monitor will have a fiduciary responsibility to the Commission. The monitor will be appointed for a five (5) year term, but the Commission may extend or modify the term as appropriate.

The proposed Consent Agreement contains a prior notice provision for subsequent acquisitions by TCCC of its franchised bottlers that also are licensed to distribute DPSG products. Under the order, TCCC will be required to give the Commission forty-five (45) advance notice of a proposed acquisition that is not subject to the Hart-Scott-Rodino Act and provide the Commission with all management documents relating to the proposed acquisition. If the 45-day period expires without Commission action, TCCC will be permitted to consummate the proposed acquisition and use DPSG confidential information in the territories of the newly acquired bottler as specified in this order. The standard Hart-Scott-Rodino procedures and time periods would continue to apply for Hart-Scott-Rodino reportable transactions.

The order, like the DPSG-TCCC license agreement, will have a term of twenty (20) years.

Analysis to Aid Public Comment

VIII. Opportunity for Public Comment

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

By accepting the Consent Agreement subject to final approval, the Commission anticipates that the competitive problem alleged in the Complaint will be resolved. The purpose of this analysis is to invite and facilitate public comment concerning the Consent Agreement. It is not intended to constitute an official interpretation of the proposed Consent Agreement, nor is it intended to modify the terms of the Decision and Order in any way.

Complaint

IN THE MATTER OF

MARK DREHER, PH.D.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5(A) AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4306; File No. 082 3122

Filed November 4, 2010 — Decision, November 4, 2010

The consent order settles allegations that that Mark Dreher, Ph.D., as Vice President of Science & Regulatory Affairs of POM Wonderful LLC, disseminated or caused to be disseminated false or misleading advertisements and promotional materials for POM Juice and POMx products. Specifically, the complaint alleges that Mr. Dreher represented that clinical studies, research and/or trials prove that drinking eight ounces of POM Juice, taking one POMx Pill, or taking one teaspoon of POMx Liquid, daily, treats, prevents, or reduces the risk of heart disease or prostate cancer. The consent order prohibits Mr. Dreher from representing that any POM product is effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease, unless the FDA specifically approves such a claim. The consent order further prohibits Mr. Dreher from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research; or from misrepresenting the health benefits, performance, or efficacy of POM's products. The consent order also requires Mr. Dreher to keep copies of relevant advertisements and materials substantiating advertising claims and to notify the Commission of any changes in employment for the next 20 years.

Participants

For the *Commission*: *Tawana E. Davis, Janet M. Evans, Mary L. Johnson, Elizabeth Nach, Elise Whang, and Andrew Wone.*

For the *Respondent*: *William M. Hannay and Ron Safer, SchiffHarden LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Mark Dreher, Ph.D., individually, 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 Mark Dreher, Ph.D., was the Vice President of Science & Regulatory Affairs of POM Wonderful LLC (“POM Wonderful”) from approximately August 2005 to May 2009. Individually or in concert with others, he participated in the policies, acts, or practices of the corporation, including the acts or practices alleged in this complaint. His principal office or place of business from 2005 to 2009 was that of the corporation, and his current principal office or place of business is in Wimberley, Texas.

2. Respondent participated in the manufacturing, advertising, labeling, offering for sale, sale, and distribution of products to the public, including POM Wonderful 100% Pomegranate Juice (hereinafter “POM Juice”), and POMx Pills and POMx Liquid (hereinafter “POMx”). POM Juice and POMx are “foods” and/or “drugs” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

3. The acts and practices of Respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent participated in the dissemination of or caused to be disseminated advertising and promotional materials for POM Juice and POMx. Examples of those advertising and promotional materials are attached as Exhibits A and B. These materials contain the following representations or statements, including statements made as an expert endorser, among others:

a. * * *

What’s New in the Lab by Dr. Mark Dreher

Picture of Mark Dreher

Mark Dreher, PhD
Chief Science Officer
POMWonderful, LLC

Hi, I’m Dr. Mark Dreher, Chief Science Officer at POM, and your guide to continuing new research on

Complaint

the benefits of POMx and POM Wonderful pomegranates as they relate to your health.

* * *

NEW RESEARCH OFFERS FURTHER PROOF OF
THE HEART-HEALTHY BENEFITS OF POM
WONDERFUL JUICE

30% DECREASE IN ARTERIAL PLAQUE

After one year of a pilot study conducted at the Technion Institute in Israel involving 19 patients with atherosclerosis (clogged arteries) . . . those patients who consumed 8 oz of POM Wonderful 100% Pomegranate Juice daily saw a 30% decrease in arterial plaque.

17% IMPROVED BLOOD FLOW

A recent study at the University of California, San Francisco (UCSF) included 45 patients with impaired blood flow to the heart. Patients who consumed 8 oz of POM Wonderful 100% Pomegranate Juice daily for three months experienced 17% improved blood flow. Those who drank a placebo experienced an 18% decline.

* * *

— POMx Pills and Liquid Heart Newsletter (Sept. 2007-Feb. 2008) [Exh. A]

b. * * *

**Prostate Cancer Affects
1 Out of Every 6 Men**

Prostate cancer is the second leading cause of cancer related death in men in the United States according to the National Cancer Institute. Prostate cancer incidence rates rose dramatically in the late 1980's with improved detection and diagnosis through widespread use of prostate-specific antigen (PSA) testing.

Complaint

* * *

What's New in the Lab by Dr. Mark Dreher

Picture of Mark Dreher

Mark Dreher, PhD
Chief Science Officer
POMWonderful, LLC

* * *

POM Wonderful 100% Pomegranate Juice and POMx are backed by a \$25 million dollar investment in world-class scientific research. This includes ten clinical studies published in top peer-reviewed medical journals that document the pomegranate's antioxidant health benefits such as heart and prostate health.

* * *

In fact, studies funded by POM represent the vast majority of human medical research ever conducted on pomegranates.

* * *

**NEW POMEGRANATE RESEARCH OFFERS
 HOPE TO PROSTATE CANCER PATIENTS**

A preliminary UCLA medical study involving POM Wonderful 100% Pomegranate Juice revealed promising news. 46 men who had been treated for prostate cancer with surgery or radiation were given 8oz [sic] of POM Wonderful 100% Pomegranate Juice to drink daily.

<p>Patients with prostate cancer showed a prolongation of PSA doubling time, coupled with corresponding lab effects on reduced prostate cancer as well as reduced oxidated stress.</p>
--

Complaint

A majority of the patients experienced a significantly extended PSA doubling time. Doubling time is an indicator of prostate cancer progression – extended doubling time may indicate slower disease progression.

Before the study, the mean doubling time was 15 months. After drinking 8oz [sic] of pomegranate juice daily for two years, the mean PSA doubling time increased to 54 months. Testing on patient blood serum showed a 12% decrease in cancer cell proliferation and a 17% increase in cancer cell death (apoptosis).

— POMx Pills and Liquid Prostate Newsletter
(Fall 2007- Feb. 2008) [Exh. B]

5. As early as May 2007, Respondent knew that a large, double-blind, placebo-controlled study, funded by POM Wonderful and led by Dr. Michael Davidson (“the Davidson Study”), showed no significant difference after 18 months between consumption of pomegranate juice and a control beverage in reducing carotid arterial wall thickness. The Davidson study was published in October 2009. Respondent participated in touting POM Wonderful’s cardiovascular research and benefits despite the negative results of the Davidson study.

6. Through the means described in Paragraph 4, Respondent has represented, including in some instances through statements as an expert endorser, expressly or by implication, that clinical studies, research, and/or trials prove that:

- a. Drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily, prevents or reduces the risk of heart disease, including by (1) decreasing arterial plaque, and (2) improving blood flow to the heart; and
- b. Drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily, treats heart disease, including by (1) decreasing arterial plaque, and (2) improving blood flow to the heart.

Complaint

7. In truth and in fact, clinical studies, research, and/or trials do not prove that:

- a. Drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily, prevents or reduces the risk of heart disease, including by (1) decreasing arterial plaque, and (2) improving blood flow to the heart; and
- b. Drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily, treats heart disease, including by (1) decreasing arterial plaque, and (2) improving blood flow to the heart.

Among other things, the Davidson Study showed no significant difference between consumption of pomegranate juice and a control beverage in carotid intima-media thickness progression rates after 18 months; two smaller studies funded by POM Wonderful or its agents showed no significant difference between consumption of pomegranate juice and a control beverage on measures of cardiovascular function; and multiple studies funded by POM Wonderful or its agents did not show that POM products reduce blood pressure.

8. Through the means described in Paragraph 4, Respondent has represented, including in some instances through statements as an expert endorser, expressly or by implication, that clinical studies, research, and/or trials prove that:

- a. Drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily, prevents or reduces the risk of prostate cancer, including by prolonging prostate-specific antigen doubling time (“PSADT”); and
- b. Drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily, treats prostate cancer, including by prolonging PSADT.

Complaint

9. In truth and in fact, clinical studies, research, and/or trials do not prove that:

- a. Drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily, prevents or reduces the risk of prostate cancer, including by prolonging PSADT; and
- b. Drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily, treats prostate cancer, including by prolonging PSADT.

Among other things, at the time the claims were made, the evidence relied on by Respondent consisted of results from an unblinded, uncontrolled study; and the study report stated that it is “controversial whether modulation of PSA levels represents an equally valid clinical end point,” and that “further research is needed to . . . determine whether improvements in such biomarkers (including PSADT) are likely to serve as surrogates for clinical benefit.”

10. Therefore, the representations made in Paragraphs 6 and 8, were, and are, false or misleading.

11. Through the means described in Paragraph 4, Respondent has represented, including in some instances through statements as an expert endorser, expressly or by implication, that:

- a. Drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily, prevents or reduces the risk of heart disease, including by (1) decreasing arterial plaque, and (2) improving blood flow to the heart; and
- b. Drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily, treats heart disease, including by (1) decreasing arterial plaque, and (2) improving blood flow to the heart.
- c. Drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily,

Complaint

prevents or reduces the risk of prostate cancer, including by prolonging prostate-specific antigen doubling time (“PSADT”); and

- d. Drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily, treats prostate cancer, including by prolonging PSADT.

12. Through the means described in Paragraph 4, Respondent has represented, including in some instances through statements as an expert endorser, expressly or by implication, that he possessed and relied upon a reasonable basis, including an actual exercise of his represented expertise in evaluating medical research at least as extensive as an expert in the field would normally conduct in order to support the conclusions presented in the endorsement, that substantiated the representations set forth in Paragraph 11, at the time the representations were made.

13. In truth and in fact, Respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 11, at the time the representations were made. Therefore, the representation set forth in Paragraph 12 was, and is, false or misleading.

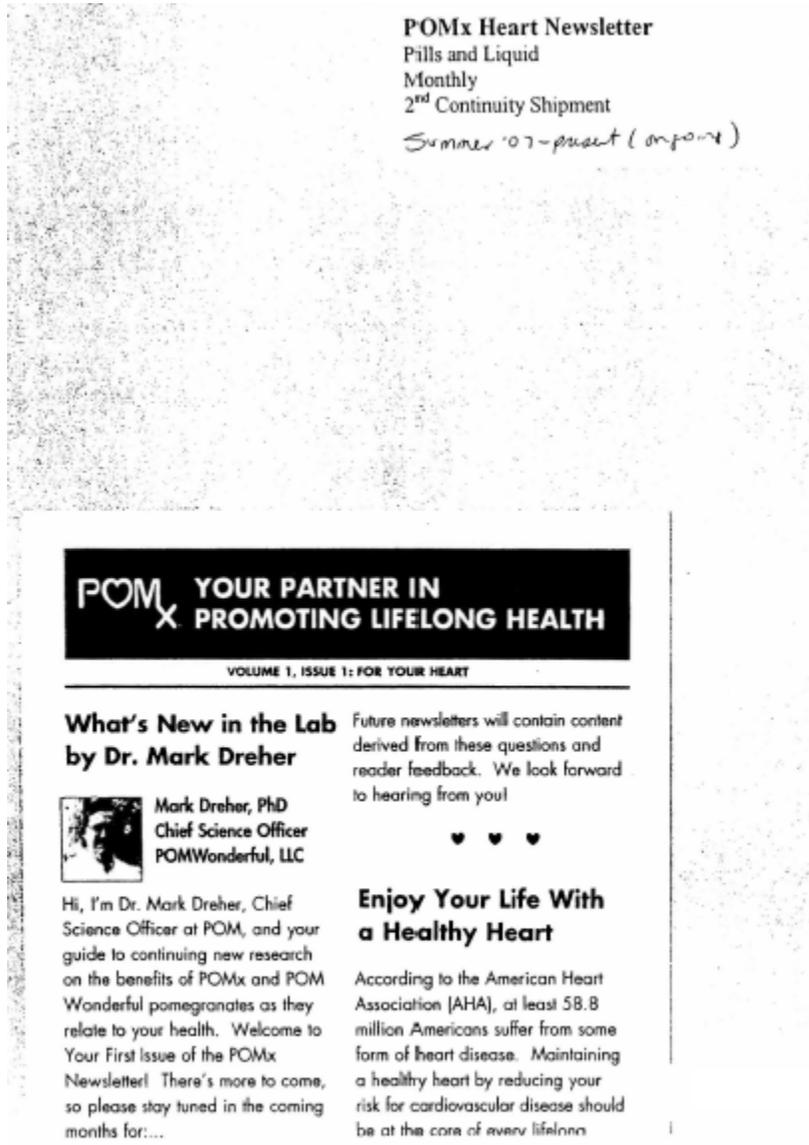
14. Respondent’s practices, as alleged in this complaint, constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, this fourth day of November, 2010, has issued this complaint against Respondent.

By the Commission.

Complaint

EXHIBIT A



POMx Heart Newsletter

Pills and Liquid
Monthly
2nd Continuity Shipment

Summer '07-present (on-going)

POMx YOUR PARTNER IN PROMOTING LIFELONG HEALTH

VOLUME 1, ISSUE 1: FOR YOUR HEART

**What's New in the Lab
by Dr. Mark Dreher**



Mark Dreher, PhD
Chief Science Officer
POMWonderful, LLC

Hi, I'm Dr. Mark Dreher, Chief Science Officer at POM, and your guide to continuing new research on the benefits of POMx and POM Wonderful pomegranates as they relate to your health. Welcome to Your First Issue of the POMx Newsletter! There's more to come, so please stay tuned in the coming months for...

Future newsletters will contain content derived from these questions and reader feedback. We look forward to hearing from you!



**Enjoy Your Life With
a Healthy Heart**

According to the American Heart Association (AHA), at least 58.8 million Americans suffer from some form of heart disease. Maintaining a healthy heart by reducing your risk for cardiovascular disease should be at the core of every lifetime.

Complaint

EXHIBIT A

POM X YOUR PARTNER IN PROMOTING LIFELONG HEALTH

VOLUME 1, ISSUE 1: FOR YOUR HEART

What's New in the Lab
by Dr. Mark Dreher

 **Mark Dreher, PhD**
Chief Science Officer
POMWonderful, LLC

Hi, I'm Dr. Mark Dreher, Chief Science Officer at POM, and your guide to continuing new research on the benefits of POMs and POM Wonderful pomegranates as they relate to your health. Welcome to Your First Issue of the POMs Newsletter! There's more to come, so please stay tuned in the coming months for...

- POM Wonderful's latest research
- Health tips
- Pomegranate facts
- New product information

There's a strong pipeline of research supporting initial findings that POM Wonderful 100% Pomegranate Juice and its counterpart, POMs, are successfully fulfilling their promise for promoting heart health. We are committed to continually testing our products, not only prior to market

Future newsletters will contain content derived from these questions and reader feedback. We look forward to hearing from you!

Enjoy Your Life With a Healthy Heart

According to the American Heart Association (AHA), at least 58.8 million Americans suffer from some form of heart disease. Maintaining a healthy heart by reducing your risk for cardiovascular disease should be at the core of every lifelong wellness plan. A nutrient-rich diet and active lifestyle are the best weapons you have for combating heart disease and enhancing your vitality at any age.

The AHA recommends eating plenty of fruits and vegetables loaded with the vitamins, minerals and fiber your body requires, without the extra calories it doesn't need. But even though you may be eating enough of the right foods, your body still may not be getting all the nutrients it needs to keep you heart truly healthy.

Did You Know?

POLYPHENOLS
Polyphenols are antioxidants that naturally occur in pomegranates. These antioxidants neutralize free radicals, helping to prevent the cell and tissue damage that can lead to disease. The heart health benefits associated with California grown, Wonderful variety pomegranates are due to their very high levels of polyphenols.

ANTIOXIDANTS: YOUR ALLY IN FIGHTING HEART DISEASE
In order to keep your body in tip-top shape and your heart beating to the rhythm of all you wish to do in life, you need help in the prevention of cell and tissue damage that can lead to disease.

Science tells us that antioxidants neutralize the free radicals that can aggressively destroy healthy cells in your body. But not all antioxidants are equal - some are better at neutralizing free radicals than others. And because your body may not always produce enough of the antioxidants required to neutralize all the free radicals that can lead to cell damage, we have developed POMs to harness and deliver the most potent antioxidants around.

THE FREE RADICAL FIGHTER
Pomegranates contain polyphenols - powerful antioxidants that are important as part of a balanced diet. Published research has shown that the unique polyphenol antioxidants (please turn to back)

release but at every step in their evolution. Various patient studies across a wide variety of health concerns are in the works, and we look forward to sharing the results of this research with you.

At POM Wonderful, we aim to be your partner in the promotion of good health that lasts a lifetime. It is our commitment to you and our mission as a company. If you have any questions and/or concerns please send them directly to me at chiefscienceoffice@pomwonderful.com

Complaint

EXHIBIT A

VOLUME 1, ISSUE 1: FOR YOUR HEART

Healthy Heart (from food) in POMx and POM Wonderful 100% Pomegranate Juice are superior fighters in the battle against free radicals. Each dose of POMx contains the same amount of antioxidant polyphenols found in 8oz of POM Wonderful 100%.

The antioxidants in POMx are supported by \$20 million in initial scientific research

Pomegranate Juice, and POMx is the most concentrated source of pomegranate polyphenol antioxidants available.

POM Wonderful is committed to understanding the effects of POM Wonderful Pomegranate Juice on cardiovascular health. To date, our scientists have found that pomegranate juice may help counteract factors leading to arterial plaque build up, as well as inhibit a number of factors associated with heart disease.

NEW RESEARCH OFFERS FURTHER PROOF OF THE HEART-HEALTHY BENEFITS OF POM WONDERFUL JUICE

30% DECREASE IN ARTERIAL PLAQUE

After one year of a pilot study conducted at the Technion Institute in Israel involving 19 patients with atherosclerosis (clogged arteries),

those patients who consumed 8oz of POM Wonderful 100% Pomegranate Juice daily saw a 30% decrease in arterial plaque.

17% IMPROVED BLOOD FLOW

A recent study at the University of California, San Francisco (UCSF) included 45 patients with impaired blood flow to the heart. Patients who consumed 8oz of POM Wonderful 100% Pomegranate

juice daily for three months experienced 17% improved blood flow. Those who drank a placebo experienced an 18% decline.

PROMOTES HEALTHY BLOOD VESSELS

An in vitro study at the University of California, Los Angeles (UCLA) showed that pomegranate juice uniquely possesses enough antioxidant activity to protect nitric oxide (an important biochemical that helps maintain healthy blood vessels for proper blood flow) against oxidative destruction thereby enhancing its biological activity. In other words, pomegranate juice by protecting nitric oxide promotes healthy blood flow.

THE POWER OF POM

The antioxidants in POMx are supported by \$20 million in initial scientific research from leading universities and so far we've uncovered encouraging results.

POMx supplements your diet without adding calories, allowing you to more easily maintain a healthy weight while still getting the necessary antioxidants

Due to this promising information, our studies on POMx and heart health continue. It is our mission to deliver the latest information on our research to you in this newsletter as soon as studies are completed. At POM Wonderful we are committed to learning all we can about the health benefits of this miraculous fruit and sharing them with you.

NEXT ISSUE: PROSTATE HEALTH

One out of every six men will get prostate cancer, but only one out of 34 will die from the disease. In our newsletter next month, we will discuss preventative measures all men need to know to manage their prostate health.

1.888.POMPILL
WWW.POMWONDERFUL.COM

POM
WONDERFUL

Complaint

EXHIBIT B

POMx Prostate Newsletter

Pills and Liquid
Monthly
3rd Continuity Shipment

Fall '07 - present (ongoing)



VOLUME 1, ISSUE 2: PROSTATE HEALTH

**Prostate Cancer Affects
1 Out of Every 6 Men**

Prostate cancer is the second leading cause of cancer related death in men in the United States according to the National Cancer Institute.

Prostate cancer incidence rates rose dramatically in the late 1980's with improved detection and diagnosis through widespread use of prostate-specific antigen (PSA) testing.

**Prostate cancer
is the second
leading cause of**

fruits and vegetables. Doctors are not sure which of these factors causes the risk to go up but the best advice is to consume daily the equivalent of five or
(continued on back)

**What's New in the Lab
by Dr. Mark Dreher**



Mark Dreher, PhD
Chief Science Officer
POMWonderful, LLC

Research studies like the ones discussed in this newsletter and

Complaint

EXHIBIT B

**POM YOUR PARTNER IN
X PROMOTING LIFELONG HEALTH**

VOLUME 1, ISSUE 3, PROSTATE HEALTH

**Prostate Cancer Affects
1 Out of Every 6 Men**

Prostate cancer is the second leading cause of cancer related death in men in the United States according to the National Cancer Institute.

Prostate cancer incidence rates rose dramatically in the late 1980's with improved detection and diagnosis through widespread use of prostate-specific antigen (PSA) testing.

**Prostate cancer
is the second
leading cause of
cancer related to
death in men
in the United States
according to
the National
Cancer Institute**

Since the early 1990's, prostate cancer incidence and deaths have been declining, but the American Cancer Society estimates that there will still be about 218,890 new cases of prostate cancer and 27,050 deaths in the United States in 2007.

According to the American Cancer Society, some of the risk factors for prostate cancer include:

Age – Growing older raises a man's risk of prostate cancer. About two of every three prostate cancers are found in men over the age of 65.

Family History – Men with close family members (father or brother) who have had prostate cancer are more likely to get it themselves, especially if their relatives were young when they got the disease.

Diet – One risk factor that can be changed is diet. The National Cancer Institute's research suggest that obesity and weight gain is linked to increased prostate cancer mortality.

Men who eat a lot of red meat or high-fat dairy products seem to have a greater chance of getting prostate cancer. These men also tend to eat fewer

fruits and vegetables. Doctors are not sure which of these factors causes the risk to go up but the best advice is to consume daily the equivalent of five or
(continued on back)

**What's New in the Lab
by Dr. Mark Dreher**

Mark Dreher, PhD
Chief Science Officer
POM Wonderful, LLC

Research studies like the ones discussed in this newsletter and conducted by UCLA (my alma mater) seem to validate the many reasons I am proud to be afflicted with POM Wonderful and POMs.

POM Wonderful 100% Pomegranate Juice and POMs are backed by a \$25 million dollar investment in world-class scientific research. This includes ten clinical studies published in top peer-reviewed medical journals that document the pomegranate's antioxidant health benefits such as heart and prostate health.

Working at POM Wonderful gives me the unique opportunity to really make a difference in the world. That's what gets me up every morning! I get to work with renowned scientists, including a Nobel Laureate, at leading

**Studies funded by
POM represent the
vast majority of
medical research
ever conducted
on pomegranates.**

universities around the world. In fact, studies funded by POM represent the vast majority of human medical research ever conducted on pomegranates. No other company that I know of is as dedicated as POM is pursuing the truth and keeping our customers informed.

At POM Wonderful, we aim to be your partner in the promotion of good health that lasts a lifetime. It is our commitment to you, our mission as a company.

Complaint

EXHIBIT B

VOLUME 1, ISSUE 3: PROSTATE HEALTH

Prostate Cancer (from fruit) more servings of vegetables and fruits rich in antioxidants and to eat less red meat and high-fat foods.

EARLY DETECTION SEEN AS KEY TO INCREASING SURVIVAL RATES*

The prostate-specific antigen (PSA) test and rectal exam can be used to detect the presence of prostate cancer when no symptoms are present. They may help catch the disease at an early stage when treatment is more effective.

During a PSA test, a small amount of blood is drawn and the level of PSA (a protein produced by the prostate) is measured to determine the level of risk. When prostate cancer is found and treated, the PSA test may also measure the potential risk for the cancer to return.

*Please talk to your doctor for more specific prostate cancer information.

NEW POMEGRANATE RESEARCH OFFERS HOPE TO PROSTATE CANCER PATIENTS

A preliminary UCLA medical study involving POM Wonderful 100% Pomegranate Juice revealed promising news. 46 men who had been treated for prostate cancer with surgery or radiation were given 8oz of POM Wonderful 100% Pomegranate Juice to drink daily. A

Patients with prostate cancer showed a prolongation of PSA doubling time, coupled with corresponding lab effects on reduced prostate cancer as well as reduced oxidated stress.

majority of the patients experienced a significantly extended PSA doubling time. Doubling time is an indicator of prostate cancer progression - extended doubling time may indicate slower disease progression.

Before the study, the mean doubling time was 15 months. After drinking 8oz of pomegranate juice daily for two years, the mean PSA doubling time increased to 54 months. Testing on patient blood serum showed a 12% decrease in cancer cell proliferation and a 17%

increase in cancer cell death (apoptosis).

In another study, in vitro laboratory testing at UCLA showed that POMx significantly decreased human prostate cancer cell growth and increased cancer cell death.

Based on the promising results of these preliminary studies, two additional studies are underway to more fully investigate the potential of POMx to extend PSA doubling time.

According to Dr. David Heber, Director of UCLA's Center for Human Nutrition, "The most abundant and most active ingredients in pomegranate juice are also found in POMx. Basic studies in our laboratory so far indicate that POMx and pomegranate juice may have the same effects."

SEND US YOUR QUESTIONS AND COMMENTS

We encourage you to participate in our commitment to a lifetime of good health by sending your questions and/or concerns to clinicalscience@pom-pills.com. Future newsletters will contain content derived from these questions and reader feedback. We look forward to hearing from you!



NEXT ISSUE: POMEGRANATE SUPPLEMENT COMPARISONS

How does POMx compare with other pomegranate supplements for antioxidant potency?



1.888.POMPILL
WWW.POMPILLS.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 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 Mark Dreher, Ph.D., was the Vice President of Science & Regulatory Affairs of POM Wonderful LLC from approximately August 2005 to May 2009. His current principal office or place of business is located in Wimberley, Texas.

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

1. Unless otherwise specified, “Respondent” shall mean Mark Dreher, Ph.D., individually.
2. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. “Covered Product” shall mean any food, drug, or dietary supplement for human use or consumption, including, but not limited to, the POM Products.
4. “Food” and “drug” shall mean as defined in Section 15 of the Federal Trade Commission Act, 15 U.S.C. § 55.
5. “Endorsement” shall mean as defined in 16 C.F.R. § 255.0.
6. “Employment” shall mean any affiliation with any business, non-profit, or government entity, including the performance of services as an officer, owner, manager, supervisor, employee, consultant, or independent contractor; and “Employer” shall mean any and all individuals or entities for whom Respondent performs services as an employee, consultant, or independent contractor.
7. “POM Product” shall mean any food, drug, or dietary supplement labeled, advertised, promoted, offered for sale, sold, or distributed by POM Wonderful LLC, Roll International Corporation, and their successors

Decision and Order

and assigns, containing POM Wonderful pomegranate or its components, including, but not limited to, POM Wonderful 100% Pomegranate Juice and pomegranate juice blends, POMx Pills, POMx Liquid, POMx Tea, POMx Iced Coffee, POMx Bars, and POMx Shots.

8. The term “including” in this Order shall mean “without limitation.”
9. The terms “and” and “or” in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that 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 POM Product, 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, illustration, trademark, or trade name, that such product is effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease, including, but not limited to, any representation that the product will treat, prevent, or reduce the risk of heart disease, including by decreasing arterial plaque, lowering blood pressure, or improving blood flow to the heart; or treat, prevent, or reduce the risk of prostate cancer, including by prolonging prostate-specific antigen doubling time (“PSADT”); unless, at the time it is made, the representation is non-misleading and:

- A. the product is subject to a final over-the-counter (“OTC”) drug monograph promulgated by the Food and Drug Administration (“FDA”) for such use, and conforms to the conditions of such use;
- B. the product remains covered by a tentative final OTC drug monograph for such use and adopts the conditions of such use;

Decision and Order

- C. the product is the subject of a new drug application for such use approved by FDA, and conforms to the conditions of such use; or
- D. the representation is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990.

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, 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, trademark, or trade name, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

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, in or affecting commerce, shall not make any representation, other than representations under Part I of this Order, in any manner, expressly or by implication, including through the use of a product name, endorsement, depiction, illustration, trademark, or trade name, about the health benefits, performance, or efficacy of any Covered Product, unless the representation is non-misleading, and, at the time of making such representation, Respondent relies upon competent and reliable scientific evidence that is sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate

Decision and Order

that the representation is true. Provided that, for any representation made by Respondent as an expert endorser, Respondent must possess and rely upon competent and reliable scientific evidence, and an actual exercise of his represented expertise in evaluating medical research at least as extensive as an expert in that field would normally conduct in order to support the conclusions presented in the representation. For purposes of this Part, competent and reliable scientific evidence means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, and that are generally accepted in the profession to yield accurate and reliable results.

IV.

IT IS FURTHER ORDERED that:

- A. Nothing in Parts II and III of this Order shall prohibit Respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990; and
- B. Nothing in Parts II and III of this Order shall prohibit Respondent from making any representation for any drug that is permitted in the labeling for such drug under any tentative final or final monograph promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration.

V.

IT IS FURTHER ORDERED that Respondent 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 Commission for inspection and copying:

- A. All advertisements, labeling, packaging, and promotional materials containing the representation;

Decision and Order

- B. All materials that were relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in his 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 VI.

VI.

IT IS FURTHER ORDERED that Respondent shall, for a period of seven (7) years after the date of issuance of this Order, deliver a copy of this Order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this Order, and shall secure from each such person a signed and dated statement acknowledging receipt of the Order. Respondent shall deliver this Order to such current personnel within thirty (30) days after the effective date of this Order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

IT IS FURTHER ORDERED that Respondent shall, for a period of five (5) years after the date of issuance of this Order, notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment. The notice shall include Respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier to the Associate Director for Enforcement,

Decision and Order

Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line FTC v. Mark Dreher. *Provided, however*, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if electronic versions of such notices are contemporaneously sent to the Commission at DEbrief@ftc.gov.

VIII.

IT IS FURTHER ORDERED that Respondent shall within sixty (60) days after the effective date of this Order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of his compliance with this Order. Within ten (10) days of receipt of written notice from a representative of the Commission, he shall submit additional true and accurate written reports.

IX.

IT IS FURTHER ORDERED that Respondent must reasonably and in good faith cooperate with the Commission in connection with its litigation in the matter of POM Wonderful LLC et al. (File No. 082-3122) and any subsequent investigations or litigation related to or associated with the transactions or occurrences that are the subject of the Commission's administrative complaint in that matter. Respondent acknowledges, understands, and agrees that such cooperation shall include, but not be limited to, the following:

- A. Appearing for interviews as may reasonably be requested by the Commission;
- B. Responding to all reasonable inquiries of the Commission;
- C. Providing all documents, records, and other tangible evidence reasonably requested by the Commission;
- D. Providing truthful declarations, affidavits, certifications, and written testimony reasonably requested by the Commission; and

Decision and Order

- E. Appearing and providing oral testimony at any trial, deposition, or other proceeding. Respondent agrees to accept service by overnight delivery of any subpoena to appear and provide testimony.

The foregoing cooperation shall be upon reasonable written notice by the Commission. Respondent's failure to cooperate as required herein constitutes a material breach of the settlement between the parties and a violation of this Order.

X.

This Order will terminate on November 4, 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 less than twenty (20) years; and
- 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 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 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 Mark Dreher, Ph.D. (“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 POM Wonderful 100% Pomegranate Juice (“POM Juice”) and POMx Pills and POMx Liquid (“POMx”). According to the FTC complaint, respondent represented, in advertisements and promotional materials, including as an expert endorser, that clinical studies, research, and/or trials prove that drinking eight ounces of POM Juice, or taking one POMx Pill or one teaspoon of POMx Liquid, daily, treats, prevents, or reduces the risk of heart disease (including by decreasing arterial plaque, or improving blood flow to the heart) and prostate cancer (including by prolonging prostate-specific antigen doubling time (“PSADT”)). The complaint alleges that these claims are false or misleading. The FTC complaint further charges that respondent represented, including as an expert endorser, that POM Juice and POMx treat, prevent, or reduce the risk of heart disease and prostate cancer, and that respondent possessed and relied on a reasonable basis, including an actual exercise of his represented expertise in evaluating medical research at least as extensive as an expert in the field would normally conduct in order to support the conclusions presented in the endorsements, that substantiated the representations, at the time the representations were made. The complaint alleges that respondent did not possess and rely upon a reasonable basis that substantiated the conclusions presented in the endorsement. Accordingly, the complaint alleges that respondent violated Sections 5(a) and 12 of the FTC Act.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts or practices in

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the future. Part I of the consent order prohibits respondent from representing that any POM Product (defined as “any food, drug, or dietary supplement labeled, advertised, promoted, offered for sale, sold, or distributed by POM Wonderful LLC, Roll International Corporation, and their successors and assigns, containing POM Wonderful pomegranate or its components”) is effective in the diagnosis, cure, mitigation, treatment, or prevention of any disease including, that such a product will treat, prevent, or reduce the risk of heart disease (including by decreasing arterial plaque, lowering blood pressure, or improving blood flow to the heart) or prostate cancer (including by prolonging PSADT), unless, at the time the claim was made, the representation is non-misleading and: (a) the product is subject to a final over-the-counter (“OTC”) drug monograph promulgated by the Food and Drug Administration (“FDA”) for such use, and conforms to the conditions of such use; (b) the product remains covered by a tentative final OTC drug monograph for such use and adopts the conditions of such use; (c) the product is the subject of a new drug application for such use approved by FDA, and conforms to the conditions of such use; or (d) the representation is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the Nutrition Labeling and Education Act of 1990 (“NLEA”).

Under this provision, therefore, respondent cannot make a claim that a POM Product is effective in the diagnosis, cure, mitigation, treatment, or prevention of a disease, unless the FDA specifically approved such a claim. The Commission has not concluded that the only way a food or supplement advertiser can adequately substantiate disease treatment, prevention, or risk-reduction claims is through FDA authorization. However, the consent order provision requiring FDA pre-approval before respondent makes these types of claims for POM Products in the future will facilitate compliance with the order and is reasonably related to the violations alleged.

Respondent may decide to make an advertising claim characterizing limited scientific evidence supporting the relationship between POM Products and a disease. However, if the net impression is that a POM Product is effective in the diagnosis, cure, mitigation, treatment, or prevention of a disease,

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and not merely that there is limited scientific evidence supporting the claim, the advertisement would be covered under Part I. Staff's experience and research show that it is very difficult to adequately qualify a disease treatment, prevention, or risk-reduction claim in advertising to indicate that the science supporting the claimed effect is limited. In other words, reasonable consumers may interpret an advertisement to mean that the product will treat, prevent, or reduce the risk of a disease, even if respondent includes language indicating that the science supporting the effect is limited in some way. However, if respondent possesses reliable empirical testing demonstrating that the net impression of an advertisement making a qualified claim for a POM Product does not convey that it is effective in the diagnosis, cure, mitigation, treatment, or prevention of a disease, then that claim would be covered under the relevant subsequent parts of the order.

Although Part I requires FDA approval before respondent can make claims that a POM Product treats, prevents, or reduces the risk of a disease, the Commission does not intend Part I to limit respondent to using the precise language specified by the FDA. To the contrary, if the FDA has approved a claim that a POM Product treats, prevents, or reduces the risk of a disease, respondent may use a variety of words and images to communicate that claim in advertising. Likewise, regardless of the particular words or images used, if the net impression of an advertisement is that a POM Product treats, prevents, or reduces the risk of a disease, then for the advertisement to comply with the order, the FDA must have specifically authorized such a claim, based upon its review of the available scientific evidence.

Part II of the consent order prohibits respondent, in connection with the advertising or marketing of any Covered Product (defined as "any food, drug, or dietary supplement for human use or consumption, including, but not limited to, the POM Products"), from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

Part III of the consent order prohibits respondent from making representations, other than representations covered under Part I, about the health benefits, performance, or efficacy of any Covered

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Product (as defined above), unless the representation is non-misleading, and, at the time of making such representation, 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, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. In addition, it provides that, for any representation made by respondent as an expert endorser, respondent must possess and rely upon competent and reliable scientific evidence, and an actual exercise of his represented expertise in evaluating medical research at least as extensive as an expert in that field would normally conduct in order to support the conclusions presented in the representation. For purposes of Part III, competent and reliable scientific evidence means tests, analyses, research, or studies 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.

Part IV of the consent order provides that nothing in Parts II and III of the order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the FDA pursuant to the NLEA.

Parts V through IX of the consent order require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to current and future principals, officers, managers, and personnel; to notify the Commission of changes in his business or employment; to file compliance reports with the Commission; and to cooperate with the Commission in connection with litigation related to its complaint against POM Wonderful LLC, FTC File No. 082-3122. Part X 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 their terms in any way.

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IN THE MATTER OF

POLYPORE INTERNATIONAL, INC.OPINION AND FINAL ORDER OF THE COMMISSION AND
CONCURRING OPINION OF COMMISSIONER ROSCH

Docket No. D-9327; File No. 081 0131
Complaint, September 9, 2008 — Initial Decision, February 22, 2010 —
Opinion and Order, November 5, 2010

The Commission issued an administrative complaint, 149 F.T.C. 486, challenging Polypore International, Inc.'s ("Polypore") acquisition of rival battery separator manufacturer Microporous Products L.P. ("Microporous") in February 2008. In his Initial Decision, 149 F.T.C. 501, Chief Administrative Law Judge J. Michael Chappell ("ALJ") held that Polypore's acquisition of Microporous was anticompetitive and that a joint marketing agreement between Polypore and a rival battery separator manufacturer violated antitrust laws. At the same time, the Court dismissed a separate allegation that Polypore engaged in exclusionary conduct. Polypore appealed the Initial Decision. On appeal, the Commission unanimously affirmed in part and reversed in part the Initial Decision. The Commission held that the acquisition harmed competition in three of the four relevant markets; in the fourth relevant market, the Commission reversed the ALJ and ruled in favor of Polypore. The Commission further ordered Polypore to divest Microporous to a Commission-approved buyer within six months.

Participants

For the Commission: Stephen Antonio, Morris Bloom, Kyle Chadwick, Joel Christie, Steven Dahm, Eric D. Edmondson, Benjamin Gris, Catharine Moscatelli, J. Robert Robertson, and Christian H. Woolley.

For the Respondent: Steven G. Bradbury, Paul T. Denis, and Irene Ayzenberg-Lyman, Dechert LLP; and Deborah D. Edney, John F. Graybeal, William L. Rikard, Jr., Adam Shearer, and Eric D. Welsh, Parker Poe Adams & Bernstein LLP.

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OPINION OF THE COMMISSION

By RAMIREZ, Commissioner, for a Unanimous Commission:

I. INTRODUCTION¹

This case involves a consummated merger of two of the three North American firms that produce battery separators for flooded lead-acid batteries.² The battery separators at issue – membranes placed between the positive and negatively-charged plates in batteries to prevent electrical short circuits – are used in a multitude of products, ranging from floor scrubbers and golf carts to cars and backup telecommunications power systems. Battery separators for flooded lead-acid batteries are vital components of products that U.S. consumers use every day.

The acquiring firm, Respondent Polypore International, Inc. (“Polypore” or “Respondent”), develops, manufactures, and sells a broad range of flooded lead-acid battery separators for various end-use applications through its Daramic business unit. The acquired company, Microporous L.P. (“Microporous”), also manufactured flooded lead-acid battery separators, and, at the time of the acquisition, was an aggressive competitor of Daramic.

¹ This opinion uses the following abbreviations for citations to the record:

Initial Decision	ID
ALJ Findings of Fact	IDF
Respondent’s Appeal Brief	RAB
Complaint Counsel’s Answering Brief on Appeal	CCAB
Respondent’s Reply Brief on Appeal	RRB
Complaint Counsel’s Exhibit	PX
Respondent’s Exhibit	RX
Trial Transcript	Tr.

² A flooded lead-acid battery is a battery containing an electrolyte liquid acid in which the positive and negative lead plates are suspended. IDF 20. Flooded lead-acid batteries, which are the focus of this case, are different than non-flooded lead-acid batteries, also known as gel or absorbed-glass-mat batteries, which use silica gel instead of liquid acid to interact with the positive and negative plates in the battery. IDF 22, 36, 83.

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In August 2007, Respondent's representatives began discussions with Microporous' owners about acquiring Microporous. Contemporaneous documents establish that Daramic at the time feared losing a large amount of business to Microporous, wanted to eliminate Microporous as a competitor, and believed that its acquisition of Microporous would allow it to maintain market share and increase prices. On February 29, 2008, Respondent acquired all of the outstanding stock of Microporous' parent corporation for approximately \$76 million.³ The acquired Microporous business included a plant in Piney Flats, Tennessee, a plant in Feistritz, Austria on the verge of commencing operations, and equipment for an additional production line (referred to as "a line in boxes").

Based on our *de novo* review of the facts and law in this matter, we conclude that the acquisition is reasonably likely to substantially lessen competition in three relevant markets: North American deep-cycle; motive; and starter, lighting, and ignition ("SLI") battery separators. We agree with Chief Administrative Law Judge D. Michael Chappell (the "ALJ") that the appropriate remedy is complete divestiture of all of the acquired Microporous assets, as well as certain other ancillary relief necessary to restore competition that was lost through the acquisition. However, while we conclude that Complaint Counsel properly defined a relevant market for uninterruptible power source ("UPS") battery separators in North America, and the record supports the conclusion that Daramic has a monopoly in that market, we find that Complaint Counsel did not meet their burden to show that the acquisition has lessened, or is reasonably likely to substantially lessen, competition in the UPS separator market.⁴

³ The Commission did not become aware of the transaction, which was not subject to the premerger notification requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a, until after the acquisition had been consummated.

⁴ We adopt the ALJ's findings of fact to the extent not inconsistent with this opinion and make new factual findings based on our *de novo* review of the record. We present our findings of fact and conclusions of law throughout the opinion as appropriate to the subject matter under discussion.

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II. FACTUAL BACKGROUND**A. THE PARTIES****1. Polypore/Daramic**

Polypore, a Delaware corporation headquartered in North Carolina, manufactures microporous membranes used in separation and filtration processes. Daramic, one of Polypore's four divisions, develops, manufactures, and sells various types of flooded lead-acid battery separators both in the United States and abroad. IDF 1-4. Prior to the acquisition of Microporous, Daramic had two plants in the United States and five foreign plants.⁵ IDF 38-39. Daramic's worldwide production capacity was [redacted] with approximately [redacted] of that total capacity located in the United States. IDF 40.

At that time, Daramic produced polyethylene or "PE" separators for all four end-use applications alleged in the Complaint to constitute relevant product markets:

- Deep-cycle – batteries installed in products with a lower amperage draw over a longer period of time, such as golf carts and floor scrubbers (IDF 19);
- Motive power – batteries used in mobile industrial products such as forklifts and mining equipment (IDF 25, 204);
- UPS – "uninterruptible power source" products, such as backup stationary batteries for computer and telecommunication systems (IDF 35, 235);⁶ and

⁵ These plants were located in Owensboro, Kentucky; Corydon, Indiana; Selestat, France; Norderstadt, Germany; Potenza, Italy; Prachinburi, Thailand; and Tianjin, China. IDF 38-39.

⁶ Separators for industrial applications, such as industrial motive and UPS products, are sometimes collectively referred to as "industrial" separators. IDF 23.

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- SLI (starter, lighting, and ignition) – batteries used in automotive applications, including cars, trucks, buses, boats, and jet skis. IDF 32.

For motive and UPS, Daramic sold primarily Daramic CL (IDF 197, 411); and for SLI it sold primarily Daramic HP. IDF 253-54, 427. Daramic also produced Daramic HD, a PE separator made with a liquid latex additive, which was created primarily for deep-cycle applications. IDF 41, 373, 472, 475. Daramic also sold a product called Darak, a non-PE separator produced in Germany and used primarily in gel batteries. IDF 41, 234, 618. Daramic's total worldwide separator sales in 2007 were approximately [redacted]. IDF 42. Of that amount, approximately [redacted] was from PE separator sales for SLI applications (*i.e.*, automotive products).⁷ *Id.*

2. Microporous

Microporous, also a Delaware corporation, was a smaller battery separator company owned by a private equity firm, Industrial Growth Partners. IDF 5, 9. Microporous previously had done business under the name Amerace. IDF 8. Prior to the February 2008 acquisition, Microporous operated one plant in Piney Flats, Tennessee and was scheduled to begin operating a second plant in Feistritz, Austria in March 2008. IDF 43-44, 778-79. Microporous also owned a line in boxes – unassembled manufacturing equipment it had originally ordered for the purpose of building a fourth production line at the Piney Flats plant. IDF 773, 775. As of the date of trial, some of the equipment for the line remained in boxes in Austria, while other pieces of the new line were at a semi-finished stage with a supplier, or in use in existing lines at Piney Flats. IDF 1269-70.

Prior to the acquisition, Microporous' product line consisted of three products: Flex-Sil, a separator made of rubber, primarily for deep-cycle applications; Ace-Sil, a hard rubber separator typically used in high-end industrial applications; and CellForce, a PE-based separator sold primarily for motive applications, which includes ground-up Ace-Sil as an additive to improve

⁷ SLI is by far the largest market segment, accounting for almost three-quarters of flooded lead-acid battery separator sales in 2005. IDF 261.

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performance. IDF 45, 198, 387. Microporous' 2007 sales were approximately [redacted], over [redacted] of which were attributable to Flex-Sil. IDF 46. Microporous competed head-to-head against Daramic for sales to both deep-cycle and motive battery separator customers. Additionally, Microporous had begun developing and marketing a PE separator for use in SLI applications – the source of most of Daramic's PE battery separator sales – and was in the process of negotiating a supply contract with Exide Technologies, Inc. ("Exide"), a large potential customer. IDF 429-36, 694-716.

Microporous was also engaged in a research and development project approved in early 2007 known as Project LENO. IDF 617. Project LENO began as an effort to develop a separator to compete with Daramic's Darak separator. IDF 234, 618. The project later included research related to the development of a separator for flooded lead-acid UPS batteries. IDF 618. At the time of the acquisition, the success of Project LENO was in doubt, and even if the research proved successful, a commercially qualified product was at best several years away. McDonald, Tr. 3866-69, *in camera*; IDF 1011-14.

B. OTHER BATTERY SEPARATOR FIRMS

1. Entek

Entek⁸ was the only firm other than Daramic and Microporous that supplied flooded lead-acid battery separators to North American customers at the time of the acquisition. Entek has one manufacturing facility in the United States (in Oregon) and one in the United Kingdom. IDF 47. Entek had sold separators for industrial applications in the 1990s, but had since exited the industrial side of the business. IDF 392-93, 578, 1027, 1029. Entek's sales at the time of the acquisition consisted almost entirely of SLI separators. IDF 382. In 2007, [redacted]. IDF 1115.

⁸ Entek International LLC and its sister company Entek International Ltd. were owned and operated by Entek Holding Company (collectively "Entek"). IDF 47.

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2. Foreign Firms

A number of suppliers in India, China, Indonesia and Korea produce flooded lead-acid battery separators for local customers. IDF 444, 1064-78. Anpei and BFR are Chinese manufacturers that produce SLI separators. IDF 340, 444, 1064, 1070. Amer-Sil is a European manufacturer that operates a plant in Luxembourg that produces polyvinyl chloride (“PVC”) separators used in European flooded lead-acid motive batteries.⁹ IDF 443. No foreign firm exports flooded lead-acid battery separators to North America, and none has any facilities in North America. IDF 332-34, 338-40, 343-50, 449-51.

C. CUSTOMERS

The battery separators at issue in this case are sold to firms that manufacture flooded lead-acid batteries. Some customers are large companies with multinational operations, while others are relatively small with operations only in the United States. Four of the largest customers are Exide, JCI, EnerSys, and East Penn Battery Company (“East Penn”). IDF 49-59, 65-66.

Exide is one of the largest battery manufacturers in the world, with facilities in North America, Europe and Asia. IDF 52, 53. Although it produces batteries for all four end-use applications, the majority of its business is in SLI batteries (for cars, trucks, motorcycles, recreational vehicles, and boats) and deep-cycle (for golf carts). IDF 54. Prior to the acquisition, Exide worked with Microporous to develop an SLI battery separator product and was in the process of negotiating a supply contract with Microporous. IDF 694-716.

JCI is the largest automotive battery manufacturing company in the world. IDF 49. It is headquartered in Milwaukee, Wisconsin and has plants throughout the world. IDF 51. JCI

⁹ North American customers do not use PVC separators for motive batteries due to performance disadvantages relative to PE separators and because PVC separators may be associated with the release of unstable chlorine at certain temperatures. [redacted] Thus, while EnerSys, a large motive customer, uses PVC separators for some applications in Europe, it does not approve PVC separators for use in North America, where the applications are heavier duty. IDF 203.

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primarily purchases SLI separators; it also buys some deep-cycle separators for golf cart batteries, which account for 2-3% of its total production. IDF 50. Prior to the acquisition, JCI encouraged Microporous to develop an SLI separator to provide a competitive alternative to Daramic for automotive applications. IDF 650, 684-89. In 2007, JCI qualified the Microporous SLI product for use but ultimately entered into a supply contract with Entek [redacted]. IDF 690, 1115.

EnerSys is the world's largest manufacturer of industrial batteries, including both motive (for forklifts) and reserve power batteries (for UPS battery backup, telecommunications, and utilities). IDF 56. It has plants in the United States, China and Europe. IDF 57. EnerSys encouraged Microporous to develop a separator product to provide a competitive alternative to the Daramic products for UPS applications, and Microporous was in the process of attempting to do so at the time of the acquisition. IDF 618.

East Penn is a lead-acid battery and wire and cable manufacturing company headquartered in Pennsylvania. IDF 65. It has two U.S. plants and an assembly plant in China, and produces batteries for all four end uses. IDF 65-66.

Other battery manufacturer customers include: Trojan Battery Company, which manufactures and sells deep-cycle batteries primarily for golf carts and other deep-cycle applications;¹⁰ Crown Battery Manufacturing Company, which makes batteries for all four applications (IDF 67-69); Douglas Battery Manufacturing Company, a family-owned company that produces certain types of deep-cycle and motive batteries¹¹ (IDF 70-73); U.S. Battery Manufacturing Company, which has two U.S. plants and manufactures batteries primarily for deep-cycle applications (IDF 74-77); and Bulldog Battery Corporation, which has one

¹⁰ Trojan Battery has two plants, both in the United States. IDF 63. Trojan was Microporous' largest customer, representing about 43% of all Microporous' sales. IDF 64. Trojan is the largest golf cart battery manufacturer in the world, with 2007 sales of approximately [redacted]. IDF 60, 61.

¹¹ In January 2010, EnerSys announced its purchase of certain Douglas assets. IDF 59.

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U.S. plant and makes flooded-lead batteries for motive applications. IDF 78-80.

III. PROCEDURAL HISTORY

A. PLEADINGS

On September 29, 2008, the Commission issued a three-count complaint against Polypore. In Count I, the Complaint charged that Polypore's February 29, 2008 acquisition of Microporous may substantially lessen competition or tend to create a monopoly in relevant North American markets for deep-cycle, motive, SLI, and UPS battery separators in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act (the "FTC Act"), 15 U.S.C. § 45.¹² Complaint ¶¶ 5, 14, 48. Specifically, Count I alleged that the acquisition was a merger to monopoly in the North American deep-cycle and motive markets, and a merger to duopoly in the SLI market. *Id.* ¶¶ 20-23, 27-29, 38. With respect to the UPS market, Count I alleged that competition was harmed because Microporous had developed a new separator that would compete with Polypore and had secured a contract with a major customer that was testing Microporous' new UPS product. *Id.* ¶¶ 24, 30, 31. Count I alleged further that testing, qualification, and reputation create significant barriers to entry in each of the relevant markets, and that the acquisition will cause and has caused higher prices and other anticompetitive effects in the relevant markets. *Id.* ¶¶ 32-38.

Count II alleged that Polypore had entered into an unlawful joint marketing agreement with Hollingsworth & Vose ("H&V"), a firm that manufactures absorbed-glass-mat separators, to forestall H&V's entry into the PE separator market, in violation of Section 5 of the FTC Act. *Id.* ¶¶ 47, 51. Count III charged that Daramic monopolized the alleged relevant markets, also in violation of Section 5 of the FTC Act, by executing contracts with

¹² The Complaint alleged in the alternative that the transaction was unlawful in an "all PE" separator market in North America. Complaint ¶¶ 6, 14. However, Complaint Counsel did not pursue this theory and instead opposed Respondent's claim of an "all PE" market at trial.

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large customers that would preclude or deter Microporous from competing effectively. *Id.* ¶¶ 39-40, 45-46.

Polypore filed an answer on October 15, 2008, admitting only that it had acquired Microporous and denying all of the substantive allegations in the Complaint. As an affirmative defense, Daramic alleged that the acquisition is a procompetitive response to market dynamics that will result in substantial merger-specific efficiencies that will outweigh any potential anticompetitive effects. Answer ¶ 14.

During the trial, which began on May 12, 2009 and concluded on June 12, 2009, the ALJ heard testimony from over thirty witnesses and admitted more than 2,000 exhibits into evidence. The ALJ closed the hearing record on June 22, 2009. The parties submitted post-trial briefs and proposed findings of fact on July 17, 2009 and made their closing arguments on August 20, 2009.¹³

B. INITIAL DECISION

The ALJ issued an Initial Decision (“ID”) on February 22, 2010, holding that the acquisition was reasonably likely to substantially lessen competition in North American markets for deep-cycle, motive, UPS, and SLI separators, as charged in Count I. ID at 7, 213-24. In particular, the ALJ found that the relevant markets were the North American markets for deep-cycle, motive, UPS, and SLI battery separators, basing his decision on the fact that separators are manufactured and designed according to end use and sellers can set prices according to a separator’s end use and customer location. The ALJ found further that, at the time of the acquisition, Microporous was Daramic’s only competitor in the deep-cycle and motive markets, and one of Daramic’s two competitors in the SLI market. The transaction was therefore a presumptively unlawful merger to monopoly in the deep-cycle and motive markets, and a presumptively unlawful merger to duopoly in the SLI market. ID at 246-51, 253-59. In the UPS

¹³ On October 15, 2009, the ALJ reopened the trial record for the limited purpose of receiving evidence regarding Daramic’s alleged decline in sales to Exide. On July 19, 2010, after the ALJ had issued the Initial Decision, the Commission reopened the hearing record to accept into evidence declarations regarding Entek’s efforts to develop a deep-cycle separator.

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market, the ALJ determined that Microporous was developing a product to compete with Daramic for North American customers and was a “substantial factor” in the market. ID at 252-53, 258. Having found that Microporous was the only firm positioned to enter the UPS market, the ALJ concluded that the acquisition entrenched Daramic’s existing UPS monopoly. ID at 259.

The ALJ also found evidence of the procompetitive benefits of pre-acquisition competition between Microporous and Daramic, and evidence that the acquisition was motivated by anticompetitive intent and resulted in post-acquisition anticompetitive effects, which bolstered the presumption of reasonably likely anticompetitive effects in each of the four relevant markets. ID at 266, 269. The ALJ also considered Daramic’s rebuttal evidence concerning entry barriers, buyer power, efficiencies and Microporous’ financial condition, but held that the evidence was not sufficient to overcome Complaint Counsel’s strong *prima facie* case. ID at 270-99.

With respect to Count II, the ALJ held that the noncompete provisions in Daramic’s joint marketing agreement with H&V constituted an unlawful horizontal market allocation agreement. ID at 319-22.

As to Count III, the ALJ concluded that Complaint Counsel failed to establish their claims of monopolization and attempted monopolization in any of the four relevant markets. Specifically, he found that Complaint Counsel did not prove that Daramic possessed monopoly power or a dangerous probability of achieving monopoly power in the SLI market. ID at 305. The ALJ also found that while Complaint Counsel proved that Daramic had monopoly power in the deep-cycle, motive and UPS markets, they did not establish that Daramic engaged in exclusionary conduct in those markets. ID at 306-16. The ALJ therefore dismissed Count III in its entirety. ID at 316.

As a remedy for Count I, the ALJ ordered complete divestiture of all the acquired physical and intangible assets, along with ancillary relief to eliminate the anticompetitive effects of the acquisition. ID at 338-41. In connection with Count II, the ALJ ordered Daramic to terminate the noncompetition provisions of its

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marketing agreement with H&V, and to cease and desist from implementing or enforcing them. ID at 323-28.

C. APPEAL

Respondent timely filed a Notice of Appeal on March 10, 2010 and a Revised Notice of Appeal on March 15, 2010. Respondent challenges all of the ALJ's findings of fact and conclusions of law relating to Count I, including the remedy. Respondent also disputes those factual findings and legal conclusions related to whether Daramic had monopoly power or a dangerous probability of achieving or maintaining monopoly power in the North American deep-cycle, motive and UPS battery separator markets.¹⁴ Respondent did not appeal any portion of the Initial Decision related to Count II, and Complaint Counsel did not appeal the dismissal of Count III. The Commission heard oral argument on July 28, 2010.

Respondent makes four principal claims on appeal. It argues first that Complaint Counsel failed to prove that separators for deep-cycle, motive, SLI and UPS batteries constitute distinct and separate relevant product markets. RAB at 9-19. According to Respondent, at the time of the acquisition, Daramic competed in an "all PE market," while Microporous competed largely in a market for rubber separators that included only its Flex-Sil product. Respondent also argues that Complaint Counsel failed to prove that the relevant geographic market is North America, asserting instead that the proper geographic market is global. RAB at 19-24.

Respondent also claims that even if Complaint Counsel had proven their alleged relevant product and geographic markets, they failed to prove actual or likely anticompetitive effects. According to Respondent, Complaint Counsel's case fails because Microporous was not a competitor in the SLI or UPS markets; Entek competes in the deep-cycle, motive and UPS markets; barriers to entry are low; and buyers are sophisticated and have

¹⁴ Because the ALJ dismissed Count III, and Complaint Counsel did not appeal the dismissal, we review all of the factual findings and legal conclusion relevant to the ALJ's decision on Count I, but do not review those factual findings or legal conclusions that were relevant solely to Count III.

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substantial leverage. RAB at 4, 25-28, 34, 41-50. Finally, Respondent argues that the remedy, and in particular the portion of the order requiring divestiture of Microporous' plant in Feistritz, Austria, is overbroad and punitive. RAB at 50-58.

IV. STANDARD OF REVIEW

The Commission reviews the ALJ's findings of facts and conclusions of law *de novo*, considering "such parts of the record as are cited or as may be necessary to resolve the issues presented." The Commission may "exercise all the power which it could have exercised if it had made the initial decision."¹⁵ 16 C.F.R. § 3.54.

V. LEGAL FRAMEWORK

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. As the statutory language suggests, Congress enacted Section 7 to curtail anticompetitive harm in its incipiency. *See Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008) (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 n.39 (1962)). Section 7 prohibits acquisitions that create a reasonable probability of anticompetitive effects. Thus, while a Section 7 violation cannot rest on proof of the "mere possibility" of anticompetitive effects, Section 7 does not require that competitive harm be established with certainty. *Id.*; *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001). Even in a consummated merger, the ultimate issue under Section 7 is whether anticompetitive effects are reasonably probable in the future, not whether such effects have occurred as of the time of

¹⁵ The *de novo* standard of review is required by the Administrative Procedure Act, 5 U.S.C. § 557(b), and the FTC Act, 15 U.S.C. § 45(b), (c), and applies to both findings of fact and inferences drawn from those facts. *Realcomp II, Ltd.*, No. 9320, at 15 n.11 (FTC Oct. 30, 2009), available at <http://www.ftc.gov/os/adjpro/d9320/091102realcompopinon.pdf>.

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trial. *United States v. General Dynamics Corp.*, 415 U.S. 486, 505-06 (1974).¹⁶

Merger enforcement is therefore concerned with preventing the unlawful acquisition, maintenance, and exercise of market power. U.S. DEPT. OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 1 (Aug. 19, 2010), *available at* <http://www.ftc.gov/os/2010/08/100819hmg.pdf> (“2010 HORIZONTAL MERGER GUIDELINES”).¹⁷ Mergers that enhance market power can enable the merged firm to profitably alter its marketplace decisions to the detriment of consumers by, for example, raising prices, cutting output or reducing product quality or variety. Mergers that enhance market power can also diminish incentives for innovation. *Id.* In some instances, a merger can reduce the number of firms in a market to a level that increases the likelihood that firms will expressly or tacitly coordinate their actions. *Id.* In other instances, a merger may create the likelihood of both unilateral and coordinated effects with respect to price or nonprice aspects of competition. *Id.*

Courts have traditionally analyzed Section 7 claims under a burden-shifting framework. *See, e.g., Heinz*, 246 F.3d at 715;

¹⁶ While evidence of post-acquisition consumer harm can provide conclusive proof that post-acquisition consumer harm is reasonably probable, the absence of post-acquisition evidence of anticompetitive effects does not necessarily prove the converse. Because post-acquisition evidence may be manipulated by the parties, it may in certain circumstances have little evidentiary value. *Chicago Bridge*, 534 F.3d at 435; *see also General Dynamics*, 415 U.S. at 504-05 (“If a demonstration that no anticompetitive effects had occurred at the time of trial or of judgment constituted a permissible defense to a § 7 divestiture suit, violators could stave off such actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending.”). Moreover, the fact that consumers have not suffered harm during the interval between the acquisition and trial “does not mean that no substantial lessening will develop thereafter; the essential question remains whether the probability of such *future* impact exists at the time of trial.” *General Dynamics*, 415 U.S. at 505; *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1378-79 (9th Cir. 1978); *see also* 2010 HORIZONTAL MERGER GUIDELINES § 2.1.1.

¹⁷ The U.S. Department of Justice and the Federal Trade Commission issued revised Horizontal Merger Guidelines on August 19, 2010. Although we rely on the 2010 Guidelines in this opinion, our substantive analysis in this case would be identical under the 1992 Horizontal Merger Guidelines.

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United States v. Baker Hughes Inc., 908 F.2d 981, 982-83 (D.C. Cir. 1990). Under this framework, Complaint Counsel can establish a presumption of liability by defining a relevant product and geographic market, and showing that the transaction will lead to undue concentration in the relevant market. *Baker Hughes*, 908 F.2d at 982-83.

A plaintiff can bolster a *prima facie* case based on market structure with evidence showing that anticompetitive unilateral or coordinated effects are likely. *Heinz*, 246 F.3d at 717. Documents created by the merging parties in the ordinary course of business are often highly probative of both industry conditions and the likely competitive effects of a merger. 2010 HORIZONTAL MERGER GUIDELINES § 2.2.1. Indeed, qualitative evidence regarding pre-acquisition competition between the merging parties can in some cases be sufficient to create a *prima facie* case even without quantitative evidence of changes in market concentration. *See, e.g., Chicago Bridge & Iron Co.*, 138 F.T.C. 1024, 1053 (2004) (noting that qualitative evidence on pre-acquisition competition may support the conclusions based on market structure and can provide an independent basis for a *prima facie* case under Section 7); 2010 HORIZONTAL MERGER GUIDELINES § 2.1.4. Evidence that sheds light on the strategic objectives of the merging parties is also probative of likely competitive effects. *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1047 (D.C. Cir. 2008) (Tatel, J., concurring); 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 964, at 18-19 (3d ed. 2009); 2010 HORIZONTAL MERGER GUIDELINES § 2.2.1.

If the plaintiff establishes a *prima facie* case of probable harm, the burden of production shifts to the defendant, who must produce evidence showing that the plaintiff's evidence paints an inaccurate picture of the merger's likely competitive effects. *United States v. Marine Bancorporation*, 418 U.S. 602, 631 (1974); *Heinz*, 246 F.3d at 725. The stronger the plaintiff's *prima facie* case, the greater the defendant's burden of production on rebuttal. *Heinz*, 246 F.3d at 725; *Baker Hughes*, 908 F.2d at 991. A defendant can rely on a variety of types of evidence to meet its burden on rebuttal, including evidence that casts doubt on the significance or accuracy of the plaintiff's market share and concentration evidence, factors that indicate that collusion is

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improbable, and evidence of likely efficiencies. *Baker Hughes*, 908 F.2d at 985. If the defendant meets its burden, the burden of production shifts back to the plaintiff to produce additional evidence of competitive harm and merges with the ultimate burden of persuasion, which remains with the plaintiff at all times. *Id.* at 983.

Both Complaint Counsel and Respondent developed their evidence and litigated this case by reference to a relevant market and this traditional burden-shifting framework. The ALJ relied on the same legal framework in the ID. We find that this framework illuminates the factual record and competitive issues in this case and therefore apply it in this opinion. As we have noted in prior cases, however, and as the courts have also recognized, this analytical approach “does not exhaust the possible ways to prove a § 7 violation on the merits.” *Whole Foods*, 548 F.3d at 1036; see also *Evanston Northwestern Healthcare Corp.*, No. 9315, Comm’n Op. at 86-88 (FTC Aug. 6, 2007), available at <http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf>; 2010 HORIZONTAL MERGER GUIDELINES § 4. Market definition is a predictive tool that is not always the best vehicle to establish proof of competitive harm and can in some cases obscure rather than expose the competitive effects of a merger. See *Evanston Northwestern*, Comm’n Op. at 86 (“The role of the market definition tool, however, is potentially much less important in merger cases in which the availability of natural experiments allows for direct observation of the effects of competition between the merging parties, as well as the absence of such competition.”). In a consummated merger, post-acquisition evidence of actual anticompetitive harm may in some cases be sufficient to establish Section 7 liability without separate proof of market definition. *Evanston Northwestern*, Concurring Op. of Comm’r Rosch at 8, available at <http://ftc.gov/os/adjpro/d9315/070806rosch.pdf>. Accordingly, the legal framework for analyzing a Section 7 claim is and should be a flexible tool that enables the factfinder to credibly and efficiently organize evidence in a manner that sheds light on the likely competitive effects of a merger.

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VI. LIABILITY**A. RELEVANT PRODUCT MARKETS**

The ALJ concluded that, prior to the acquisition, Daramic and Microporous competed in four distinct relevant product markets: deep-cycle, motive, UPS, and SLI battery separators. ID at 210. This determination was based on the fact that battery separators have different design and performance features that vary with the end use of the separator, and that, in most instances, separators manufactured for one type of battery are not reasonably interchangeable with separators for a different type of battery. ID at 211. The ALJ also found that industry participants not only recognize battery separator markets based on end use but that separator manufacturers price that way. ID at 211-12.

Respondent disputes these findings. According to Respondent, PE separators, which comprise most of Daramic's product line, are reasonably interchangeable with each other regardless of end use. Respondent also claims that Daramic's PE separators are not substitutes for, and do not compete with, Microporous' Flex-Sil product, a rubber separator used in deep-cycle batteries. RAB at 9-19. On that basis, Respondent argues that the proper relevant product markets are an "all PE" separator market and a market consisting only of Flex-Sil.¹⁸ *Id.* We disagree and affirm the ALJ's product market determinations.

The factors that determine the contours of a relevant market are well known. The "boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325; *see also United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). "Interchangeability of use and cross-elasticity of demand look to the availability of products that are similar in character or

¹⁸ Respondent also argues that Microporous' Ace-Sil constitutes its own relevant market. Ace-Sil is a hard rubber battery separator that is typically used in very high-end stationary applications such as telecommunications, nuclear plants, and military products. IDF 45. The Complaint does not allege that the transaction led to a substantial lessening of competition in any market where Ace-Sil separators are sold. We therefore reach no conclusion as to whether Ace-Sil constitutes a relevant product market.

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use to the product in question and the degree to which buyers are willing to substitute those similar products for the product.” *FTC v. Swedish Match N. Am., Inc.*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000).

As “evidentiary proxies for direct proof of substitutability” courts look at “practical indicia” of market boundaries, such as industry or public recognition of the market, the product’s peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.¹⁹ *Brown Shoe*, 370 U.S. at 325; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir. 1986). These observable market facts provide evidence of interchangeability and the cross-elasticity of demand.

Under the Horizontal Merger Guidelines, a product market is defined by asking whether a hypothetical monopolist of the proposed product market could impose a small but significant and nontransitory increase in price (“SSNIP”) without losing sufficient sales to render the price increase unprofitable. 2010 HORIZONTAL MERGER GUIDELINES § 4.1.1; *see also Whole Foods*, 548 F.3d at 1038; *Swedish Match*, 131 F. Supp. 2d at 160-61 & n.8. Where a seller “could profitably target a subset of customers for price increases,” a relevant market can be based on a particular use or uses by groups of buyers of the product for which a hypothetical monopolist could profitably impose at least a “small but significant and nontransitory” increase in price. 2010 HORIZONTAL MERGER GUIDELINES § 4.1.4. A hypothetical

¹⁹ Although Respondent criticizes the ALJ’s reliance on “46-year old *Brown Shoe*’s ‘practical indicia’” rather than quantitative evidence, courts continue to rely on these factors to define a relevant market. *See, e.g., Whole Foods*, 548 F.3d at 1033, 1044-45; *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 41-43 (D.D.C. 2009); *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075, 1078 (D.D.C. 1997). The Commission and the DOJ also consider such evidence relevant and probative. 2010 HORIZONTAL MERGER GUIDELINES § 2.2; U.S. DEPT. OF JUSTICE & FED. TRADE COMM’N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES 9 (Mar. 2006), *available at* <http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf> (“In the vast majority of cases, the Agencies largely rely on non-econometric evidence, obtained primarily from customers and from business documents.”).

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monopolist is unlikely to be able to raise price to a targeted group where buyers can engage in arbitrage. *Id.*

The record here supports relevant product markets based on the end use of separators. Manufacturers tailor separators along a variety of dimensions according to both the individual customer and the specific application or end use. IDF 92-98, 104, 106-08, 110. Flooded lead-acid battery separators are differentiated by various physical characteristics, including their base material (*e.g.*, polyethylene or rubber), additives to the base material, “rib spacing and profile,” “backweb” thickness, overall thickness, border areas, and finishing (*e.g.*, delivered in rolls or cut into smaller flat sheets).²⁰ IDF 85-86. The fact that two separators may have one characteristic in common, such as backweb thickness, does not mean that the separators can be substituted for one another in a particular application if the other features are different, such as the base material, additives to the base material, or profile. IDF 86-97. If a separator designed for one type of battery is used in a different type of battery, the battery’s performance, including its life, would be adversely affected. *See, e.g.*, Leister, Tr. 4022-24. Thus, based on design and functionality, a separator manufactured for a particular end use or customer is not reasonably interchangeable with other separators.

We recognize that certain separator products, such as Daramic HD and CellForce, can be used in more than one type of battery. But that fact does not alter our conclusion. Daramic itself distinguishes between end-use separator markets and sets separator prices accordingly. For instance, it currently charges different prices for Daramic HD and CellForce (formerly a Microporous product) depending on the separator’s end use. IDF 114-16; PX0395 at 40, *in camera*; Gilchrist, Tr. 458, *in camera*; Hauswald, Tr. 793-95, *in camera*. Daramic also tracks sales according to the end use of separators (as did Microporous). IDF 100-02. Moreover, because separators are tailored according

²⁰ Ribs are protrusions on the separator that help establish the physical spacing in the battery to ensure that there is an appropriate amount of acid between the plates. The shapes and sizes of the ribs make up part of the separator’s profile. IDF 31. Backweb thickness is measured between the ribs and acts to create a wall of insulation in the battery between the plates. IDF 16.

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to customer-specific designs, arbitrage is unlikely. IDF 85, 92, 117-18. Accordingly, as explained in detail below, deep-cycle, motive, UPS, and SLI separators constitute distinct relevant product markets.

1. Deep-Cycle Market

Deep-cycle batteries are used in products such as golf carts, floor scrubbers, and scissor lifts that require a low amperage draw over a long duration of time. IDF 19, 128. Deep-cycle batteries are typically discharged more deeply – to a lower state of discharge – than motive batteries and are designed to run at a lower amperage for a longer period of time than SLI batteries. IDF 130-31.

Relative to other batteries, deep-cycle batteries have high antimony content in the lead alloy grid, which aids in their construction and enhances the capacity for cycles of charges and deep discharges. IDF 15, 132-37. If antimony migrates from the positive to the negative plate in the battery, “antimony poisoning” occurs, which causes the voltage of the battery to drop and can lead to conditions that shorten the battery’s life. IDF 138-39. The separator in a deep-cycle battery ties up the antimony in the electrolyte liquid, preventing the antimony from settling on the negative plate. IDF 15.

Rubber separators are the most effective in preventing the transfer of antimony between the lead plates and therefore in reducing antimony poisoning in deep-cycle batteries. IDF 140. Microporous’ Flex-Sil is made of natural rubber. IDF 143. CellForce, also developed and sold by Microporous, is a PE-based separator with a rubber additive in the form of ground-up Ace-Sil. IDF 144, 148. Microporous sold both for deep-cycle batteries. As alternatives to the Microporous products, Daramic sold a rubber separator, Daramic DC, and later a blended PE-rubber product, Daramic HD, which includes rubber in the form of latex. IDF 145-47, 502, 505-06.

Pure PE separators that are used in motive, UPS, and SLI batteries are not viable substitutes for deep-cycle separators because they do not suppress antimony poisoning and do not perform as well in deep-cycle batteries as separators that are made of, or incorporate, rubber. IDF 150-55. Similarly, because of the

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differences in the batteries and the corresponding requirements for the separators used in those batteries, separators made for motive batteries and separators made for SLI batteries are not reasonably interchangeable with separators made for deep-cycle batteries. IDF 130, 132, 152-56.

Prior to the acquisition, Daramic HD competed with Microporous' Flex-Sil separators. When Daramic HD was introduced in 2005 as a competitive alternative to Flex-Sil, deep-cycle customers initially used it in a limited way, but then expanded their use over time. IDF 512. U.S. Battery tested Daramic HD in 2005, for example, and "indicated a desire to switch four of its new product lines away from Flex-Sil to Daramic HD." IDF 480. U.S. Battery later increased its purchases of Daramic HD and extended its use to additional battery models. IDF 515. Similarly, Exide began switching from Flex-Sil to Daramic HD for its deep-cycle batteries in 2005 and later continued to convert additional batteries from Flex-Sil to Daramic HD. IDF 502, 513, 518. Exide now uses both Flex-Sil and Daramic HD as substitutes in its most common golf cart battery, which makes up approximately 80% of Exide's deep-cycle sales. IDF 503. The record also shows that Microporous responded to competition from Daramic's deep-cycle separators by reducing prices. IDF 464, 470-71. Daramic HD constrained the price of Flex-Sil. IDF 470-71. Similarly, prior to the acquisition, U.S. Battery, Trojan Battery, and Exide successfully used the threat of switching to Daramic HD as leverage to avoid Flex-Sil price increases. IDF 470, 521, 523, 528-29.

Certain customers, however, continue to prefer Flex-Sil over both Daramic HD and CellForce despite Flex-Sil's higher price, and Respondent points to this preference to support its claim that Flex-Sil occupies its own relevant market. We are not convinced, however. Preferences by some buyers for one product do not necessarily mean that the product comprises a separate relevant product market, particularly when differentiated products are involved. Substitution for the purpose of defining relevant markets does not require complete switching between products in the same market. *See United States v. Oracle*, 331 F. Supp. 2d 1098, 1131 (N.D. Cal. 2004); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 122 (D.D.C. 2004). Furthermore, courts have not hesitated to assign products to the same market despite price

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differences when the products, in fact, constrained each other's price levels.²¹

The record also shows that deep-cycle battery manufacturers would not switch to pure PE products in response to a price increase. For instance, when Exide was unable to purchase Daramic HD due to a strike at Daramic's Owensboro plant, Exide did not switch to a pure PE separator for its deep-cycle batteries, instead paying a price premium to purchase Flex-Sil as a substitute.²² IDF 173. Daramic's Vice-President of Marketing and Sales, Sterling Tucker Roe, testified that despite price increase announcements, no deep-cycle customers have switched from products that contain rubber to pure PE separators. IDF 170-71. We therefore find that separators for deep-cycle batteries are a relevant product market.

2. Motive Market

Motive batteries are used primarily in industrial equipment such as forklifts. IDF 204. These batteries are typically operated for much longer periods than SLI batteries and have more rigorous mechanical and chemical requirements. IDF 196. Motive separators are designed to meet these more demanding performance standards. *Id.* The positive plates in motive batteries, for instance, are surrounded by thick insulation to prevent an electrical short. IDF 194. This means that motive

²¹ See, e.g., *AD/SAT v. Associated Press, Inc.*, 181 F.3d 216, 228 (2d Cir. 1999) (holding that the price difference between one-hour delivery services for newspaper advertisements (\$40) and overnight transmission services (\$8) was insufficient to demonstrate the two services were in different markets). Even the cases cited by Respondent did not hold that products fall in different markets based on price differences alone; rather, the courts considered whether the price differences had implications for substitution and the cross-elasticity of demand. Thus, in *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988), the court *in dictum* expressly stated that "generally a price differential, even a substantial one, is irrelevant for purposes of determining reasonable interchangeability."

²² Respondent takes issue with this and other similar customer testimony, arguing it is unreliable. RAB at 19. We disagree. The record contains credible customer testimony identifying specific actions that customers have taken to fill supply needs. See *Oracle*, 331 F. Supp. 2d at 1133 (finding testimony of defendant's witnesses credible because they testified about concrete and specific actions taken to meet customers' information processing needs).

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battery separators typically have a thicker backweb than other separators. IDF 195. Requirements for electrical resistance are lower because of the typically low current densities for motive batteries. IDF 196. Because of motive batteries' distinctive characteristics, separators that are made for deep-cycle, UPS, SLI and other applications are not typically interchangeable with motive separators.²³ IDF 130, 193-96.

Larry Axt, Vice President of Global Procurement at EnerSys, testified that when Daramic declared *force majeure* for motive separators in 2006, EnerSys established a team to search worldwide for an alternative source of supply, but was unable to find an alternative supplier anywhere in the world. Axt, Tr. 2216-18, *in camera*. The merging parties' own documents also confirm that motive separators are a distinct market. *See* IDF 216-20.

3. UPS Market

UPS batteries provide reserve power for stationary products such as computer systems, telecommunications networks, and data centers. IDF 225-35. UPS batteries generate a higher current over a shorter period of time than classic reserve power batteries. They must be very dependable and generally last between 15 and 20 years. IDF 225. UPS batteries have thick plates and tend to be built with a clear case to allow inspection of the battery's acid level. IDF 226. Separators for UPS batteries are typically made of microporous PE but require lower residual oil content than separators for other flooded battery applications to reduce what is referred to as the "black scum" problem. IDF 227-29. Oil residue or "black scum" interferes with the maintenance of a UPS battery by obscuring the indicators of the acid level, making it harder to detect the formation of lead sulfate on the plates. IDF 228. Black scum can also interfere with a valve, causing the battery to overflow and spill acid when an automatic watering system is used. IDF 229.

²³ North American customers do not use PVC separators for motive batteries because they do not perform as well as PE separators and may be associated with the release of unstable chlorine. IDF 200-01. Thus, while EnerSys uses PVC separators for some applications in Europe, it does not use PVC separators in North America where the applications are heavier duty. IDF 203.

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Daramic developed a separator, Daramic CL, with a patented type of oil, which Daramic calls “clean oil,” that reduced the black scum problem. IDF 230. Other PE separators do not reduce black scum and are not well suited for UPS battery applications.²⁴ IDF 231-32. Accordingly, separators for UPS batteries are also a relevant product market.

4. SLI Market

SLI batteries are used in automobiles and other motorized vehicles. IDF 259-60. SLI separators have their own distinct characteristics, which enable SLI separators to perform optimally in motor vehicles, and distinguish SLI separators from other PE separators. SLI separators must have relatively low electrical resistance to permit the surge in current that is needed to start a car. IDF 249. Puncture resistance and mechanical strength are also particularly important because the battery fails if the separator is punctured during assembly of the vehicle. IDF 252. In addition, SLI separators, and hence the backweb, must be very thin. IDF 250-51. Because SLI separators are thin, they are produced with fewer raw materials and are typically priced lower than separators for other end uses.²⁵ Based on functionality and performance characteristics, separators made for other types of batteries are not reasonably interchangeable with separators made for SLI batteries. IDF 131-32, 195-96. Daramic and Microporous documents and testimony also segregate automotive separators as a distinct market segment. IDF 268-70. Separators for SLI batteries are therefore also a relevant product market.

5. The Expert Evidence

Complaint Counsel’s expert, Dr. John Simpson, applied the hypothetical monopolist test to each market using a critical loss

²⁴ Daramic’s Darak separator, made from cross-linked phenolic rather than PE, contains no oil and might solve the black scum problem, but it is very stiff and very chemically stable with low electrical resistance. Darak is primarily used in gel, as opposed to flooded lead-acid batteries, and is significantly more costly than PE-based separators. IDF 41, 234.

²⁵ The average price of Daramic’s SLI separators is \$0.70 per square meter; Daramic HD separators for deep-cycle applications range in price from \$1.50 to \$2.90 per square meter; and its motive power separators cost \$1.90 to \$3.00 per square meter. IDF 267, 114.

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analysis. PX0033 at 6, 12-19, *in camera*. Dr. Simpson concluded that a hypothetical monopolist that supplied separators for each end use would lose less than 10% of its sales in response to a 5% price increase. *Id.*

Respondent's expert, Dr. Henry Kahwaty, opined in turn that PE separators belong in a single relevant market because they are highly differentiated and can be tailored to work across applications. RX0945 at 035-38, 049-53, *in camera*. He also concluded that separator manufacturers do not have sufficient information to set targeted prices based on end use. *Id.* at 053-56. Dr. Kahwaty also argued that Flex-Sil constitutes a separate relevant market because Flex-Sil has unique performance characteristics and is sold at a premium. *Id.* at 041-42. Dr. Kahwaty's application of the hypothetical monopolist test to a market consisting of Flex-Sil led him to find that the critical loss from a 5% price increase for Flex-Sil is 15.4%. Based largely on qualitative evidence regarding the preferences of Flex-Sil's largest customers, Dr. Kahwaty concluded that a hypothetical monopolist could profitably raise the price of Flex-Sil by at least 5%. *Id.* at 046.

We do not find Dr. Kahwaty's opinions persuasive. As explained above, there is more than ample evidence that separator manufacturers can and do set separator prices according to end use. Dr. Kahwaty also failed adequately to consider the evidence regarding pre-acquisition competition between Daramic HD and Flex-Sil.²⁶ While we agree with Dr. Kahwaty that Dr. Simpson's

²⁶ As Dr. Simpson pointed out, Dr. Kahwaty argued that a hypothetical firm that was the only supplier of Flex-Sil could profitably raise the price of Flex-Sil over existing prices by at least 5%, but does not explain why Microporous did not raise the price of Flex-Sil prior to the acquisition if it had the power to do so. PX2251 at 2-3, *in camera*. Dr. Kahwaty also stated that Flex-Sil appears to be priced below a profit maximizing level because its price is set by negotiations with customers, but he fails to explain how customers that allegedly have no competitive alternatives could extract lower prices through negotiations. RX0945 at 048, *in camera*. Elsewhere, Respondent emphasizes that Flex-Sil was priced above competitive levels before the acquisition and asserts that the ALJ defined an overly broad market by examining substitution patterns without adjustment for Flex-Sil's pre-existing market power. RRB at 33. However, for the purpose of evaluating the competitive effects of a merger between the producers of Flex-Sil and Daramic HD, evidence of pre-merger competition between those products suggests that customers could be harmed

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application of the hypothetical monopolist test to the deep-cycle market could in theory miss a separate relevant market for Flex-Sil,²⁷ that did not occur here. Dr. Simpson carefully analyzed the qualitative evidence regarding pre-acquisition competition between Flex-Sil and Daramic HD and based on that evidence correctly concluded that Daramic HD was a meaningful competitive constraint on the price of Flex-Sil. PX0033 at 13. Moreover, even apart from Dr. Simpson's opinion, for the reasons discussed above, Complaint Counsel established that the proper relevant markets in this matter are based on the end use of battery separators.

B. RELEVANT GEOGRAPHIC MARKET

The ALJ defined a North American geographic market based on customer location. ID at 239-43. He found that separator manufacturers can and do set prices based on a customer's geographic location, and that, because separators are tailored to an individual customer's demand, a customer could not likely defeat a discriminatory price increase through arbitrage. IDF 271-79.

Respondent argues that arbitrage would defeat any effort to exercise market power based on customer location and claims that the proper geographic market is global. RAB at 19-24. Respondent's expert also rejected the conclusion that sellers could price discriminate based on customer location. Analyzing the geographic market based on the location of suppliers, Dr. Kahwaty concluded that the relevant geographic market is global. RX0945 at 057-58, *in camera*.

We review the evidence under the familiar standards from the case law and the Horizontal Merger Guidelines. The boundaries of the relevant geographic market, like the boundaries of the relevant product market, depend on reasonable interchangeability

by the acquisition and warrants including both products in the same relevant market.

²⁷ In setting out the framework for his analysis, Dr. Simpson considered whether a hypothetical monopolist supplying deep-cycle separators to North American customers could profitably impose a SSNIP, but did not first consider whether a monopolist supplying Flex-Sil to North American customers could do the same.

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and cross-elasticity of demand. *Brown Shoe*, 370 U.S. at 336. A relevant geographic market defines the geographic area to which consumers “could practicably turn for alternative sources of the product.” *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995). Under the Horizontal Merger Guidelines, a relevant geographic market is the smallest region in which a hypothetical monopolist that was the only seller of the relevant product located within that region could profitably implement a “small but significant and non-transitory” increase in price. 2010 HORIZONTAL MERGER GUIDELINES § 4.2. Where suppliers can set prices based on customer location, and customers cannot avoid targeted price increases through arbitrage, suppliers may be able to exercise market power over customers located in a particular geographic region, even if a price increase to customers located in other geographic regions would be unprofitable. *Id.* at § 4.2.2.

Applying these standards to this case, we find that the relevant geographic market is North America. Because battery separators are tailored to a particular customer and type of battery, and sold through individualized negotiations, separator suppliers set separator prices based in part on customer location. IDF 275-79. Moreover, because separators are differentiated along a variety of dimensions according to customer demand, a customer could not easily defeat a discriminatory price increase through arbitrage.²⁸ IDF 274.

Additionally, while the evidence shows that North American suppliers export separators to other parts of the world, it is undisputed that North American battery manufacturers do not

²⁸ Complaint Counsel established that Daramic and Entek currently charge different prices for separators in different geographic regions, which shows that suppliers can and do set prices according to customer location. That fact, along with the inability of customers to defeat a discriminatory price through arbitrage, supports the conclusion that the transaction could enhance Daramic’s market power over North American customers, even if it did not have the same impact on customers located in other parts of the world. For similar reasons, we find the Elzinga-Hogarty test does not illuminate the competitive effects of this transaction because it considers competition based on supplier rather than customer location. See Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 ANTITRUST BULLETIN 45 (1973); Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation Revisited: The Case of Coal*, 23 ANTITRUST BULLETIN 1 (1978).

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consider foreign supply a reasonable competitive alternative to local supply due primarily to cost and quality. Foreign supply increases the risk of supply chain disruption and entails greater freight, warehousing, inventory and other costs. It also decreases the likelihood of a timely response to quality or technical problems. IDF 286-91, 312-14. With one exception, there is no evidence that any North American battery manufacturer has imported flooded lead-acid battery separators from outside North America. IDF 283-85, 311, 333-34, 346, 349-50, 352-53. The lone exception occurred in 2008 when EnerSys was forced to purchase separators from Daramic's plant in Feistritz due to a labor strike at Daramic's Owensboro, Kentucky plant. EnerSys estimated that importing separators from Europe increased its costs by approximately 20%. IDF 313. Other separator customers, as well as Daramic and Microporous, recognize the cost-based benefits of local supply. IDF 287-88, 290-300, 303-09. All of this serves to confirm that North America is the relevant geographic market.

C. MARKET PARTICIPANTS

Market participants are firms that currently supply products in the relevant market, as well as firms not currently selling in the market that are likely to provide rapid and effective supply responses to the exercise of market power by current sellers without incurring significant sunk costs. 2010 HORIZONTAL MERGER GUIDELINES § 5.1. Where a firm is actively attempting to sell its products to customers in the relevant market and those efforts impact the behavior of existing sellers, that firm may be treated as an actual competitor. *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) (finding that a merger violated Section 7 where the acquired firm had made efforts to sell in the relevant market and those efforts, even though unsuccessful, had influenced the behavior of the acquiring firm in that market).²⁹

²⁹ See also *Marine Bancorp.*, 418 U.S. at 625 n.24 (noting that the unlawful merger in *El Paso* had “removed not merely a potential, but rather an actual, competitor” because the acquired firm’s marketing efforts relative to one of the acquiring firm’s customers had caused the acquirer to make major price and other concessions); 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 912a (3d ed. 2006) (“The acquisition by an already dominant firm of a new or nascent rival can be just as anticompetitive as a

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The ALJ found that Daramic and Microporous were the only firms participating in the deep-cycle separator market prior to the acquisition, with market shares of approximately 10% and 90% respectively. IDF 384-85. He also found them to be the sole participants in the motive market, respectively representing approximately 90% and 10% of the market. IDF 410. In the SLI market the ALJ concluded that Daramic accounted for approximately 48% of the market, Entek had approximately 52%, and Microporous was actively bidding for SLI business. IDF 439; ID at 259. Finally, he also determined that, while Daramic had a 100% share in the UPS market, Microporous was a “substantial factor” in that market. ID at 258. We affirm the ALJ’s conclusions with respect to the deep-cycle, motive and SLI markets. However, we find that Complaint Counsel failed to prove that Microporous was a participant in the UPS market.

1. Microporous Was a Participant in the North American SLI Market

We agree that Microporous was a participant in the North American SLI market, seeking to challenge Daramic and Entek’s hold on the market. Not only was Microporous actively competing for SLI business, it had made meaningful progress towards supply arrangements with JCI and Exide, two of the largest automotive battery manufacturers in the world with significant manufacturing facilities in North America. IDF 49-55; ID at 258-59. It is also clear that Daramic perceived Microporous as a competitive threat and reacted by reducing prices. IDF 820-21, 824-25, 849, 852.

JCI first approached Microporous about an SLI supply agreement in 2003, as part of JCI’s plan to generate more competition in the market. IDF 649-50. Daramic responded by convincing JCI to enter into a [redacted] supply contract with the suggestion it would cut off supply in Europe if JCI did not agree to a long-term commitment. IDF 663, 667, 677-78. At the same time, however, JCI continued to work with Microporous to

merger to monopoly. . . . [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.”).

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develop acceptable SLI separators and qualified the SLI separators in 2007. IDF 684-90.

During this time, Microporous was also negotiating a supply agreement with Exide. IDF 710-16. In 2007, Microporous and Exide had entered into a memorandum of understanding (“MOU”) in which Microporous represented it would supply substantial volumes of SLI separators to Exide beginning in 2010. IDF 697-700. Microporous sent separator samples to Exide for testing, exchanged drafts of a supply agreement with Exide, and continued to meet and consult with Exide regarding an SLI separator. IDF 707-09. The MOU expired at the end of 2007, and the parties renewed the agreement in February 2008. IDF 710. Melvin Gillespie, who was responsible for Exide’s negotiations with Microporous, testified that when Exide renewed the MOU in February 2008, it planned to purchase SLI separators from Microporous beginning in January 2010. *Id.* Microporous and Exide were still engaged in discussions shortly before Daramic acquired Microporous in February 2008. IDF 711-16.

Respondent tries to downplay Microporous’ dealings with these customers. It argues, for instance, that Microporous failed to produce an acceptable SLI product for JCI and that their discussions ended in 2007. RAB at 25-26. But, while JCI did reject Microporous’ early run of separators, the record shows that JCI qualified the Microporous SLI product in 2007. IDF 640, 651, 684-90. Moreover, JCI’s decision to enter into a long-term supply agreement with Entek rather than Microporous in the fall of 2007 does not mean that Microporous was not an active participant in the SLI market. JCI’s decision had little to do with Microporous’ development or manufacturing capabilities and instead reflected JCI’s concern that Daramic might acquire Microporous and that a trade secrets dispute between Daramic and Microporous³⁰ could delay Microporous’ installation of necessary capacity by the end of 2008. IDF 691-93, 734.

³⁰ The dispute concerned a PE manufacturing line Microporous had purchased from Jungfer, an Austrian company, in 1999. Under its contract with Jungfer, Microporous was prohibited from using Jungfer’s trade secrets to sell PE separators in Europe. Daramic acquired Jungfer in 2001 and attempted to enforce the trade secrets clause against Microporous, to prevent Microporous from installing PE production lines in Europe. IDF 760-65.

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Respondent also claims that Exide did not seriously pursue a supply relationship with Microporous. RAB at 26. Respondent notes that Exide did not renew the MOU until several weeks after the original had expired, and that the parties made no progress on a supply agreement in 2007. Respondent also points to a February 2008 email in which Steven McDonald, Microporous' Director of Sales and Marketing, expressed frustration with the pace of the negotiations with Exide. RAB at 27 (citing RX0285). However, Exide's Vice-President for Global Procurement testified that, in February 2008, when Exide's MOU with Microporous was extended, "We had full intention that we were going to be buying Microporous separators in 2010." Gillespie, Tr. 2976; IDF 710. Moreover, we fail to see why Microporous' expression of frustration with the pace of negotiations with Exide suggests Microporous was not seriously competing for business in the SLI market. Indeed, the document suggests just the opposite.

Finally, citing a November 2007 Board of Directors memorandum, Respondent contends the Microporous Board mandated a business strategy away from the production of SLI separators.³¹ RAB at 27 (citing RX0401). Here too, the weight of the evidence demonstrates otherwise. Both the former President and owners of Microporous testified that nothing in that Board document prevented Microporous from pursuing SLI opportunities, and that, absent the acquisition, Microporous intended to supply Exide. IDF 799-803; Trevathan, Tr. 3753. In fact, negotiations with Exide continued through February 2008, providing direct, contemporaneous evidence that Microporous did not regard pursuit of SLI business as foreclosed. IDF 710-16.

There is also no question that Daramic perceived Microporous as a serious competitive threat in the SLI market. As early as January 2004, Daramic's head of worldwide sales, Mr. Roe, alerted the sales team that JCI might soon be pursuing automotive

³¹ The memorandum, titled "MPLP Strategic Mandates," was from the Microporous Board of Directors to Microporous' President Mike Gilchrist. Describing the company's strategic objectives for 2008, the Board wrote that, "[o]ther than filling the 2nd line in Austria, the Board does not endorse a pure PE growth strategy competing head-to-head with larger competitors (i.e. Daramic, Entek). Some exceptions may be made to this . . . but these and any other exceptions must be approved by Board on a case-by-case basis." RX0401.

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opportunities and that it had “become critical that we assess the true sales situation of [Microporous’] Cell-Force product.” IDF 681 (quoting PX0244; Roe, Tr. 1248-51). By 2007, Daramic believed that Microporous was a serious competitive threat and that it had the potential to capture as much as 20 to 25 msm of Daramic’s business in 2009 and an even larger share in 2010. IDF 807. Responding to a request concerning Daramic’s 2008 budget and long range plans, Mr. Roe stated that “2008 will be the most challenging year ever faced by Daramic,” that Daramic was “beginning to feel the real effects” of price competition and Daramic’s past performance issues; and that, “unlike prior years, we have a true legitimate big competitor entering the market [Microporous] and for sure they will capture volume whatever it takes.”³² IDF 435 (citing PX0482 at 2); IDF 809 (quoting PX0238 at 1; PX0922 at 362-63, *in camera*; Roe, Tr. 1302-03). Collectively, this evidence demonstrates that Microporous was a participant and actual competitor in the North American SLI separator market.

2. Complaint Counsel Failed to Prove That Microporous Was a Participant in the UPS Separator Market

In 2007, Microporous began developing a PE separator to compete with Daramic’s Darak product, a non-PE separator made in Germany, as part of a research effort known as Project LENO.³³ IDF 244. Based on the status of Project LENO at the time of the acquisition, the ALJ concluded that Microporous was a potential competitor “poised” to enter the North American UPS separator market and was a “substantial factor” in that market. ID at 258-59.

Respondent disputes this, claiming that Microporous’ research effort was unsuccessful and failed to lead to a commercially viable product. RAB at 27-28. Respondent also argues that Project LENO focused on developing separators for gel batteries

³² Likewise, there is evidence that Entek also considered Microporous to be a competitive threat in the SLI market. IDF 436; Weerts, Tr. 4517, *in camera*; PX1832 at 26-27, *in camera*.

³³ Respondent maintains Darak has never been sold for use in flooded lead acid batteries in North America. RAB at 28.

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primarily for European customers. *Id.* Thus, even if successful, the research would have had no impact on a North American market for flooded lead-acid UPS battery separators. *Id.* Complaint Counsel counter by arguing that Project LENO included the development of a “white PE” separator for flooded lead-acid UPS batteries, and that Microporous was testing a UPS product it expected would generate substantial revenues as early as 2008. CCAB at 8, 20-21.

We find that the evidence is not sufficient to prove that Microporous was a participant in the UPS battery separator market. Unlike in the SLI market, Microporous had not developed a commercially viable separator to offer North American UPS customers, nor had any customer qualified or come close to qualifying a Microporous UPS separator. There is also no indication that Daramic perceived Microporous as a competitive threat in the UPS market, or that it reacted by competing more aggressively in the UPS market. In addition, while Project LENO did evolve to include research related to the development of a white PE separator for UPS batteries, the evidence suggests that the success of Project LENO was in doubt. The ALJ relied primarily on the testimony of Microporous’ Director of Research & Development, George Brilmyer, to find otherwise. Based on Mr. Brilmyer’s testimony, the ALJ concluded that the Microporous team believed it had found a solution to the “black scum” problem and that EnerSys planned to switch to the Microporous white PE product for its flooded lead-acid UPS batteries when it was qualified. IDF 622-24. The ALJ determined that, with Project LENO, Microporous “would likely have been in the [UPS separator] market within one year without the additional expenditure of sunk costs of entry.” IDF 420. However, Mr. Brilmyer had left the merged company by August 2008 and testified he did not know the current status of the EnerSys tests on the white PE separator. Brilmyer, Tr. 1857. He also acknowledged that testing often takes years, the industry had been seeking a solution to the black scum problem for a long time, and Daramic was still working on a possible formulation when he left the company in August 2008. *Id.* at 1847, 1887, 1908. Moreover, Mr. McDonald, Microporous’ Director of Sales, testified that when samples of a white PE product were provided to EnerSys in the summer of 2007, the testing ran into problems and could not be conducted in actual batteries. McDonald, Tr.

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3866-68, *in camera*. Mr. McDonald also testified that an additional sample was provided to EnerSys in July 2008, but his understanding of the status of the project at the time of trial was that there is “no advantage with the white PE versus the PE they are already purchasing from Daramic.” McDonald, Tr. 3869, *in camera*.

Considering the record as a whole, and in light of the evidence regarding entry barriers in this industry discussed below, we conclude that the evidence does not support the ALJ’s conclusion that Microporous was a participant in the North American UPS market.

3. Entek Was Not a Participant In Either the Motive or Deep-Cycle Market

Of the four relevant markets, the ALJ concluded that Entek was a participant only in the SLI market. IDF 382-83, 392, 403, 421, 1027-30. Specifically, the ALJ found that Entek was committed to an SLI-only strategy, and that its past refusals and disinterest in response to customer invitations to supply non-SLI separators showed it did not intend to participate outside the SLI separator market. IDF 378-81, 394-98, 421, 1029-30.

Respondent initially argued that Entek was an uncommitted entrant in the deep-cycle and motive markets because it had previously sold separators for deep-cycle and industrial applications and could quickly shift supply to these applications in response to a price increase. RAB at 5-6, 28. Respondent also maintained that Entek had substantial excess capacity at the time of the acquisition and was discussing sales of deep-cycle and industrial applications with EnerSys, Exide and JCI. *Id.* at 28. In connection with its Third Motion to Reopen the Hearing Record, Respondent purported to present new evidence showing that “a competitor of [Daramic], which Respondent believes to be Entek . . . is providing separators for deep-cycle and motive applications to North American customers, in direct competition with Daramic.” Brief in Support of Third Motion to Reopen at 1. Accordingly, Respondent now argues that Entek is an actual competitor in both the motive and the deep-cycle markets and that the ALJ erroneously concluded that the acquisition resulted in mergers to monopoly in those two markets. *Id.* at 2.

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We disagree. There is no evidence that Entek is currently supplying separators for motive or deep-cycle batteries. Nor is there evidence suggesting a likelihood of timely entry by Entek in either market. Entek exited the motive market over ten years ago, deciding to focus on thin separators such as those used in SLI applications. IDF 1027, 1029. Prior to the acquisition, Entek declined numerous opportunities to re-enter the motive market.³⁴ IDF 395, 397, 1032, 1034. Although Entek had excess capacity in 2008,³⁵ and appears, at least initially, to have considered potential motive opportunities, the evidence does not show that Entek is likely to provide a rapid supply response. IDF 399. For example, while Entek responded to Exide's November 2008 request for proposal to supply motive and UPS separators, Entek explicitly stated that Exide would have to pay for tooling and that it could not guarantee a competitive price. IDF 1035. These were important issues to Entek. IDF 1035 (citing Gillespie, Tr. 3129-30, *in camera*). At the time of trial in June 2009, Entek still had not run any material and did not know what the costs or pricing would be for industrial separators. IDF 1037; Weerts, Tr. 4509, 4527, *in camera*. Moreover, Exide estimated that testing separators for motive or stationary applications would take approximately two years. Gillespie, Tr. 2973-74.

Entek also had discussions with EnerSys, but here too the evidence does not show that Entek is a participant in the motive market. EnerSys first approached Entek at an industry conference in May 2008 about potential production of motive separators. IDF 1041. While indicating initial interest at the conference, Entek failed to return a signed non-disclosure agreement, which was the prerequisite for further discussions, despite numerous follow-up e-mails and telephone calls from EnerSys. *Id.* Then, shortly before trial, Entek submitted an offer for approximately

³⁴ Likewise, when Crown Battery asked Entek if it could supply industrial PE separators during the Daramic Owensboro strike in August 2008, Entek could not do so because it lacked the proper tooling. IDF 394, 952.

³⁵ The record shows that Entek had substantial excess capacity in 2008. Much of that capacity was due to an expansion undertaken pursuant to a 2007 MOU under which Entek became JCI's exclusive supplier in North America and Europe. Weerts, Tr. 4472-74, *in camera*; RX0131, *in camera*. The expansion was aimed at SLI separators, not motive or deep-cycle products, and most of the excess capacity was at Entek's UK plant rather than its U.S. plant in Oregon. Weerts, Tr. 4458-59, *in camera*.

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1,000 square meters of one profile of industrial product where EnerSys required six msm of that profile. IDF 1042. EnerSys determined that Entek's profile would not work for its North American products, and it had no plans to order PE separators from Entek. IDF 1042-43. Moreover, even had the parties decided to proceed further, six to eight months of preliminary testing on pre-production samples would have been required, and production testing would have taken another two and a half years. IDF 1044.

The recent evidence submitted by Respondent does not show Entek to be any closer to participation in the motive market. Daramic's CEO, Mr. Toth, stated that, in May 2010, he spoke with a JCI representative regarding "JCI's need for battery separators for industrial applications, including separators for golf cart batteries." Affidavit of Robert B. Toth, ¶ 2 (June 30, 2010), *in camera*. The JCI representative apparently responded that "Entek was willing to produce an industrial separator . . . and had, in fact produced industrial separators."³⁶ *Id.* at 3. However, in a declaration submitted by Complaint Counsel, Robert Gruenster, JCI's Executive Director of Product Engineering, stated that JCI does not manufacture motive batteries [redacted]. Declaration of Robert Gruenster, ¶ 2 (July 12, 2010), *in camera*; *see also* Hall, Tr. 2665.

Respondent also argues that Entek is a participant in the deep-cycle market, pointing to evidence that Entek has considered developing a deep-cycle separator for JCI.³⁷ RAB at 28. Entek has discussed supplying separators to deep-cycle customers. Prior to the acquisition, Crown Battery discussed purchasing a deep-cycle separator from Entek and expected to test an Entek

³⁶ The reference in Mr. Toth's affidavit to "industrial separators" is ambiguous. Daramic has elsewhere used the term "industrial" to refer to a broad range of batteries – basically, all batteries other than SLI and other starter batteries. RX1305 at 7. As a result, it is unclear whether the phrase is intended to refer to separators for motive batteries. The other affidavits submitted by Respondent – all from Daramic employees – clearly refer only to golf cart (*i.e.*, deep-cycle) battery separators. *See* Affidavit of Randy A. Hanschu, ¶¶ 3, 6 (June 29, 2010), *in camera*; Affidavit of Steve McDonald, ¶ 3 (June 28, 2010); Affidavit of S. Tucker Roe, ¶¶ 4, 6 (June 30, 2010), *in camera*.

³⁷ Although JCI entered into a long-term supply agreement with Entek [redacted]. IDF 1046.

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separator for its deep-cycle batteries in 2009. IDF 1031; Balcerzak, Tr. 4138-39. It appears from Respondent's recent affidavits that Entek recently provided samples to JCI and Superior Battery for testing.³⁸ However, these discussions with customers are not sufficient to show that Entek is a participant in this market. More than two years after the acquisition, and despite evidence of Daramic's post-acquisition price increases in the deep-cycle market, there is nothing to suggest Entek has entered the deep-cycle market or even qualified a product. At best, the record shows that Entek is testing a product with JCI and Superior Battery, which is not enough to show that Entek is a market participant.

The evidence, in other words, does not show that Entek is in a position to provide a rapid and effective supply response to the exercise of market power by Daramic in the motive or deep-cycle markets. The ALJ therefore correctly concluded that Entek was not a participant in these markets, and the additional evidence that Respondent submitted on reopening does not persuade us otherwise.

D. REASONABLY LIKELY COMPETITIVE EFFECTS**1. The Acquisition Is Presumptively Illegal in the North American Deep-Cycle, Motive, and SLI Markets**

The ALJ concluded that the acquisition was presumptively unlawful in all four relevant markets. In particular, the ALJ found that the merger created a monopoly in the deep-cycle and motive markets, where prior to the acquisition, Daramic and Microporous were the only two market participants. ID at 246-49, 251. The ALJ also found that Daramic entrenched its monopoly position in the UPS market by acquiring the only firm "poised" to enter that market. ID at 259. In the SLI market, the ALJ concluded that Daramic acquired one of its two competitors, recreating the duopoly that existed before Microporous began to compete in that market. ID at 259.

³⁸ See *supra* note 36.

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Respondent disputes the ALJ's findings on market definition and Entek's participation in the non-SLI markets, and challenges the ALJ's market concentration findings on those grounds. Respondent also claims that Complaint Counsel failed to make out a *prima facie* case with respect to the SLI market because Microporous did not have SLI sales at the time of the acquisition. Respondent asserts that Complaint Counsel cannot establish a *prima facie* case unless they show an increase in the numerical concentration data. RRB at 18.

As explained above, we find that the ALJ properly defined four relevant markets and concluded that Entek was a participant in only the North American SLI separator market. We also agree that the acquisition was presumptively unlawful in the North American deep-cycle, motive and SLI separator markets. However, we conclude that Complaint Counsel have not met their burden with respect to liability in the North American UPS market because, as discussed above, they have not proven that Microporous was a participant in that market.³⁹

Daramic and Microporous were the only participants in the deep-cycle market, with market shares of approximately 90% and 10% respectively. IDF 384-385. The acquisition increased the HHI in the deep-cycle market by 1,891 points, resulting in an HHI of 10,000. IDF 384. Likewise, Daramic and Microporous were the sole participants in the motive market, with market shares of approximately 90% and 10% respectively. IDF 410. The merger raised the HHI in the motive market by 1,663 points, also resulting in an HHI of 10,000. *Id.* The concentration data in both the deep-cycle and motive markets is in itself more than sufficient to create a presumption of illegality in those markets.⁴⁰ See *Heinz*, 246 F.3d at 716 (increase in HHI of 510 in a market with HHI of 4,775 created a presumption "by a wide margin"); 2010 HORIZONTAL MERGER GUIDELINES § 5.3.

³⁹ We also find that the evidence regarding Project LENO is not sufficient to establish liability under a theory of potential competition.

⁴⁰ While we find that the evidence does not support Respondent's assertion that Entek was a participant in the deep-cycle or motive markets, our conclusion that the acquisition is presumptively unlawful in these markets would not differ with a merger to duopoly.

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At the time of the acquisition, Daramic and Entek were responsible for all sales in the North American SLI market. IDF 439. The market was highly concentrated, with an HHI of 5,005. IDF 439; *see Heinz*, 246 F.3d at 716 (HHI of 4,775 indicative of a highly concentrated market); 2010 HORIZONTAL MERGER GUIDELINES § 5.3. Although Microporous had not yet made sales in the SLI market, it was actively competing for business and constraining Daramic's prices. IDF 820, 822, 826-28, 833, 849, 850-52. The acquisition eliminated the impact that Microporous had on competition in the market and returned the market to a duopoly controlled by the two long-time incumbents. This evidence is sufficient to create a presumption that the merger was also unlawful in the SLI market.⁴¹ *See Chicago Bridge*, 138 F.T.C. at 1053; *Heinz*, 246 F.3d at 717.

2. There Is Also Evidence of Reasonably Likely Anticompetitive Effects in the Deep-Cycle, Motive and SLI Markets

The ALJ also concluded that the evidence showed a reasonable likelihood of anticompetitive unilateral effects in all

⁴¹ In light of our conclusions below that barriers to entry into each of the relevant markets are significant, we find that liability in the SLI market could be premised in the alternative on the elimination of actual or perceived potential competition. Both doctrines apply to mergers that involve concentrated markets with few likely entrants. *Marine Bancorp.*, 418 U.S. at 624-25, 630. Actual potential competition rests on the theory that the merger eliminated a firm that was on the verge of entering the market *de novo* or through a toehold acquisition. *Id.* at 633; *accord Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977-78 (8th Cir. 1981); *Mercantile Texas Corp. v. Board of Governors*, 638 F.2d 1255, 1265-70 (5th Cir. 1981). Perceived potential competition rests on the theory that the very presence of one of the merging parties as a potential entrant constrained the exercise of market power by current sellers in the market. *Marine Bancorp.*, 418 U.S. at 624-25. The facts here support liability under both theories. Microporous was the only firm in a position to enter the concentrated North American SLI market and was already bidding for business. Daramic perceived Microporous as a competitive threat and reacted by offering more competitive terms to those customers it believed it could lose to Microporous. Accordingly, even if Microporous was not an actual competitor in the SLI market at the time of the acquisition, the acquisition was nevertheless unlawful. The Agencies analyze acquisitions of potential competitors under the standard horizontal merger framework. 2010 HORIZONTAL MERGER GUIDELINES § 5.1.

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four markets and a reasonable likelihood of anticompetitive coordinated effects in the SLI market. We concur with the ALJ's findings with respect to the deep-cycle, motive and SLI markets.

a. Pre-acquisition competition between Daramic and Microporous

Daramic spent many years working to develop a battery separator that would perform effectively in deep-cycle applications. IDF 457. It introduced Daramic DC, its first commercial separator for deep-cycle batteries, in 2002, and an improved product, Daramic HD, in 2005. IDF 459, 476. The evidence shows that Daramic developed its deep-cycle products to compete with Microporous' Flex-Sil rubber separator. IDF 489-90.

Before the acquisition, competition between Daramic and Microporous in the deep-cycle market resulted in lower prices for customers. Donald Wallace, Executive Vice President of U.S. Battery, testified that after he told Microporous his company was buying deep-cycle separators from Daramic, Microporous offered a lower price for Flex-Sil. Wallace, Tr. 1927, 1945-46. Mr. McDonald, a Daramic sales manager and former Microporous employee, testified that Microporous had reduced its price in response to customer threats to switch to HD. McDonald, Tr. 3779, 3943. Trojan Battery, U.S. Battery, and Exide were each able to get a price reduction or avoid a price increase from Microporous by threatening to switch at least a portion of their deep-cycle business to Daramic HD. IDF 470, 520, 521, 525, 535.

Pre-acquisition competition between Daramic and Microporous also lead to lower prices for customers in the motive market. Daramic's Vice-President for Sales and Marketing testified that he reduced prices on industrial separators in response to competing offers from Microporous. IDF 583; Roe, Tr. 1265; PX0409. In 2004, EnerSys was able to use a competing bid from Microporous to negotiate a price reduction from Daramic of approximately 14% for its North American motive business. IDF 593. The President of Bulldog Battery, Norman Benjamin, testified that after his company switched its motive business from Daramic to Microporous, Daramic tried to win the business back

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by offering a lower price. IDF 607; Benjamin, Tr. 3505, 3516. Microporous responded by reducing its price to close to the price Daramic had quoted. Benjamin, Tr. 3516-17. But where Daramic did not face competition from Microporous, it pushed for higher prices. In an internal Daramic email regarding Exide, a Daramic sales executive wrote to his colleague that Daramic should be prepared to push for a price premium, noting that “Since they can’t go to Amerace [*i.e.*, Microporous], we can negotiate a little tougher.”⁴² IDF 600; PX0843 at 1.

Microporous was also planning to expand its production capacity in both Europe and the United States. IDF 773-804. Daramic perceived this expansion as a threat in both the motive and SLI markets. PX0433 at 4; PX2242 at 1, *in camera*. In response, Daramic put together “the MP plan.” IDF 820-23; Roe, Tr. 1292-94. Daramic identified East Penn Battery, Crown Battery, and Douglas Battery as customers that were “At Risk via MP.” PX0258; Roe, Tr. 1288-90. In the fall of 2007, Daramic offered these customers contracts that would freeze prices in 2009 and limited future price increases to a pre-set formula as part of its “strategy against Amerace.” IDF 822; PX0255, *in camera*.

b. Daramic’s pre-acquisition intent

Daramic’s internal business documents, including the documents given to Polypore’s Board of Directors shortly before it met to consider the acquisition, provide convincing evidence of Daramic’s pre-acquisition anticompetitive intent. In an effort to minimize the import of these documents, Respondent claims it acquired Microporous “as a means to diversify its product line, gain access to Microporous’ rubber technology and enter the niche rubber market, as requested by customers.” RAB at 3, 34 & n.23. While Daramic was certainly interested in acquiring Microporous’ rubber technology and increasing its sales to deep-cycle battery customers, that does not contradict the strong evidence of anticompetitive intent.

⁴² Despite the evidence of the benefits to customers of pre-acquisition competition between Daramic and Microporous, Respondent asserted at oral argument that certain customers supported the acquisition. Transcript of Oral Argument at 71-72. However, the record does not show pre-acquisition customer support for the merger, nor does the record show that, at the time of trial, any customers were better off as a result of the merger.

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Daramic's documents show it was motivated to acquire Microporous at least in part to eliminate a competitive threat in the motive and SLI markets. These documents also show that Daramic saw the acquisition as a profitable alternative to expanding its share in the deep-cycle market through continued innovation and competition with Microporous on price and quality.

Several years before the acquisition, Daramic executives began to express their concerns about competition with Microporous and discuss an acquisition as a defensive strategy. IDF 759; PX0167. Daramic's head of sales sent a memorandum to Daramic's then-CEO, Frank Nasisi, on May 13, 2005, explaining the advantages and disadvantages of acquiring Microporous. PX0433 at 4; Hauswald, Tr. 638; Roe, Tr. 1192. Mr. Roe stated that if Daramic did not acquire Microporous, Microporous "may continue [its] plans for a second line resulting in either our loss of current customers or further reduction in our market pricing, hence loss of margins." PX0433 at 4.

Mr. Toth took over as CEO of Polypore in July 2005. IDF 754. Daramic's Vice President, Pierre Hauswald, helped him assess a potential acquisition of Microporous. *Id.* In a cover note on the subject, Mr. Hauswald wrote that Microporous represented "a threat to Daramic for the future (construction of a second line, former discussion they had with JCI . . .). Their first line cost us [redacted] year, in price concession and loss of business. The second line could cost us another [redacted]." PX2242 at 1, *in camera*. Internal Daramic emails from 2005 also show that Daramic executives were concerned about Microporous' expansion plans and more vigorous competition in both the motive and SLI markets.⁴³

⁴³ PX0168 (September 21, 2005 email from Pierre Hauswald to Robert Toth, stating 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 expire."); PX0694 (October 14, 2005 email from Frank Nasisi to Pierre Hauswald and Robert Toth, responding to news that Microporous had started construction on a second production line, stating "We 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.").

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Daramic remained concerned about Microporous' expansion just prior to the acquisition. On October 24, 2007, Mr. Hauswald reported to Polypore's Board on Daramic's due diligence on the proposed acquisition, known as "Project Titan." IDF 854. Documents prepared for the October 24, 2007 Board meeting show that Daramic continued to view the acquisition as a profitable alternative to competition in the motive and SLI markets. PX0738, *in camera*; PX0203, *in camera*.

On October 4, 2007, Michael Graff, Chairman of the Board, received an advance copy of the Project Titan October 24, 2007 Board presentation that included Mr. Hauswald's speaker notes as part of an interim report on the project. IDF 854. With the exception of the speaker notes and backup slides, the presentation to the Board on October 24, 2007 was identical to the slides previously provided to Mr. Graff. IDF 859. The slides and speaker notes include projections of Daramic's sales volumes, prices, margins and earnings with and without the acquisition. Daramic projected that without the acquisition, its volume would fall by [redacted] in 2008, [redacted] in 2009, and [redacted] in 2011. PX0738 at 4, *in camera*. Daramic also projected that absent the acquisition, it would suffer a loss of [redacted] in 2008, [redacted] in 2009, and [redacted] in 2010 from competition with Microporous. *Id.* at 8. In a slide summarizing Daramic's business risks without the acquisition, Daramic wrote that it faced a "5-year EBIDTA loss of [redacted] by fighting against MP Phase III; Excess supply and market price erosion, Daramic market share loss of [redacted]." *Id.* at 10. Mr. Hauswald wrote in his speaker notes that without the acquisition, Daramic would have to "lower prices by [redacted] beginning in 2008 on [redacted] of IND volume to avoid MP phase 3." *Id.* at 4.

The Board presentation also included a slide describing benefits and synergies from the acquisition. These included "implement [redacted] price increase to non-contract customers on industrial product in 2010-generating [redacted] incremental EBITDA." PX0738 at 7, *in camera*. With respect to the deep-cycle market, the stated benefits included replacing HD with CellForce, improvements in efficiency at the Owensboro plant, and "increase in market price." *Id.* Daramic's 2008 budget also projected that absent the acquisition Daramic would lose increasing amounts of business to Microporous and would be

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forced to reduce prices. The budget documents projected that, with the acquisition, Daramic could increase the price of CellForce and industrial products. PX0823 at 13, *in camera*.

Shortly before the acquisition closed on February 28, 2008, the due diligence team provided the Board with a status report on the acquisition, citing, as a benefit, the intended implementation of a “[redacted] increase to non-contract customers on industrial product in 2010” and “phase out HD with CellForce . . . and increase in market price.” IDF 861; PX0464 at 004, *in camera*.

c. Daramic’s post-acquisition prices

The evidence also shows that Respondent announced post-acquisition price increases that were consistent with the anticompetitive increases projected in its pre-acquisition documents. This evidence is probative of the acquisition’s reasonably likely anticompetitive effects and strengthens Complaint Counsel’s *prima facie* case.

Approximately six months after Respondent acquired Microporous, it began to announce broad-based price increases [redacted]. IDF 611, 912-16; PX0950 at 14-15, *in camera*. Daramic’s announced price increases were as high as [redacted]. IDF 611, 913-915; PX0950 at 14-15, *in camera*. While Respondent is correct that Complaint Counsel did not prove that all customers that received price increase announcements actually began to pay higher prices, the record does show that the announced increases were effective in at least some instances. For example, Daramic announced a [redacted] price increase to East Penn Battery on PE separators for 2009. IDF 897; PX0950 at 15, *in camera*. Daramic’s head of sales testified that Daramic had effectively negotiated a [redacted] price increase with East Penn. Roe, Tr. 1192, 1222. Mr. Roe testified that the price increase applied to Daramic’s HD products, as well as separators for SLI and motive applications. *Id.* Similarly, between August and November 2008, Daramic notified Bulldog Battery that it would be increasing the price of CellForce by [redacted], effective January 1, 2009. IDF 898; PX0950, *in camera*. Mr. Benjamin, Bulldog Battery’s President, testified that Bulldog experienced a price increase of [redacted] on CellForce, effective January 1, 2009. IDF 898; Benjamin, Tr. 3503, 3505, 3521-22. By contrast,

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in the five years immediately preceding the acquisition, Microporous had only increased the price of CellForce to Bulldog Battery by approximately 3%. IDF 613. When asked at trial whether he tried to move his business to a different supplier in response to the price increase, Mr. Benjamin testified that “there is no other supplier, so you’re kind of stuck.” IDF 614; Benjamin, Tr. 3526.

Additionally, Complaint Counsel’s expert credibly testified that Daramic’s across-the-board price increases, whether implemented or announced, could not be explained by rising input costs, increasing demand, or changes in productivity alone. IDF 920-21; Simpson, Tr. 3213-20, *in camera*. Respondent argues Dr. Simpson did not rely on the correct price indices to measure post-acquisition changes in input costs. RAB at 37. However, Dr. Simpson testified that he selected the indices based on the input costs that Daramic itself cited to customers as the basis for increasing price. Simpson, Tr. 3214-19, *in camera*; PX2068 at 1. We find Dr. Simpson’s testimony on this issue persuasive.

This strong qualitative evidence of anticompetitive unilateral effects in the deep-cycle, motive, and SLI markets corroborates Complaint Counsel’s already strong *prima facie* case.

3. Anticompetitive Coordinated Effects Are Likely in the SLI Market

The ALJ found that Respondent failed to rebut the strong presumption of likely coordinated effects in a merger to duopoly in the SLI market. ID at 265. Respondent maintains that, because SLI separators are differentiated and sold through large individually-negotiated supply contracts, coordination is unlikely. RAB 39-40.

In a market with high barriers to entry, a merger to duopoly creates a presumption of anticompetitive coordinated effects. *Heinz*, 246 F.3d at 724-25 (finding that the elimination of a third rival would create a “durable duopoly,” increasing both the opportunity and incentive for the duopolists to coordinate to increase price); *FTC v. PPG Indus.* 798 F.2d 1500, 1503 (D.C. Cir. 1986) (noting that “where rivals are few, firms will be able to

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coordinate their behavior either by overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels”). By eliminating Microporous as a third player in the SLI market, the acquisition increased the likelihood of anticompetitive coordinated effects. A defendant can defeat the presumption of likely coordination with evidence showing structural barriers to coordination in the market. *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26, 60 (D.D.C. 2009). Respondent has not met that burden here.

Respondent is correct that battery separators are differentiated products and, in many cases, sold through large negotiated contracts. Respondent is also correct that these factors make it more difficult for sellers to coordinate on price and increase the incentives for sellers to deviate from any coordinated pricing arrangement. But there is a strong presumption of coordination in a market with only two sellers, and the evidence regarding industry custom and practice supports that presumption here.

Despite product differentiation, price levels and price increases are relatively transparent in the industry. Daramic announces price increases publicly. In 2005, after Daramic announced that it was increasing prices, Daramic’s head of sales told his colleagues in an internal email that he had “GREAT NEWS . . . [a]s you can see, Entek has followed our lead. Their increase for thinner (6 mil – 8 mil) backwebs is 4%-5% and the thicker is 7% -10%. I am sure NSG and [Microporous] will follow. We really should not be afraid to ask and get the 6% we announced.” PX0235. When Daramic announced its 2009 price increases in the fall of 2008, it did so in a press release. PX0371. Moreover, Daramic’s Vice-President, Mr. Hauswald, testified that the separator industry is small enough that sellers are typically able to acquire competitive information from customers in the course of negotiations. IDF 731-33; Hauswald, Tr. 629, 834-40, *in camera*. Based on both the presumption of coordination and the evidence regarding pricing transparency, we conclude that anticompetitive coordinated effects in the SLI market are likely.⁴⁴

⁴⁴ Respondent argues that it has lost significant business from JCI and Exide to Entek since the acquisition, demonstrating vigorous competition in the SLI market. RAB at 39. We find otherwise. As an initial matter, JCI entered into a long-term supply agreement with Entek [redacted], before the

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E. RESPONDENT'S REBUTTAL EVIDENCE

While we conclude that Complaint Counsel have established a *prima facie* case of likely competitive harm in the North American deep-cycle, motive and SLI separator markets, Respondent can rebut Complaint Counsel's case with evidence that shows that competitive harm is unlikely. *Heinz*, 246 F.3d at 725. Respondent argues that entry and power buyers would counteract any potential anticompetitive effects from the acquisition. We affirm the ALJ's conclusion that Respondent did not satisfy its burden of production.⁴⁵

1. Entry

Even mergers in concentrated markets are unlikely to harm competition where entry is likely, timely and sufficient to alleviate the otherwise likely anticompetitive effects. *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 55 (D.D.C. 1998); 2010 HORIZONTAL MERGER GUIDELINES § 9. For entry to constrain the likely harm from a merger that enhances market power, the scale must be large enough to constrain prices post-acquisition. *Chicago Bridge*, 534 F.3d at 429. Respondent's burden is to produce evidence sufficient to show that the likelihood of entry "reaches a threshold ranging from 'reasonable probability' to 'certainty.'" *Id.* at 430 n.10. The history of entry in the relevant markets "is a central factor in assessing the likelihood of entry in

acquisition, even though the agreement was not effective until JCI's contract with Daramic expired in December 2008. IDF 734, 736. And while Exide did move a portion of its business from Daramic to Entek since the acquisition, the evidence shows that Exide's long-term supply arrangement with Daramic expired, and Exide adopted a strategy of avoiding sole-source arrangements. IDF 744, 747. We do not agree that these events show coordination in the SLI market is unlikely post-acquisition.

⁴⁵ At trial, Respondent also argued that evidence of efficiencies and Microporous' financial condition were sufficient to rebut Complaint Counsel's *prima facie* case. ID at 293-300. The ALJ rejected these arguments and Respondent has not raised these arguments in its appeal briefs. However, because Respondent's Notice of Appeal challenges all portions of the ID relating to Count I, we have reviewed the evidence in support of these defenses and agree with the ALJ that Respondent's evidence regarding efficiencies and Microporous' financial condition at the time of the acquisition is not sufficient to show that competitive harm from the acquisition is unlikely.

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the future.” *Cardinal Health*, 12 F. Supp. 2d at 56; 2010 HORIZONTAL MERGER GUIDELINES § 9.

The ALJ concluded that entry into the relevant markets is slow and difficult and that neither Asian manufacturers nor Entek were likely to enter the markets and restore lost competition. ID at 283-88. Respondent contends that entry barriers are low and that evidence of likely entry from Asian suppliers and Entek is sufficient to rebut Complaint Counsel’s *prima facie* case. RAB at 41-50.

We find that the record does not support Respondent’s arguments. In fact, Daramic itself acknowledges the existence of substantial barriers to entry. IDF 928-30. Among other barriers, a *de novo* entrant would face large capital requirements to build a separator plant of sufficient size and scale to operate profitably and service large customers. IDF 924-25, 928-29. An entrant would also have to possess or develop the specialized technological expertise and know-how needed to build and operate a production line. IDF 935-63. Reputation also creates barriers to entry. IDF 970-71; PX0265 at 11. Patent protections and other proprietary information can create additional barriers. IDF 932-34.

Overcoming these entry barriers is a slow process. Design, installation and testing of a PE separator line can take eighteen to twenty months. IDF 974-75, 988-90, 992. Product testing and qualification with customers can last from 18 to 24 months for deep-cycle separators (IDF 1017-24); two to three years for motive and UPS separators (IDF 1011-13); and up to 21 months for SLI separators. IDF 1025. Since many of the steps towards entry must happen sequentially, entry takes several years. IDF 923. The history of entry into the North American separator markets supports our conclusion that entry barriers are substantial. There is no evidence that any firms other than Daramic and Microporous have entered the relevant markets in the past ten years. Daramic’s history of entry in the deep-cycle market, and Microporous’ history with respect to CellForce, and its motive and SLI separators, show that entry into the relevant markets is slow and costly, and developing a products reputation for reliability with customers is difficult, even for manufacturers with

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experience in other separator markets. IDF 457-69, 649-51, 684-90, 993-95.

The barriers are even greater for Asian firms. As discussed above, Asian supply is not a competitive alternative for North American customers due to transportation costs, import and export duties, and the increased costs and risks with respect to supply chain management and warehousing. IDF 286-91, 312-19, 349, 1060. Excluding freight, import duties, and value-added tax, the prices that BFR quoted to EnerSys were more than 10% higher than Daramic's prices. IDF 341, 1096. When transportation costs and taxes are included, the differential is approximately 20%. IDF 341. Mr. Kung, a principal of Chinese SLI supplier BFR, testified that BFR cannot compete in North America because its prices are not competitive and it does not have enough English-speaking staff or capacity to supply North American customers. IDF 321, 336. Accordingly, BFR has no intention of selling PE separators in North America. IDF 343. Asian manufacturers also face higher production costs than North American manufacturers and have a relatively poor reputation for quality and reliability among North American battery manufacturers. IDF 1061, 1065-66, 1075-77, 1082, 1088-89. For example, EnerSys does not perceive Chinese SLI manufacturers BFR and Anpei to be comparable to Microporous in terms of quality or reliability. IDF 1101.

There is also little support for Respondent's contention that battery manufacturers would sponsor Asian entry into the North American market. RAB at 45-50. [redacted] IDF 336, 339, 343, 1111, 1121. The record also shows that EnerSys at one time considered sponsoring development of a PE separator from Alpha Beta, a Chinese manufacturer that provides EnerSys with absorbed-glass-mat separators, but stopped plans to move forward because Alpha Beta lacked the expertise to justify a large capital investment. IDF 1124. Exide and East Penn Battery each testified that they did not intend to sponsor entry by any manufacturer, Asian or otherwise. IDF 1125-26. Nor does the evidence show that Asian firms could enter more quickly because their products have already been approved and qualified by North American customers.⁴⁶ While some battery manufacturers have

⁴⁶ Respondent overstates the evidence supporting this argument. RAB at

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performed preliminary testing on material produced by certain Asian manufacturers, the results have generally not been encouraging, and none of the Asian manufacturers has yet been qualified to provide separators in any of the relevant product markets. IDF 1102, 1061, 1081-83, 1095, 1102.

Significantly, no Asian firm has entered the North American separator market, despite Daramic's post-acquisition price increases. IDF 897-916. In fact, there is no evidence that any Asian separator manufacturer has ever sold separators to North American customers. IDF 346, 349. When Respondent's counsel was asked at oral argument about Asian imports, he stated that there had been "interaction" between North American customers and Asian suppliers, but he could not point to any actual sales or imports into North America, or even the likely prospect of such sales. Oral Argument Tr. at 33-35. Interaction between North American customers and Asian firms is not sufficient to show a likelihood of entry. As we explained in *Chicago Bridge*, mere evidence of customers inquiring about producers' willingness to supply products is not sufficient to establish an entry defense. 138 F.T.C. at 1102.

We also find that the evidence does not support Respondent's argument that entry by Entek is likely to alleviate the anticompetitive effects of Daramic's merger to monopoly in the deep-cycle and motive markets. Entek exited the motive market years ago and has since shown little interest in pursuing opportunities in that market. IDF 398, 1029. To the contrary, it has committed itself to an SLI strategy. *Id.* Entek has acknowledged in post-acquisition commercial communications that it is unlikely to be price-competitive in other markets. IDF 1035; Gillespie, Tr. 3040, *in camera*; Weerts, Tr. 4509, *in camera*. An Entek representative testified that Entek would face costly technical difficulties producing the thicker non-SLI separators. IDF 1030; Weerts, Tr. 4515-16, *in camera*. These price and cost considerations suggest not only that Entek is

43. The record shows that in 2003, East Penn tested and approved a separator from Anpei, a Chinese manufacturer, for a small engine battery, such as those used in lawn mowers, though it never purchased any of the separators. IDF 1108; Leister, Tr. 3992, 4032-33; RX0079. Otherwise, the evidence Respondent cites shows only that North American customers have conducted the first steps of the testing and qualification process. IDF 1001, 1004-05.

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unlikely to enter the motive market, but that if it did, entry would not be sufficient to constrain Daramic's pricing unless or until these disadvantages were overcome. Moreover, Entek would also face the delays associated with qualification, which, for motive separators, are particularly lengthy. IDF 402, 1011-13; Gillespie, Tr. 3038-39, *in camera*.

Additionally, while recent evidence suggests that Entek is taking some steps to enter the deep-cycle market, there is no evidence that Entek's separators have been qualified. Qualification in deep-cycle markets typically takes between eighteen and twenty-four months. IDF 1018-24. Even if we assume that Entek's deep-cycle products will be qualified and that Entek eventually will enter the market, Daramic's own history of entry in the deep-cycle market suggests it will take several years before Entek's participation in the market would restore lost competition. IDF 993. Thus, evidence of Entek's recent steps towards entering the deep-cycle market is not sufficient to show that a merger to monopoly in the deep-cycle market is not likely to cause substantial competitive harm.

2. Power Buyers

Respondent argues that large buyers like JCI, Exide, EnerSys, and Trojan Battery will prevent the exercise of market power that Daramic gained through the acquisition. RAB at 4-5. However, even large and sophisticated customers cannot alleviate the anticompetitive effects of a merger if the customers have no competitive options. Buyers now face a monopoly in the deep-cycle and motive markets. JCI, Exide, EnerSys, and Trojan Battery each testified that they have no alternatives to Daramic in these markets. IDF 206, 210, 555, 574, 579; Hall, Tr. 2703-07. Although Respondent argues that large customers have demonstrated their past ability to constrain prices, the evidence shows that buyers previously negotiated lower prices by relying on the competition between Daramic and Microporous that no longer exists. IDF 523, 562, 529, 593-95. The evidence shows these customers now lack any leverage with Daramic and are paying higher prices post-acquisition. IDF 555-57, 574. The evidence also fails to show that these putative power buyers have leverage in the SLI market. The post-acquisition supply proposals to Exide are less favorable on pricing than what Exide was paying

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pre-acquisition.⁴⁷ IDF 903-05. Overall, Exide's analysis shows that it will "pay more, in the millions of dollars more" for its separator supply in 2010 than it would have had to pay in the pre-acquisition environment. Gillespie, Tr. 3049-50, *in camera*.

While some customers have continued to bargain with Daramic for lower prices, a customer's struggle to avoid immediately acceding to a price increase does not render it a power buyer. The mere failure to acquiesce silently is hardly equivalent to a successful constraint of market power. Here, buyers typically responded to announcements of price increases by asking Daramic to justify the price increase or seeking to engage in negotiations to reduce its size,⁴⁸ but this is far from a showing of any substantial constraint on price. Similarly, even when customers attempted to use stronger tactics, they remained unable to avoid Daramic's price increases.⁴⁹

Moreover, even if we were to assume that the four claimed power buyers somehow would be able to avoid price increases as a result of their size and sophistication, there is no reason to believe that other Daramic customers would fare as well. Separator sales are individually negotiated for each customer, and the separators are manufactured with customer-specific designs. IDF 117. In these circumstances, smaller buyers would not be protected by the resistance offered by larger, more powerful

⁴⁷ The other putative power buyers do not have a recent pricing history with Daramic for SLI separators. EnerSys and Trojan Battery do not sell SLI batteries. IDF 56-57, 60. JCI's SLI business is covered by a 2007 exclusive contract with Entek. IDF 734, 736.

⁴⁸ In the deep-cycle market, Daramic announced a post-acquisition price increase of 15% on CellForce and 13% on Flex-Sil despite a contract that limited price increases. Trojan responded with a counterproposal accepting only much smaller increases. Daramic reduced its announced increase only slightly, to 13% on CellForce and 10% on Flex-Sil. When no agreement was reached, Daramic sued Trojan. The dispute had not been resolved as of the time of trial. IDF 557-60.

⁴⁹ EnerSys and Exide have short-paid invoices in response to price increases but have no choice but to pay the increases when Daramic threatens to cut off supply. IDF 562-63 (in the post-acquisition deep-cycle market, Exide ultimately agreed to pay a surcharge); IDF 205-06 (in the motive market, at the time of the trial, Daramic was seeking price increases that EnerSys would have no choice but to pay if Daramic threatened to cut off supply).

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customers. *See, e.g., United States v. United Tote, Inc.*, 768 F. Supp. 1064, 1085 (D. Del. 1991) (large customers that could protect themselves would not shelter smaller buyers from increased prices); *FTC v. Bass Bros. Enterprises, Inc.*, 1984-1 Trade Cas. (CCH) ¶ 66,041 at 68,616 (N.D. Ohio 1984) (large buyers could not protect remainder of purchasers).

VII. REMEDY

To remedy Respondent's violation of Section 7, the ALJ ordered complete divestiture of Microporous' assets, which included the manufacturing plants in Piney Flats and Feistritz, as well as the line in boxes. ID at 330-31; Order at ¶¶ I.AA, II.A, II.B. The divestiture also included any technology and intellectual property that Microporous owned before the acquisition, along with additions or improvements that Respondent made to those assets since the acquisition. ID at 338; Order at ¶ II.A. To ensure a divestiture buyer could continue operating the Piney Flats and Feistritz plants without disruption, the ALJ also ordered Respondent to grant the acquirer a perpetual, worldwide, royalty-free license to Daramic technology that Respondent used at these manufacturing facilities. ID at 338; Order at ¶ II.C.4. Respondent was ordered to agree that it would not sue the acquirer to block access to technology that Respondent owned at the time of divestiture, where the lawsuit would interfere with the acquirer's ability to compete in the relevant markets. ID at 338; Order at ¶ II.F.1. The ALJ also ordered other ancillary relief to support the divestiture and restore competition that was lost as a result of the acquisition.⁵⁰ ID at 339-41.

Assuming liability, Respondent argues that divestiture of the Feistritz plant is not necessary to restore competition in North

⁵⁰ Paragraph III of the Order provides for the appointment of a Monitor Trustee to ensure compliance with the Order. Paragraph IV provides for a divestiture trustee in the event Respondent does not divest within the required time frame. Paragraph V requires Respondent to maintain the Microporous assets pending divestiture. Paragraph VI requires Respondent to permit customers to reopen and negotiate or terminate contracts entered into by Daramic after its acquisition of Microporous. Paragraph VII relates to Count II and is not at issue on appeal. Paragraph VIII prevents Respondent from introducing any battery separator using the Microporous cross-linked rubber technology for a period of two years following the divestiture.

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America. RAB at 50-56; RRB at 16-17. Respondent also challenges the portion of the ALJ's order requiring it to grant the acquirer a license to certain Daramic intellectual property used since the acquisition. Respondent also takes issue with two of the ancillary provisions: Paragraph VI, regarding customer contracts executed after the acquisition, and Paragraph V.B.1., regarding maintenance of the Microporous workforce. RAB at 57-58.

The purpose of relief in a Section 7 case is to restore competition lost through the unlawful acquisition. *See Evanston Northwestern*, Comm'n Op. on Remedy at 3 (Apr. 28, 2008), available at www.ftc.gov/os/adjpro/d9315/080428commopiniononremedy.pdf; *Ford Motor Co. v. United States*, 405 U.S. 562, 573 n.8 (1972). We recognize that complete divestiture is generally the most appropriate way to restore competition lost through an unlawful acquisition. *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 329 (1961); *Chicago Bridge*, 534 F.3d at 441. Moreover, because Complaint Counsel have established a strong case of liability in three of the relevant markets, any doubts as to remedy should be resolved in favor of broader relief. *See E.I. du Pont de Nemours*, 366 U.S. at 334; *Chicago Bridge*, 138 F.T.C. at 1164.

In accordance with these well-established principles, we conclude that complete divestiture is the most appropriate remedy. As discussed in more detail below, complete divestiture provides the greatest likelihood that the asset package will restore competition and be sufficiently viable to readily attract an acceptable buyer. We therefore order Daramic to divest all the assets it acquired from Microporous, including the plant in Feistritz. We also adopt the remaining provisions of the ALJ's Order with certain modifications.

A. DIVESTITURE

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. National Lead Co.*, 352 U.S. 419, 428 (1957). In the exercise of that discretion, the Commission may order divestiture of assets outside the relevant market where divestiture of those assets is necessary to restore competition within the relevant market. *See Chicago Bridge*, 138

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F.T.C. at 1163-64 (ordering divestiture of assets for building water tanks although the relevant product market was cryogenic tanks, because cryogenic tank sales were irregularly timed and water tank sales would provide the regular income stream needed for the divestiture buyer's viability), *aff'd*, 534 F.3d at 442. We find that complete divestiture of the former Microporous battery separator business, including the Feistritz plant, is warranted here.

As an initial matter, a divestiture package that includes the Feistritz plant will allow the acquirer to maintain sufficient capacity at the Piney Flats facility to ensure that it can effectively compete for business in North America. Prior to the acquisition, Microporous produced CellForce for its foreign customers at its Piney Flats plant, which constrained its capacity to compete for additional business within North America. IDF 769, 795. In 2005 and 2006, the CellForce line at Piney Flats was operating at full capacity. RX0741 at 65; Trevathan, Tr. 3667-68. As a result, Microporous was unable to respond to new North American customer demand. For example, EnerSys was using CellForce in Europe but was unable to obtain CellForce for North America because of this capacity constraint. Axt, Tr. 2126. Similarly, Trojan Battery's ability to expand its use of CellForce for its deep-cycle batteries was limited by the capacity constraint at Piney Flats. Godber, Tr. 276. Once the Feistritz plant was under construction, Microporous became a more vigorous competitor in North America. Microporous was able to commit to additional North American CellForce sales to EnerSys, Trojan Battery, and U.S. Battery. IDF 787, 1280; Godber, Tr. 226-27; PX1741 at 4, *in camera*. Microporous also entered into discussions with other battery separator customers who had not yet made purchase commitments at the time of the acquisition. IDF 797.

Absent divestiture of the Feistritz plant, an acquirer is likely to face the same capacity constraint Microporous faced before it constructed the Feistritz plant. CellForce production in 2008 totaled nearly [redacted]. RX0677, *in camera*. Microporous' backfill efforts that began after 2008 led to additional commitments from EnerSys, Trojan, and U.S. Battery that would have added more than 3.3 msm to sales. RX0207, *in camera*; Godber, Tr. 226-27; PX1741, *in camera*; Wallace, Tr. 1977; Qureshi, Tr. 2037. The 2008 production plus the additional commitments exceeded the Piney Flats plant's CellForce capacity

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of [redacted]. RX0561, *in camera*. Beyond the existing commitments, Microporous executives had no doubt they would be able to backfill the remaining freed capacity at Piney Flats after production for European customers was transferred to Feistritz. Microporous' President at the time of the acquisition testified that in 2007 "we had more offers for business than we were going to be able to handle under the scenario of backfilling." Gilchrist, Tr. 344. Because the purpose of any divestiture is to create an effective future competitor that would restore lost competition, it is important to avoid saddling the divestiture buyer with capacity constraints that would hinder its ability to seek future sales and limit its competitive significance in the relevant markets.

Respondent argues that even if Piney Flats does not provide the acquirer with enough capacity to compete effectively in North America, divestiture of the line in boxes is the proper solution. We disagree. The line in boxes is not yet operational at Piney Flats. IDF 1269. Although design and planning work has been done and much of the long-lead equipment has been acquired, not all of the necessary equipment is on hand. IDF 775, 1268. As of the time of the trial, no work had been done to install the line. IDF 777. On average, it takes about four months to install equipment and about two months to start up and debug a separator line. IDF 975. Even after installation, more time will be necessary for the line to operate efficiently, and it will take six months to fully train the manufacturing line workforce. IDF 985. The acquirer would also need time for customers to qualify any material produced on the new production line. Gilchrist, Tr. 322-23, 348. Thus, the line in boxes would not provide the acquirer with the timely or certain production capacity it would need to compete effectively in North America when the order takes effect. Moreover, while the line in boxes and the CellForce line at Piney Flats would provide sufficient capacity to produce the current worldwide volume of CellForce, if that capacity were largely employed to produce CellForce for motive and deep-cycle customers, the acquirer would not have meaningful capacity to compete for SLI business with either CellForce or a pure PE

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separator, as Microporous was doing at the time of the acquisition.⁵¹

In addition to eliminating the capacity constraint in North America, a divestiture package that includes the Feistritz plant will also allow the acquirer to offer North American customers benefits they find attractive, and that Microporous would have offered absent the acquisition. The evidence shows that some customers prefer suppliers with multiple plants as insurance against supply disruptions at any one location. IDF 313 (finding that EnerSys imported separators from Daramic's Feistritz plant for use in Mexico during a 2008 strike at Daramic's Owensboro plant); Hauswald, Tr. 1073-74 (describing how Daramic shifted production from Owensboro to Piney Flats to partially compensate for the strike at Owensboro). EnerSys, Trojan Battery, Exide, and Crown Battery all testified that it was important to have a supplier with more than one plant for an essential input like a separator. IDF 1273; Axt, Tr. 2129-31; PX1660 at 2-3; Godber, Tr. 225-26; Gillespie, Tr. 2993; Balcerzak, Tr. 4125-26. Indeed, when Microporous had only the plant in Piney Flats, EnerSys would not commit to additional volume unless Microporous had another manufacturing facility. IDF 1277. Daramic itself considers multiple plants an advantage and emphasizes its multi-plant operations as a selling point to customers.⁵² Roe, Tr. 1318.

Customers also prefer suppliers with global operations. Two of Microporous' largest global customers expressed their preference to work with a supplier that can provide local supply for their global operations. Larry Axt, Vice-President of Global Procurement for EnerSys, testified that his company had large manufacturing operations in both Europe and North America, and he preferred to do business with a supplier that could provide supply locally to both regions. Axt, Tr. 2108-09. Although

⁵¹ The capacity of the line in boxes is 11 msm, which can be used for either CellForce or a pure PE separator. PX0063 at 3. The CellForce line in Piney Flats, plus the line in boxes, would provide capacity of 22 msm.

⁵² Respondent now argues that customers could gain equivalent protection through other steps such as acquiring and holding backup supplies. This, however, would increase the customers' warehousing and inventory costs and make it more difficult for the supplier to compete effectively.

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EnerSys does more business in Europe than in North America, it is the largest producer of industrial batteries in the world, with three plants producing motive batteries located in North America. IDF 56-59, 278. Similarly, Melvin Gillespie, Vice-President of Global Procurement for Exide, testified that because Exide has large operations in both North America and Europe, a Microporous with production capacity in both North America and Europe “would be the best model for us.” Gillespie, Tr. 3131-3132, *in camera*. Exide is also one of the largest buyers of battery separators in the world. IDF 52-55. At the time of the acquisition, Microporous was able to offer all its customers the insurance of multiple plants and the cost advantages associated with global operations. These attributes would have made Microporous a more attractive option for North American customers, and a more effective competitor in the relevant markets. Divestiture of the Piney Flats plant alone, even with the line in boxes, would not restore the more attractive competitor lost through the unlawful acquisition.⁵³

Respondent also claims that a divestiture package that includes the Feistritz facility will not be viable in the marketplace because Feistritz is currently operating at a loss. According to Respondent, an order that requires divestiture of Feistritz without a minimum price is punitive. RAB at 56. We agree with Respondent that we must consider the viability of the asset package in the marketplace. We conclude, however, that excluding Feistritz from the divestiture package creates the greater risk to marketplace viability. As we explain above, a divestiture package that does not include the Feistritz plant will not provide the acquirer with sufficient capacity to expand in the North American markets for motive and SLI separators. Moreover, since the acquisition, Daramic has transferred CellForce production for EnerSys’ foreign plants from its Piney Flats plant to Feistritz, which Microporous was planning to do at the time of the acquisition. Gaugl, Tr. 4569-70; Trevathan, Tr. 3762-63. EnerSys is also currently an important CellForce

⁵³ Respondent also contends that because Microporous was “viable” before operations at Feistritz commenced, a divestiture buyer would not need the Feistritz plant for viability. But even if that were true, Respondent’s contention is beside the point. Creating a firm whose operations are merely viable would not fully replicate the competition that Daramic unlawfully eliminated.

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customer in North America. Axt, Tr. 2099-2101, 2108. Excluding the Feistritz facility from the divestiture package would result in a buyer acquiring the entire CellForce business, including the EnerSys contracts, but not the production facilities that Daramic currently operates to fulfill those contracts. Without both production facilities, the associated disruption to the ongoing CellForce business will likely diminish rather than enhance the marketability of the former Microporous business.⁵⁴

Finally, Respondent argues that the Feistritz divestiture is unjustified because the plant was not in operation at the time of the acquisition. But the Feistritz plant was in operation and producing commercial output within a week of the acquisition. IDF 1266. At the time of the acquisition, Microporous had employees in place and was testing the components of the production lines. IDF 1265. And, as discussed above, the backfill efforts associated with Microporous' planned expansion impacted competition in North America for at least several months prior to the acquisition as they allowed Microporous to secure additional business.

We thus conclude that complete divestiture of Microporous, including the Feistritz plant, is necessary to restore lost competition to the relevant North American markets.

⁵⁴ See FED. TRADE COMM'N, STATEMENT OF THE FEDERAL TRADE COMMISSION'S BUREAU OF COMPETITION ON NEGOTIATING MERGER REMEDIES (Apr. 2, 2003), available at <http://www.ftc.gov/bc/bestpractices/bestpractices030401.shtm>. In policy guidance materials, the Commission's Bureau of Competition has stated that divestiture of an autonomous ongoing business increases the likelihood that a divestiture package will be viable and sufficient to restore competition in the relevant market because it requires the agency to make the fewest assumptions about the market and its participants. This same logic applies with even greater force to this consummated merger, where we know for a fact that Microporous, as it was constituted in February 2008, was a marketable business. See *Chicago Bridge*, 138 F.T.C. at 1164 (“[W]hat we know with certainty is that this combination of assets has made a saleable package in the past.”); *RSR Corp.*, 88 F.T.C. 800, 894 (1976) (“[A]bsent 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 pre-acquisition status.”).

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B. ANCILLARY RELIEF

Respondent contests three additional provisions in the ALJ's Order. Respondent first objects to the requirement that it maintain a workforce equal to that in place at the time of the acquisition. RAB at 56, n.33; Order at ¶ V.B.1. Respondent explains that the workforce has already dropped below the February 2008 level due to the recession, efficiencies implemented at the Piney Flats plant, and employees that have quit. *Id.* Paragraph V.B.1. is designed to prevent Respondent from depleting the workforce once a divestiture is ordered. It does not appear that Daramic had any general incentive to deplete the Microporous workforce in a manner that might adversely impact the viability and competitiveness of the Microporous business prior to the date of the Order, March 1, 2010. Accordingly, we modify Paragraph V.B.1. to require that Respondent maintain a workforce that is at least equivalent in size, training, and expertise to what was associated with the former Microporous as of March 1, 2010.

Respondent also objects to the scope of post-acquisition customer contracts that are terminable pursuant to Paragraph VI.A. The ALJ's Order allows customers to reopen and negotiate or terminate Daramic contracts that reflected the exercise of post-acquisition market power. Respondent objects to the ALJ's definition of "Terminable Contracts" because it would include contracts entered into by Daramic prior to the acquisition that are in effect between the date of a final order and the effective date of the divestiture. RAB at 57. Complaint Counsel agree that pre-acquisition contracts should not be terminable so long as post-acquisition changes to such contracts remain terminable. CCAB at 61. We therefore modify the definition of "Terminable Contracts" to exclude contracts entered into by Daramic prior to the acquisition, while preserving the customer's ability to terminate post-acquisition modifications to such contracts.

Finally, Respondent objects to Paragraph II.C.4. of the ALJ's Order, which requires that it grant to the divestiture buyer a license to certain intellectual property that was owned or used by Daramic *prior* to the acquisition. RAB at 57. Complaint Counsel have clarified that they interpret the definition as only including such "intellectual property that Respondent *voluntarily* chose to use in and commingle with Microporous' operations." CCAB at

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61 (emphasis in original). The license is not, therefore, meant to extend to all of Respondent's pre-acquisition intellectual property, but only to such intellectual property as Respondent may have chosen to use or incorporate in Microporous operations or Microporous battery separators during the course of the investigation, litigation, and pending divestiture.

We retain the licensing provision because it protects the divestiture buyer from having to, in effect, remove any improvements or alterations that Respondent has incorporated in the products by using Daramic pre-acquisition intellectual property. Removal of the incorporated intellectual property could adversely impact customers of the divestiture buyer and undermine the divestiture buyer's reputation. In addition, the threat of removal could harm sales of the battery separators that would be divested if customers were to perceive that such improvements would be removed from products delivered after divestiture. However, we modify the definition of "Shared Intellectual Property" to make it clear that not every "Retained Asset" is included in the license to the divestiture buyer. The scope of the license extends only to such intellectual property that the Respondent chose to use or incorporate in the operations or separators that will be divested.

**CONCURRING OPINION OF COMMISSIONER J.
THOMAS ROSCH**

I concur with the Commission's thorough and well-reasoned decision finding that Daramic's acquisition of Microporous violated Section 7 of the Clayton Act. I also concur with the Commission's conclusion that only complete divestiture will remedy this violation. I write separately to describe an alternate analytical framework that would focus on the competitive effects of this transaction instead of focusing initially on defining the precise contours of the relevant market and only then considering the transaction's competitive effects.

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I also write separately to address Daramic's assertion that the Commission should consider first and foremost the testimony of the economic expert it retained and the economic tools described in the Horizontal Merger Guidelines in defining the relevant market. I would focus instead on the direct evidence of competitive effects, including the parties' motives for the merger and their post-merger behavior, and let that direct evidence define the market that is relevant in this case.

I. THE LAW

The Commission's decision acknowledges that both the courts and the Commission have recognized that the traditional burden-shifting framework that begins with defining the relevant market "does not exhaust the possible ways to prove a § 7 violation on the merits." Opinion at 11 (quoting *FTC v. Whole Foods Market*, 548 F.3d 1028, 1036 (D.C. Cir. 2008) (Brown, J.)). Nevertheless, the Commission's opinion embraces a traditional analytical framework in this case, including precise upfront market definition. Opinion at 10-11.

The ultimate inquiry in this case, as in any Section 7 case, is whether the transaction is likely to result in anticompetitive effects, not what the precise metes and bounds of the relevant market are. In rule of reason cases brought under Section 1 of the Sherman Act, the courts have long analyzed the analogous issue of whether it is appropriate to determine the lawfulness of completed or ongoing conduct by evidence of anticompetitive effects, rather than by requiring precise upfront market definition. See *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000); *Ball Mem'l Hosp. v. Mut. Hosp. Ins.*, 784 F.2d 1325, 1336 (7th Cir. 1986); see also *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004) ("*Toys 'R' Us* [and] *Indiana Federation of Dentists* . . . stand for the proposition that if a plaintiff can show the rough contours of a relevant market, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power—in lieu of the usual showing of a precisely defined relevant market and a monopoly market share.").

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In that context, the courts have recognized that the purposes of market definition, on the one hand, and direct evidence of anticompetitive effects, on the other hand, are consistent—both techniques seek to determine whether an agreement by competitors is likely to facilitate the exercise of market power, or whether a completed agreement has enabled the exercise of market power. *See Toys “R” Us*, 221 F.3d at 937. Thus, for more than a decade, scholars have declared that in Section 1 rule of reason cases, market definition is not an end in itself but rather an indirect means to assist in determining the existence or likelihood of the exercise of market power. *See* IIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 532a, at 242-43 (3d ed. 2007); Herbert Hovenkamp, *Federal Antitrust Policy* § 12.8, at 550 (3d ed. 2005). Put differently, both the courts and scholars have recognized that in Section 1 rule of reason cases, market definition is a tool for analyzing market power, but it is not the only tool, either as a matter of law or economics.

There is no principled reason why the same analysis should not be used in Section 7 cases. Indeed, two decades ago, Judge Posner observed that judicial interpretation of Section 1 of the Sherman Act and Section 7 of the Clayton Act had converged. *United States v. Rockford Mem’l Corp.*, 898 F.2d 1278, 1281-83 (7th Cir. 1990); *see also* IV Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 913b (3d ed. 2009) (“In cases where a merger facilitates a significant ‘unilateral’ price increase for a grouping of sales that was not an obvious relevant market prior to the merger, the appropriate conclusion is that the merger has identified a new grouping of sales capable of being classified as a relevant market. This formulation meets the statutory requirement [in Section 7] that the ‘effect’ of a merger is anticompetitive in some ‘line of commerce’ and in some ‘section of the country.’”). At the same time, Judge Thomas (now Justice Thomas) emphasized in *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990), that the ultimate inquiry in a Section 7 case is whether the transaction is likely to result in anticompetitive effects, not simply to define the relevant market.

This is not to say that one can avoid defining the relevant market altogether. As the passage from Areeda & Hovenkamp makes clear, the text of Section 7 requires identification of the “line of commerce” and the “section of the country” that are likely

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to suffer anticompetitive effects as a result of a transaction. *See also Republic Tobacco*, 381 F.3d at 737 (in Section 1 cases, an antitrust plaintiff cannot “dispense entirely with market definition” but it is sufficient that the “rough contours” of the market be identified). In the case of a consummated merger, which this is, there is generally no need to predict whether the transaction is likely to result in anticompetitive effects because that will be apparent from what has actually occurred. When that is so, the competitive effects themselves may define the relevant market. Thus, at least in a case like this, market definition cannot properly be considered a gating item in the sense that competitive effects cannot be considered before the market is defined. Indeed, in the case of a consummated merger, the relevant market may generally be defined after the effects of the transaction are identified.

The authorities on which Daramic relies are not to the contrary. Daramic asserts, for example, that market definition is a “critical” requirement in antitrust cases generally, and it cites seven cases supporting that assertion. RAB at 9. That is correct, but it does not mean that the relevant market must necessarily be defined with precision upfront. Daramic also contends that Complaint Counsel bears the burden of proving the relevant market. *Id.* That is true too, but it does not mean that Complaint Counsel cannot bear this burden, at least in a consummated merger case, by proving that the challenged merger resulted in anticompetitive effects. In fact, that is just what former Chairman Muris contemplated when he said that in a consummated merger case, “it’s not enough to assert that the transaction was anticompetitive – you have to prove it.” *Id.* at 9 n.7 (quoting *Interview with Timothy Muris*, Global Competition Review, Dec. 21, 2004).

Daramic repeatedly assails the ALJ’s reliance on statements of the parties and other participants in the market, including customers, instead of on “economic” or “econometric” evidence. *Id.* at 1, 6-7, 9-24. Specifically, Daramic urges that the testimony of Complaint Counsel’s expert be disregarded because he relied on “soft” qualitative evidence instead of “rigorous” economic tests like the “hypothetical monopolist test,” the SSNIP test, and the Elzinga-Hogarty test. *Id.* at 1, 6-7, 10-15, 19-21, 23-24.

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Similarly, Daramic urges that the testimony of its own expert must be credited because it was “grounded” in such economic theories. *Id.* at 15-16, 21, 23-24.¹ In the same vein, at pages 10 and 16 of its appeal brief, Daramic describes as a “46-year old” historical relic the Supreme Court’s decision in *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962), in which the Court specifically blessed the use of “practical indicia” of the market, like the views of market participants, to define the relevant market.² Presumably, Daramic would also dismiss the district court’s decision in *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1075, 1078 (D.D.C. 1997) and the D.C. Circuit’s majority decision in *Whole Foods*, 548 F.3d at 1033 (Brown, J.); *id.* at 1044-45 (Tatel, J.), both of which relied on such “practical indicia” in the same fashion.³

To be sure, economic analyses like the “hypothetical monopolist” test, the SSNIP test, and the Elzinga-Hogarty test may be valuable predictive tools in unconsummated merger cases where there is a need to predict whether the transaction will result in anticompetitive effects. But, where, as here, the merger has been consummated, the need for predicting the effects of the transaction may be reduced or eliminated. That, in turn, may reduce or eliminate the need for economic tools to help make the prediction. There may be empirical evidence whether and to what extent customers regarded the parties’ rivals as alternatives before and after the transaction; whether a price increase or a significant impairment in non-price terms or innovation occurred in the wake

¹ I emphasize that I would not choose the testimony of Complaint Counsel’s expert over the testimony of Daramic’s expert, as such, or the use of the hypothetical monopolist and SSNIP tests, which these experts purported to use. Opinion at 17-18. I only credit the testimony of Complaint Counsel’s expert insofar as that testimony accurately described the “practical indicia” endorsed in *Brown Shoe*.

² Daramic invokes “soft” evidence of the relevant market—*i.e.*, practical indicia of the relevant market of the sort blessed in *Brown Shoe*—when it considers it in its self-interest to do so. RAB at 8, 18, 20-23.

³ Daramic’s contention at page 12 of its appeal brief that reliance on such “soft” evidence did not permit Complaint Counsel’s expert to “estimate cross-elasticities of demand” is wrong. As Daramic admits in footnote 11 of its brief, Complaint Counsel’s expert specifically relied on “statements by the buyers that they had very little options to substitute” to find that “the demand curve was very inelastic.”

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of the transaction; and whether and to what extent rivals were attracted by the changes resulting from the transaction and capitalized on them by entry or repositioning. Evidence about what actually happened following the transaction may, in other words, reduce the need to employ economic theories in order to predict the relevant market or what is likely to happen—in particular, the SSNIP test described in the Horizontal Merger Guidelines. Put differently, economic theory is not a substitute for, or superior to, the empirical evidence about whether the transaction has actually resulted in anticompetitive effects. *See, e.g., FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 68-72 (D.D.C. 2009); *Abbott Labs. v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408, 428 (D. Del. 2006); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004); *FTC v. Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

Again, however, it cannot be said that the fact that a merger is consummated will always eliminate the need for these predictive tools. For one thing, in *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), the Supreme Court held that if and to the extent a relevant market was dynamic (or to put it simply, that the past or current circumstances in the market were not prologue), adjustments should be made in our assumptions about those circumstances. That may require predictions that can be aided by the use of economic tools. For another thing, drivers are more careful when they see a police car nearby (or think that one may be nearby). *See Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 434-35 (5th Cir. 2008) (observing that post-acquisition evidence can be manipulated by respondents). Thus, what has actually occurred may be illusory. It may be that as soon as the police are gone (or in this context, as soon as an investigation or challenge is over), market conduct may change radically. For that reason too, predictive economic tools may be useful in some, but not all, consummated merger cases. But the record does not reflect the need for such tools in this case.

II. THE FACTS

The Commission opinion describes in detail evidence demonstrating that Daramic's acquisition was likely to and in fact did cause anticompetitive effects. I write separately to emphasize

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two types of evidence that are particularly helpful in illuminating the transaction's effects: Daramic's documents describing the transaction's purpose, and post-merger price increases.

Both the ALJ and the Commission found that Daramic's documents established that Daramic acquired Microporous (1) to eliminate a key competitive threat in the motive, deep cycle, and SLI markets; (2) to eliminate a threat to its revenues and profits; and (3) to enable price increases. Opinion at 28-30. The Supreme Court has held that the intent of a party can be considered to illuminate the effects of its conduct. *See Aspen Skiing Co v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985) ("evidence of intent is . . . relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive'"); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("knowledge of intent may help the court to interpret facts and to predict consequences"); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) ("Evidence of the intent behind the conduct of a monopolist is relevant . . . to the extent it helps us understand the likely effect of the monopolist's conduct."); *U.S. Football League v. NFL*, 842 F.2d 1335, 1359 (2d Cir. 1988) ("Evidence of intent *and* effect helps the trier of fact to evaluate the actual effect of challenged business practices in light of the intent of those who resort to such practices."). Thus, I consider this evidence to be relevant in order to assess the transaction's competitive effects.

Both the ALJ and the Commission opinion also found that Daramic announced significant and wide-ranging post-acquisition price increases that were consistent with its pre-acquisition intent documents. Opinion at 30-31; IDF 897-918. Daramic argues that these price increases were justified by higher input costs, but both the Commission opinion and the ALJ found otherwise. Opinion at 31; IDF 917-22. Daramic also argues that the price increases were never implemented, but merely announced. RAB at 36. This ignores the surcharge that Daramic announced and instituted for most customers on July 1, 2008. IDF 906. In addition, Daramic announced increased prices in late 2008 and early 2009, which were effective for many customers. Opinion at 30-31; IDF 897-918. For other customers, the record was closed before a final price was reached. Yet even for these customers, the evidence shows that Daramic was seeking significant price

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increases and that customers had very limited success resisting those increases. And, perhaps most significantly, those price increases did not result in a single lost sale for Daramic. IDF 916.

III. CONCLUSION

In sum, especially where, as here, the merger at issue is consummated, it is generally preferable to determine whether a merger has had anticompetitive effects by reference to the parties' motives for the transaction and the actual effects resulting from the merger instead of trying first to define with precision the dimensions of relevant market based on the testimony of paid expert economists and the predictive economic tools described in the Merger Guidelines.

FINAL ORDER

The Commission has heard this matter upon the appeal of Respondent from the Initial Decision, and upon briefs and oral argument in support thereof and in opposition thereto. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to sustain the Initial Decision with certain modifications:

IT IS ORDERED that the Initial Decision of the Administrative Law Judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission, to the extent not inconsistent with the findings of fact and conclusions contained in the accompanying Opinion.

Other findings of fact and conclusions of law of the Commission are contained in the accompanying Opinion.

IT IS FURTHER ORDERED that the following Order to cease and desist be, and it hereby is, entered:

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ORDER**I.**

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

- 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,

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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, 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 part 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, collective bargaining agreements, confidentiality agreements, and nondisclosure agreements.
- I. "Customer" means any Person that is a direct or indirect purchaser of any Battery Separator.

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- 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 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.

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- N. "Divestiture Trustee" means a Person appointed pursuant to Paragraph IV. of this Order to accomplish the divestiture of Microporous.
- 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 from the Acquisition Date through 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.

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

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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.
- 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

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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, 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

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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;
 - 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 with respect to 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.

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- 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 from the Acquisition Date through the Effective Date of Divestiture except for Daramic Battery Separators.
- EE. "Microporous Employee(s)" means any Person:
1. Employed by Microporous as of the Acquisition Date;
 2. Employed at the Piney Flats Plant at any time from the Acquisition Date through the Effective Date of Divestiture; or
 3. Employed at the Feistritz Plant at any time from the Acquisition Date through the Effective Date of Divestiture.
- FF. "Microporous Intellectual Property" means all rights, title and interest in and to:
1. All Microporous Patents;
 2. All Microporous Manufacturing Technology;
 3. All Microporous Know-How;
 4. All Microporous Trade Names and Marks;
 5. All Microporous Copyrights; and

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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.
- 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.

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- 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 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 from the Acquisition Date through 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;

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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 "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 propert(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 all of the following:
1. any Intellectual Property that is 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 from the Acquisition Date through the Effective Date of Divestiture; or
 2. any Intellectual Property 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 from the Acquisition Date through the Effective Date of Divestiture.
- TT. "Shared Intellectual Property License" means: (i) a worldwide, royalty free, perpetual, irrevocable, transferrable, sub licensable, 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.

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- 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; 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 from the date the Order becomes final and effective through the Effective Date of Divestiture; *provided, however*, that "Terminable Contracts" does not include any contracts or agreements between Respondent or 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

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unregistered trademarks, including registrations and 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 and effective, 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 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

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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 from the Acquisition Date through 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;
 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

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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 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

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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,
 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:

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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 anyone 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.

- 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 part, 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;

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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 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

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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 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

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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.

- 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 and effective, 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 becomes final and effective.
- 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:

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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 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

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business, facilities and technical information, and such other relevant information as the Monitor Trustee may reasonably request, related to 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 retained by the Monitor Trustee pursuant to Paragraph III.C.5. of this Order.

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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.
 - G. Respondent shall cooperate with the Monitor Trustee appointed pursuant to this Paragraph in the performance any duties and responsibilities under this Order.

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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(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(1), 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(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(1), 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 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

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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.
 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.

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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 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

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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 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.

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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, wilful or wanton acts, or bad faith by the Divestiture Trustee. For purposes of this Paragraph, the term "Divestiture Trustee" shall include all Persons 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

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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:

- A. From the date this Order becomes final and effective through 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 March 1, 2010;
 - 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

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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 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:

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1. No later than ten (10) days from the date this Order becomes final and effective, Respondent shall notify all Customers with Terminable Contracts of their 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 and effective.
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 and effective.
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*, that: (a) a Customer with more than one

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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;

Provided, however, that Respondent may enforce Contracts, or seek judicial remedies for breaches of Contracts, based upon rights or causes of action

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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:
 1. Within fifteen (15) days after the date this Order becomes final and effective:
 - 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

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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 and effective, 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, 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.

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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.

IT IS FURTHER ORDERED that, no later than ten (10) days from the date on which this Order becomes final and effective, 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;

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- 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 effective 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.
- 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 and effective, and annually thereafter until expiration or termination of Respondent's obligations under the Order on the anniversary of the date this Order becomes final and effective, and at other times as the Commission may require, Respondent shall file

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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 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 and effective.

By the Commission.

Complaint

IN THE MATTER OF

RITE AID CORPORATIONCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4308; File No. 072 3121**Complaint, November 12, 2010 — Decision, November 12, 2010*

The consent order addresses allegations that Rite Aid Corporation (“Rite Aid”) failed to protect the sensitive financial and medical information of its customers and employees, in violation of federal law. Specifically, the complaint alleged that Rite Aid failed to properly dispose of personal information, train employees, assess compliance with disposal policies and procedures, or establish procedures for discovering and resolving risks to personal information. The consent order requires Rite Aid to establish a comprehensive information security program to ensure the security, confidentiality, and integrity of personal information it collects from consumers and employees. The consent order further requires Rite Aid to have its security program independently audited by a third party every two years for the next 20 years to ensure compliance.

Participants

For the *Commission*: *Kristin Krause Cohen, Loretta H. Garrison, and Alain Sheer.*

For the *Respondent*: *Stephen Paul Mahinka, Morgan Lewis & Bockius.*

COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that Rite Aid Corporation (“Respondent” or “Rite Aid”) 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 Rite Aid is a Delaware corporation with its principal office or place of business at 30 Hunter Lane, Camp Hill, PA 17011. It conducts business through several wholly-owned subsidiaries and limited liability companies.

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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 Federal Trade Commission Act.

RESPONDENT’S BUSINESS

3. At all relevant times, Respondent has been in the business of selling prescription and non-prescription medicines and supplies, as well as other products. It operates, among other things, approximately 4,900 retail pharmacy stores in the United States (collectively, “Rite Aid pharmacies”) and an online pharmacy business. Respondent allows consumers to pay for their purchases with credit, debit and electronic benefit transfer cards (collectively, “payment cards”); insurance cards; personal checks; or cash.

4. In conducting its business, Respondent routinely obtains information from or about its customers, including, but not limited to, name; telephone number; address; date of birth; bank account number; payment card account number and expiration date; prescription information, such as medication and dosage, prescribing physician name, address, and telephone number, health insurer name, and insurance account number and policy number; and Social Security number (collectively, “personal information”). Respondent also collects personal information from or about employees and job applicants, including, but not limited to, Social Security number.

5. Respondent operates computer networks in its pharmacies, corporate headquarters, and distribution centers. Among other things, Respondent uses the networks to fill orders for prescription medicines and supplies; process sales, including to obtain authorization for payment card and insurance card transactions; and aggregate, store, and transmit personal information.

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RESPONDENT'S REPRESENTATIONS

6. Respondent has disseminated or caused to be disseminated statements and privacy policies to consumers regarding the privacy and confidentiality of personal information, including, but not limited to:

- a. From at least 2003, the following statement in its Notice of Privacy Practices:

Rite Aid takes its responsibility for maintaining your protected health information in confidence very seriously. Protected health information means information about you that may identify you and that relates to your past, present or future physical or mental health or condition and related health care services. It also includes basic demographic information. We are required by law to maintain the privacy of protected health information and to provide you with a Notice of Privacy Practices including our legal duties with respect to protected health information. (See Exhibit A).

- b. From at least 2004, the following statement in a brochure seeking its customers' medical history:

Although you have the right not to disclose your medical history, Rite Aid would like to assure you that we respect and protect your privacy. (See Exhibit B.)

RESPONDENT'S SECURITY PRACTICES

7. Respondent has engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for personal information. Among other things, Respondent has failed to: (1) implement policies and procedures to dispose securely of such information, including, but not limited to, policies and procedures to render the information unreadable in the course of disposal; (2) adequately train employees to dispose securely of such information; (3) use reasonable measures to assess compliance with its established policies and procedures

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for the disposal of such information; and (4) employ a reasonable process for discovering and remedying risks to such information.

8. As a result of the failures set forth in Paragraph 7, Respondent discarded materials containing personal information in clear readable text (such as pharmacy labels and employment applications) in unsecured, publicly-accessible trash dumpsters used by Rite Aid pharmacies on numerous occasions. For example, in late 2006 and continuing into 2007 and 2008, television stations and other media outlets reported finding personal information in unsecured dumpsters used by Rite Aid pharmacies in at least 7 cities throughout the United States. The personal information found in the dumpsters included information about Respondent's customers and job applicants. Information discarded in publicly-accessible dumpsters could be misused to commit identity theft or to steal prescription medicines.

VIOLATIONS OF THE FTC ACT

9. Through the means described in Paragraph 6, Respondent represented, expressly or by implication, that it implemented reasonable and appropriate measures to protect personal information against unauthorized access.

10. In truth and in fact, Respondent did not implement reasonable and appropriate measures to protect personal information against unauthorized access. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

11. As set forth in Paragraph 7, Respondent failed to employ reasonable and appropriate measures to prevent unauthorized access to personal information. Respondent's practices caused, or are 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.

12. The acts and practices of Respondent as alleged in this complaint constitute unfair or deceptive acts or practices, in or

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affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

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

By the Commission.

Complaint

EXHIBIT A

The Health Insurance Portability and Accountability Act ("HIPAA")

NOTICE OF PRIVACY PRACTICES

THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT PATIENTS MAY BE USED AND DISCLOSED AND HOW PATIENTS CAN GET ACCESS TO THIS INFORMATION.

PLEASE REVIEW IT CAREFULLY.

Rite Aid will ask you to sign an Acknowledgment that you have received this Notice of Privacy Practices ("Notice"). This Notice describes, in accordance with the HIPAA Privacy Regulation, how Rite Aid may use and disclose your protected health information to carry out treatment, payment or health care operations and for other specific purposes that are permitted or required by law. The Notice also describes your rights and Rite Aid's duties with respect to protected health information about you.

Rite Aid will store information provided by you in the computer system. That information will include your name, address, phone number and other identifying information. In addition, any information that you provide concerning drugs that you are taking, medical conditions you may have, allergies, and other matters affecting your health will be stored in the computer.

TREATMENT, PAYMENT, AND HEALTH CARE OPERATIONS

We will use your health care information to treat you. For example, we will use health care information to dispense prescription medications. We may also disclose your information to other health care providers for the purpose of treatment.

We will use your health care information to receive payment for products and services. For example, we may contact your third party payor (for example, insurer or pharmaceutical benefits manager) to determine whether your program will pay for your prescription. We will bill you and/or a third party payor for the cost of prescription medications dispensed to you. The information on or accompanying the bill may include your identification, as well as the prescriptions you are taking.

We will use your health care information to carry out health care operations. For example, we may use information in your health record to monitor the quality of pharmacist performance and to train pharmacy personnel.

USES AND DISCLOSURES THAT ARE EITHER PERMITTED OR REQUIRED BY THE REGULATION

Using their judgement as health care professionals, our pharmacists may disclose your protected health information to a family member, other relation, close personal friend, or any person you identify as being involved in your health care.

We form contracts with some entities known as Business Associates to perform services for us. For example, we sometimes require Business Associates to sort insurance or other third party payor claims for submission to the actual payor. We may disclose protected health information to our Business Associates so that they can perform the job we asked them to do, then bill your third party payor for services rendered. We require the Business Associates to appropriately safeguard the protected health information.

Complaint

EXHIBIT A

We may contact you to provide refill reminders or information about treatment alternatives or other health related benefits and services that may be of interest.

OTHER REQUIRED OR PERMITTED DISCLOSURES

- We may disclose your health care information to the following entities and/or under given circumstances:
- to the Food and Drug Administration (FDA) relative to adverse events regarding drugs, foods, supplements, and other health products or to post marketing surveillance to enable product recalls, repairs, or replacement;
 - to public health or legal authorities charged with preventing or controlling disease, injury, or disability;
 - to law enforcement agencies as required by law or in response to a valid subpoena or other legal process;
 - to health oversight agencies (medical licensing boards, e.g.) for activities authorized by law such as audits, investigations, and inspections necessary for Rite Aid's licensure and for the government to monitor the health care system, etc.;
 - in response to a court order, administrative order, subpoena, discovery request, or other lawful process by another person involved in a dispute involving a patient, but only if efforts have been made to tell the patient about the request or to obtain an order protecting the requested health care information;
 - as authorized by and as necessary to comply with laws relating to worker's compensation or similar programs established by law;
 - whenever required to do so by law;
 - to researchers when their research has been approved by an institutional review board that has reviewed the research proposal and established protocols to ensure the privacy of the patient's information;
 - to a coroner or medical examiner when necessary, for example, to identify a deceased person or to determine a cause of death, or to funeral directors consistent with applicable law to carry out their duties;
 - to organ procurement organizations or other entities engaged in the procurement, banking, or transplantation of organs for the purpose of tissue donation and transplant, consistent with applicable law;
 - to contact the patient for the purpose of fundraising;
 - to notify, or assist in notifying, a family member, personal representative, or another person responsible for the patient's care, of the patient's location, or general condition;
 - to a correctional institution or its agents, if a patient is or becomes an inmate of such an institution, when necessary for the patient's health or the health and safety of others;
 - when necessary to prevent a serious threat to the patient's health and safety or the health and safety of the public or another person;
 - as required by military command authorities, when the patient is a member of the armed forces, and to appropriate military authority about foreign military personnel;
 - to authorized federal officials for intelligence, counterintelligence, and other national security activities authorized by law;
 - to authorized federal officials so they may provide protection to the president, other authorized persons, or foreign heads of state or conduct special investigations;
 - to a government authority, such as a social service or protective services agency, if Rite Aid reasonably believes the patient to be a victim of abuse, neglect, or domestic violence, but only to the extent required by law, if the patient agrees to the disclosure, or if the disclosure is allowed by law and Rite Aid believes it is necessary to prevent serious harm to the patient or to someone else or the law enforcement or public official that is to receive the report represents that it is necessary and will not be used against the patient.

MORE STRINGENT LAWS

If your state has a law or regulation that is more stringent than the HIPAA Regulation, please refer to the accompanying page where that more stringent law will be reflected.

Complaint

EXHIBIT A

AUTHORIZED USE AND DISCLOSURE

We will obtain your written Authorization before using or disclosing protected health information about you for purposes other than those listed above or otherwise permitted or required by law. You may revoke an Authorization in writing at any time. Such revocations must be made in writing. Forms for making revocations, which are available in Rite Aid pharmacies, should be completed and sent to the Privacy Office, Rite Aid, P.O. Box 3165, Harrisburg, PA 17105. Upon receipt of the written revocation, we will stop using or disclosing protected health information about you, except to the extent that we have already taken action in reliance on the Authorization.

THE PATIENT'S RIGHTS

RESTRICTION REQUESTS

You have the right to request that we restrict how your protected health information is used or disclosed in carrying out treatment, payment, or health care operations. Such requests must be made in writing to the Privacy Office, Rite Aid, P.O. Box 3165, Harrisburg, PA 17105. We are not required to agree to the requested restrictions. If however, we do agree to the requested restrictions, that agreement will be binding on us.

ALTERNATIVE MEANS OF COMMUNICATION

You have the right to request that our communications to you concerning your health care information be made by alternative means or at alternative locations. For example, you may wish us to communicate in some way other than mailing to your home address or calling your home telephone number. Such requests must be made in writing to the Privacy Office, Rite Aid, P.O. Box 3165, Harrisburg, PA 17105. We will comply with a reasonable request for such an alternative.

ACCESS

You have the right to inspect and obtain a copy of your protected health information. You have the right to access and copy protected information about you contained in the designated record set for as long as we maintain your protected health information. The designated record set usually will include prescription and billing records. To receive a copy of your protected health information, you must send a written request to the Privacy Office, Rite Aid, P.O. Box 3165, Harrisburg, PA 17105. Forms for making Access requests are available in our pharmacies. We may charge you a fee for the costs of copying, mailing, or other supplies that are necessary to grant your request. We may also deny your request to inspect and copy in limited circumstances. If you are denied access to your protected health information in most cases you may request that the denial be reviewed.

HEALTH CARE INFORMATION AMENDMENTS

If you feel that the protected health information we maintain about you is incomplete or incorrect, you may request that we amend it. You may request an Amendment for as long as we maintain the protected health information. A request for an Amendment must be made in writing. Forms for making such requests, which are available in our pharmacies, should be completed and sent to the Privacy Office, Rite Aid, P.O. Box 3165, Harrisburg, PA 17105. You must include a reason that supports your request. In certain cases, we may deny the request. If the request for Amendment is denied, you have the right to file a statement of disagreement with the decision, and we may give a rebuttal to your statement.

ACCOUNTING

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 150

Complaint

EXHIBIT A

For most purposes other than treatment, payment, or health care operations, you have the right to receive an Accounting of the disclosures we made, on or after April 14, 2003, of your protected health information. The Accounting will exclude disclosures we may have made directly to you, disclosures to friends or family members involved in your care, and disclosures for purposes you specifically authorized in writing. The right to receive an Accounting is subject to certain other exceptions, restrictions, and limitations. A request for an Accounting must be made in writing. Forms for making such requests, which are available in our pharmacies, should be completed and sent to the Privacy Office, Rite Aid, P.O. Box 3165, Harrisburg, PA 17105. The time period for the requested accounting must be specified and it may not be longer than six years. The first Accounting you request within a 12-month period will be provided free of charge, but you may be charged for the cost of providing additional Accountings within that period. We will notify you of the cost involved and you may choose to withdraw or modify the request at that time.

NOTICE OF PRIVACY PRACTICES

You have a right to receive a paper copy of this Notice from us upon request even if you have already received the Notice electronically (for example, on the Internet).

RITE AID'S DUTIES

Rite Aid takes its responsibility for maintaining your protected health information in confidence very seriously. Protected health information means information about you that may identify you and that relates to your past, present or future physical or mental health or condition and related health care services. It also includes basic demographic information. We are required by law to maintain the privacy of protected health information and to provide you with a Notice of Privacy Practices including our legal duties with respect to protected health information. In addition, Rite Aid is required to abide by the terms of the Notice that is currently in effect.

We reserve the right to change the terms of our Notice and to make the new Notice provisions effective for all protected health information that we maintain. When we make changes in our Notice, copies of the revised Notice will be available on request in all our pharmacies. A copy will be posted in all of our pharmacies and will be available on our web site at www.riteaid.com.

FOR MORE INFORMATION OR TO REPORT A PROBLEM

If you have questions or would like additional information about our privacy practices, you may contact the Privacy Office at (717) 761-2633 or by writing to the Privacy Office, Rite Aid, P.O. Box 3165, Harrisburg, PA 17105. Forms for filing a written complaint to Rite Aid are available at our pharmacies. If you believe your privacy rights have been violated, you can file a complaint with Rite Aid's Privacy Office or with the Secretary of Health and Human Services. There will be no retaliation for filing a complaint.

EFFECTIVE DATE

This Notice of Privacy Practices is effective as of April 14, 2003.

Complaint

EXHIBIT B

CONFIDENTIAL

Dear Valued Customer:

Your Rite Aid Pharmacist is committed to providing you with the most advanced pharmacy care possible.

The information that you fill out in this brochure is vital to enhance your health. The more you tell us, the better we can serve you. This information is the foundation of a personal health profile we maintain for you, so our LifeCheck™ Computer can help prevent harmful drug interactions with prescriptions or OTC medications you may be taking.

You're committed to staying healthy, and Rite Aid wants to be there with you every step of the way. We want to give you the best care you can get and we're continually working to make this possible. From ongoing training programs for our pharmacists to 24-hour convenient service, we are always going out of our way to make your life easier.

Although you have the right not to disclose your medical history, Rite Aid would like to assure you that we respect and protect your privacy. We encourage you to completely fill out this form and return it to your pharmacist so that we can give you the kind of personal care that you and your family deserve.

Your health is important, to you and to us. We hope to earn your trust and to become your pharmacy for life. Because with us, it's personal.

Sincerely,

Your Rite Aid Pharmacist

Rite Aid Pharmacy

Rite Aid is always investing in new technology and pharmacist training to deliver the outstanding pharmacy care that you deserve.

Rite Advice® Written information on dosage, side effects and potential drug interactions is included with every prescription.

Convenient Refills Refills are just a call or a click away. Use Refills by Phone or Internet Refills 24 hours a day and know exactly what time your refill will be ready.

• Refills by Phone – call the phone number located on your prescription bottle and follow the automated instructions.

• Internet Refills – log on to riteaid.com powered by drugstore.com and click "refill now."



With us, it's personal.



Fill out this brochure with your medical history to help your pharmacist provide you with the most complete, personalized service possible.



With us, it's personal.

RA0001574

CONFIDENTIAL

Patient Information

Medical Information



Please check the appropriate box(es)

Patient Name

Last First Middle Initial

Street or PO Box Apt.#

City State Zip

Telephone

E-mail Address

Date of Birth (Month/Day/Year)

Gender (circle one): MALE FEMALE

If you have children in your household, to prevent accidental drug poisoning, please specify child resistant packaging.

Would you like us to dispense your medications in child resistant packaging? YES NO

Prescription Insurance

YES NO If yes, name cardholder

Cardholder's Name

Relationship to cardholder (circle one) (Cardholder, spouse, child, dependent parent, disabled dependent, full-time student, other)

KNOWN ALLERGIES AND DRUG REACTIONS

- No known allergies/drug reactions Aspirin Cephalosporins (ex. Ceclor, Keflex) Codeine Erythromycin Penicillins Sulfu drugs Tetracyclines Xanthines (ex. Theophylline)

HEALTH CONDITIONS

- Angina Anemia Arthritis Asthma Blood clotting disorders Blood pressure, high Breast feeding Cancer Diabetes Heart conditions Kidney disease Liver disease Lung disease Parkinson's disease Pregnancy Ulcers

Other allergies and drug reactions

Other health conditions

List of prescriptions you are currently taking which were NOT purchased in this store

List of non-prescription medications you are currently taking

PHARMACISTS COMMENTS

This information requested by your Rite Aid Pharmacist is required by state regulation to that to us, we can provide appropriate pharmacy services to you. This information will be kept confidential. Your health information may change periodically, please notify your Rite Aid Pharmacist of any changes in medications, prescription and non-prescriptions, allergies, drug reactions or health conditions.

Signature

Date

Signature

DO NOT WISH TO COMPLETE THIS FORM

Date

RA0001575

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 waives and other provisions as required by the Commission's Rules; and

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

1. Respondent Rite Aid Corporation is a Delaware corporation with its principal office or place of business at 30 Hunter Lane, Camp Hill, Pennsylvania 17011.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

Decision and Order

Respondent, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

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

1. Unless otherwise specified, “store” shall mean each pharmacy entity or store location that sells prescription medicines, drugs, devices, supplies, or services and/or non-prescription products and services.
2. Unless otherwise specified, “LLC” shall mean a limited liability company: (a) that owns, controls, or operates one or more stores (including, but not limited to, the companies identified in attached Exhibit A), and (b) in which Rite Aid Corporation is a member, directly or indirectly.
3. Unless otherwise specified, “Respondent” shall mean Rite Aid Corporation, its subsidiaries, divisions, affiliates, and LLCs, and its successors and assigns.
4. “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 or other government-issued identification number; (g) prescription information, such as medication and dosage, and prescribing physician name, address, and telephone number, health insurer name, insurance account number, or insurance policy number; (h) a bank account, debit card, or credit card account

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number; (i) a persistent identifier, such as a customer number held in a “cookie” or processor serial number, that is combined with other available data that identifies an individual consumer; (j) a biometric record; or (k) any information that is combined with any of (a) through (j) above. For the purpose of this provision, a “consumer” shall include an “employee,” and an individual seeking to become an employee, where “employee” shall mean an agent, servant, salesperson, associate, independent contractor, and other person directly or indirectly under the control of Respondent.

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

I.

IT IS ORDERED that Respondent, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, limited liability company, division, 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 it maintains and protects the privacy, confidentiality, security, or integrity of personal information collected from or about consumers.

II.

IT IS FURTHER ORDERED that Respondent, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, limited liability company, division, 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, 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

Decision and Order

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.
- 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.
- E. the evaluation and adjustment of Respondent's information security program in light of the results of the testing and monitoring required by subpart C, any

Decision and Order

material changes to Respondent's operations or business arrangements, or any other circumstances that Respondent knows or has reason to know may have a material impact on the effectiveness of its information security program.

III.

IT IS FURTHER ORDERED that, in connection with their compliance with Part II of this order, Respondent, and its officers, agents, representatives, and employees, 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 year after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for twenty (20) 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;
- 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 II 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

Decision and Order

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 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 for Enforcement within ten (10) days of request.

IV.

IT IS FURTHER ORDERED that Respondent shall maintain and, upon request, make available to the Federal Trade Commission for inspection and copying:

- A. 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 III of this order, all materials relied upon to prepare the Assessment, whether prepared by or on behalf of 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 II and III of this order, for the compliance period covered by such Assessment.

Decision and Order

V.

IT IS FURTHER ORDERED that Respondent Rite Aid Corporation shall deliver a copy of this order to all its current and future subsidiaries (including LLCs and each store that is owned, controlled, or operated by Respondent or an LLC), 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 subsidiaries and personnel within sixty (60) days after service of this order, and to such future subsidiaries and personnel within sixty (60) days after the Respondent acquires the subsidiary or the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission at least thirty (30) days prior to any change in Respondent 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 company; the creation or dissolution of a subsidiary (including an LLC), 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 Respondent's name or address. *Provided, however,* that, with respect to any proposed change in Respondent 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.

VII.

IT IS FURTHER ORDERED that Respondent, and its successors and assigns, within sixty (60) days after the date of service of this order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this order. Within ten (10) days of

Decision and Order

receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.

VIII.

This order will terminate on November 12, 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:

- 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.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, a consent agreement from Rite Aid Corporation (“Rite Aid”).

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.

The Commission’s proposed complaint alleges that Rite Aid is in the business of selling prescription and non-prescription medicines and supplies, as well as other products. It operates, among other things, approximately 4,900 retail pharmacy stores in the United States (collectively, “Rite Aid pharmacies”) and an online pharmacy business. The company allows consumers buying products in Rite Aid pharmacies to pay for their purchases with credit, debit and electronic benefit transfer cards; insurance cards; personal checks; or cash.

The complaint alleges that in conducting its business, Rite Aid routinely obtains information from or about its customers, including, but not limited to, name; telephone number; address; date of birth; bank account number; payment card account number and expiration date; prescription information, such as medication and dosage, prescribing physician name, address, and telephone number, health insurer name, and insurance account number and policy number; and Social Security number. The company also collects and maintains sensitive information from or about its employees and job applicants, which includes, among other things, Social Security numbers.

The complaint further alleges that Rite Aid engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for sensitive information from consumers, employees, and job applicants. In particular, Rite Aid

Analysis to Aid Public Comment

failed to: (1) implement policies and procedures to dispose securely of such information, including, but not limited to, policies and procedures to render the information unreadable in the course of disposal; (2) adequately train employees to dispose securely of such information; (3) use reasonable measures to assess compliance with its established policies and procedures for the disposal of such information; or (4) employ a reasonable process for discovering and remedying risks to such information.

The complaint alleges that as a result of these failures, Rite Aid pharmacies discarded materials containing sensitive information in clear readable text (such as pharmacy labels and job applications) in unsecured, publicly-accessible trash dumpsters on numerous occasions. For example, in July 2006 and continuing into 2007 and 2008, television stations and other media outlets reported finding such information in unsecured dumpsters used by Rite Aid pharmacies in at least 7 cities throughout the United States. When discarded in publicly-accessible dumpsters, such information can be obtained by individuals for purposes of identity theft or the theft of prescription medicines.

The proposed order applies to sensitive information about consumers, employees, and job applicants obtained by Rite Aid. It contains provisions designed to prevent Rite Aid from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits misrepresentations about the security, confidentiality, and integrity of sensitive information. Part II of the order requires Rite Aid to establish and maintain a comprehensive information security program that is reasonably designed to protect the security, confidentiality, and integrity of such information (whether in paper or electronic format) about consumers, employees, and those seeking to become employees. The order covers health and other sensitive information obtained by all Rite Aid entities, including, but not limited to, retail pharmacies. The security program must contain administrative, technical, and physical safeguards appropriate to Rite Aid's size and complexity, the nature and scope of its activities, and the sensitivity of the information collected from or about consumers and employees. Specifically, the order requires Rite Aid to:

Analysis to Aid Public Comment

- 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 sensitive 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 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 sensitive information they receive from Rite Aid, and require service providers by contract to implement and maintain appropriate safeguards.
- Evaluate and adjust its information security programs in light of the results of testing and monitoring, any material changes to operations or business arrangements, or any other circumstances that it knows or has reason to know may have a material impact on its information security program.

Part III of the proposed order requires Rite Aid to obtain within one year, and on a biennial basis thereafter for a period of twenty (20) years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that: (1) it has in place a security program that provides protections that meet or exceed the protections required by Part II of the proposed order; and (2) its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of sensitive consumer, employee, and job applicant information has been protected.

Analysis to Aid Public Comment

Parts IV through VIII of the proposed order are reporting and compliance provisions. Part IV requires Rite Aid 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, Rite Aid must retain the documents for a period of three years after the date that each assessment is prepared. Part V requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part VI ensures notification to the FTC of changes in corporate status. Part VII mandates that Rite Aid submit a compliance report to the FTC within 60 days, and periodically thereafter as requested. Part VIII is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

The Commission conducted its investigation jointly with the Office for Civil Rights in the Department of Health and Human Services (“OCR-HHS”). Working together, the Commission and OCR-HHS each entered into separate but coordinated agreements with Rite Aid to resolve all the issues of both agencies.

This is the Commission’s twenty-ninth case to challenge the failure by a company to implement reasonable information security practices, and the second case: (1) involving a health provider, (2) proceeding jointly with OCR-HHS, and (3) challenging the security of employee data.

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

Complaint

IN THE MATTER OF

**PILOT CORPORATION, PROPELLER
CORPORATION, AND FLYING J INC.**

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

Docket No. C-4293; File No. 091 0125

Complaint, June 29, 2010 — Decision, November 15, 2010

The consent order addresses allegations that the acquisition by Pilot Corporation (“Pilot”) of Flying J Inc.’s travel center businesses would result in higher diesel fuel prices for long-haul trucking fleets. The consent order requires Pilot to divest the travel centers to Love’s Travel Stops and Country Stores (“Love’s”) and to provide Love’s access to and use of a fuel purchase card system that Pilot acquired; to continue operating Wendy’s restaurants affiliated with certain divested travel centers for one year; to provide Love’s with business information related to the travel centers being divested; and to maintain the travel centers as viable businesses pending divestiture. The consent order further permits the Commission to appoint a trustee to oversee the divestiture, if necessary.

Participants

For the *Commission*: *Karen Kazmerzak, Mary N. Lehner, Justin Stewart-Teitelbaum, Terry Thomas, Cathlin Tully, and Josie M. Williams.*

For the *Respondents*: *Marimichael O. Skubel, Kirkland and Ellis LLP; and Rebecca Farrington and George L. Paul, White and Case LLP.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Respondents Pilot Corporation and Propeller Corp. (collectively, “Pilot”), and Flying J Inc. have entered into acquisition agreements which, 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, and

Complaint

it appearing to the Federal Trade Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. RESPONDENTS AND JURISDICTION

1. Pilot Travel Centers LLC is the largest travel center operator in the United States. Pilot Travel Centers LLC is a privately held, for-profit limited liability company. It is organized, existing, and doing business under and by virtue of the laws of Delaware, with its headquarters and principal place of business at 5508 Lonas Drive, Knoxville, Tennessee 37909. Pilot Travel Centers LLC operates in 39 U.S. states.

2. Respondent Pilot Corporation holds 52.5 percent of the non-corporate interests of Pilot Travel Centers LLC and a right to 50 percent representation on Pilot Travel Centers LLC's Board of Managers. Pilot Corporation and Respondent Propeller Corp. share control over Pilot Travel Centers LLC equally. Pilot Corporation is a privately held, for-profit corporation. It is organized, existing, and doing business under and by virtue of the laws of Tennessee, with its headquarters and principal place of business at 5508 Lonas Drive, Knoxville, Tennessee 37909.

3. Respondent Propeller Corp. holds 47.5 percent of the non-corporate interests of Pilot Travel Centers LLC and a right to 50 percent representation on Pilot Travel Centers LLC's Board of Managers. Pilot Corporation and Propeller Corp. share control over Pilot Travel Centers LLC equally. Propeller Corp. is a for-profit corporation, privately held in its entirety by five stockholders managed by CVC European Equity V Limited and three stockholders managed by CVC European Equity Tandem Fund Limited. Propeller Corp. is organized, existing, and doing business under and by virtue of the laws of Delaware, with its headquarters and principal place of business at 712 5th Avenue, 43rd Floor, New York, New York 10019.

4. Pilot Corporation, Propeller Corp., and their relevant operating entities are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

Complaint

5. Respondent Flying J Inc., a privately held, for-profit corporation, is a fully integrated oil company with operations throughout the United States and Canada. It is organized, existing, and doing business under and by virtue of the laws of Utah, with its headquarters and principal place of business at 1104 Country Hills Drive, Ogden, Utah 84403. Flying J Inc. owns and operates, among other things, travel center, trucking, fuel card, and related businesses, the interests and assets of which Pilot proposes to acquire (the assets, stock, and other interests to be acquired, collectively, “Flying J”). Flying J Inc. operates in more than 40 U.S. states. Flying J Inc., its wholly-owned subsidiary, and wholly-owned subsidiaries of ConocoPhillips jointly control the CFJ Entities.

6. The CFJ Entities own Flying J-branded travel centers operated by Flying J Inc. in 36 U.S. states. The CFJ Entities consist of: (1) CFJ Properties, a general partnership that is 50% owned by wholly-owned subsidiaries of ConocoPhillips and 50% owned by a wholly-owned subsidiary of Flying J Inc.; (2) CFJ I Management Inc., CFJ II Management Inc., and CFJ III Management Inc. (“CFJ Management Companies”), each of which is 50% owned by a wholly-owned subsidiary of ConocoPhillips and 50% owned by Flying J Inc.; and (3) CFJ Plaza Company I LLC, CFJ Plaza Company II LLC, and CFJ Plaza Company III LLC, each of which is 49.5% owned by a wholly-owned subsidiary of ConocoPhillips, 49.5% owned by Flying J Inc., and 1% owned by its corresponding CFJ Management Company.

7. Flying J Inc. and its relevant operating subsidiaries are, and at all relevant times have been, engaged in activities in or affecting “commerce” as defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. THE PROPOSED ACQUISITION

8. Pursuant to agreements dated December 18, 2009, Pilot intends to acquire the interests and assets of Flying J’s travel center and related businesses for approximately \$1.8 billion.

Complaint

III. THE RELEVANT MARKETS

9. The relevant product market in which to analyze the proposed acquisition is the over-the-road sale of diesel to long-haul fleets by national travel center operators.

10. Travel centers provide locations for long-haul trucks to fuel and serve as the long-haul driver's home away from home, offering amenities including parking for tractor-trailers, truck service centers, truck washes, certified automated truck scales, fast food restaurants, shower facilities, internet access, and financial services for drivers.

11. Today, four travel center operators – Pilot, Flying J, TravelCenters of America (“TA”), and Love's Travel Stops and Country Stores (“Love's”) (collectively, “national travel center operators”) – have the scale and scope to compete for any substantial portion of long-haul over-the-road diesel business. Pilot and Flying J are the first and second choices for a number of long-haul fleets.

12. The relevant geographic market in which to analyze the proposed transaction is the contiguous United States. National travel center operators can and do negotiate blanket minimum national discounts with long-haul fleets.

IV. ENTRY CONDITIONS

13. Post-acquisition, entry or expansion into the relevant market would not be timely, likely, and sufficient in scope to deter or negate the anticompetitive effects of the proposed acquisition.

V. ANTICOMPETITIVE EFFECTS

14. The acquisition may substantially lessen competition in the relevant market by, among other things: (a) eliminating actual, direct, and substantial competition between Pilot and Flying J; and (b) increasing the likelihood that Pilot will exercise market power unilaterally.

VI. VIOLATIONS CHARGED

Decision and Order

15. The agreements described in Paragraph 8 constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

16. The acquisition described in Paragraph 8, 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 twenty-ninth day of June, 2010, issues its Complaint against Respondents.

By the Commission, Commissioner Brill not participating.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Pilot Corporation (“Pilot”) and Propeller Corp. (“Propeller”), of certain Flying J Inc. (“Flying J”) (collectively, “Respondents”) assets, stock, and other interests (collectively, “Flying J Assets”), 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

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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, and having duly considered the comments filed thereafter by interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, and having modified the Decision and Order in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent Pilot is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its headquarters address at 5508 Lonas Drive, Knoxville, Tennessee 37909.
2. Respondent Propeller is a privately held corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 712 5th Avenue, 43rd Floor, New York, New York 10019.
3. Respondent Flying J is a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah, with its headquarters address at 1104 Country Hills Drive, Ogden, Utah 84403.
4. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents, 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. “Pilot” means Pilot Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Pilot (including, but not limited to, Pilot Travel Centers LLC and CTP Holdings LLC), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. “Propeller” means Propeller Corp., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Propeller (including, but not limited to, Pilot Travel Centers LLC and CTP Holdings LLC), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- C. “Flying J” means Flying J Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Flying J (including, but not limited to, Travel Plaza LLC and TCH LLC), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- D. “Respondent(s)” means Pilot, Propeller, and Flying J, individually and collectively.
- E. “Commission” means the Federal Trade Commission.

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- F. “Acquirer(s)” means the following:
1. Love’s; 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.
- G. “Acquisition” means the acquisition of the Flying J Assets by Pilot and Propeller as contemplated by the Acquisition Agreements.
- H. “Acquisition Agreements” means:
1. Contribution Agreement by and among Pilot Travel Centers LLC, Flying J Inc., and Pacific Sunstone Inc., dated December 18, 2009, and all attachments, amendments, exhibits, and schedules related thereto; and
 2. Purchase Agreement by and among Pilot Travel Centers LLC, Douglas Oil Company of California, Kayo Oil Company, and ConocoPhillips Company, dated December 18, 2009, and all attachments, amendments, exhibits, and schedules related thereto.
- I. “Acquisition Date” means the date on which the Acquisition occurs pursuant to the Acquisition Agreements.
- J. “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 diesel fuel. The term “Agency” includes, without limitation, the United States Environmental Protection Agency (“EPA”).

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- K. “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 the Travel Center Businesses Assets to an Acquirer pursuant to this Order.
- L. “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 operation and management of a Travel Center Business including, but not limited to, information related to the cost, supply, sales, sales support, distribution and marketing of diesel fuel to long-haul fleets; *provided, however*, this provision shall not include information that subsequently falls within the public domain through no violation of this Order; *provided further, however*, this provision shall not include information related to pricing.
- M. “Dealer Agreement” means any agreement between Respondent(s) Pilot and/or Propeller and any Third Party travel center owner or operator whereby Respondent(s) Pilot and/or Propeller lease(s) diesel fuel dispensers and related equipment in exchange for a fee paid to the Third Party.
- N. “Diesel Agreement Information” means information related to a Dealer Agreement or a Travel Center Acquisition Agreement including, but not limited to, the site location, counter-party contact information (including contact name and telephone number), contract pricing, agreement term, a copy of the final executed Dealer Agreement or Travel Center Acquisition Agreement, and all other ancillary agreements related thereto.
- O. “Diesel Agreement Summary Report” means a listing of all Dealer Agreement(s) and Travel Center Acquisition Agreement(s) entered into between

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Respondent(s) Pilot and/or Propeller and a Third Party from the Acquisition Date (or the date the last Diesel Agreement Summary Report was filed) and all relevant Diesel Agreement Information.

- P. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service.
- Q. “Divestiture Trustee” means any trustee appointed by the Commission pursuant to Paragraph IV of this Order.
- R. “Geographic Territory” means the contiguous United States of America.
- S. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order.
- T. “Love’s” means Love’s Travel Stops & Country Stores, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oklahoma, with its headquarters address at 10601 N. Pennsylvania Ave, Oklahoma City, Oklahoma 73120.
- U. “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.
- V. “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.
- W. “Remedial Agreement(s)” means:
1. any agreement between Respondent(s) and an Acquirer that is specifically referenced and attached to this Order, including all amendments,

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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 the requirements of the Order.
- X. "TCH Customer Confidential Business Information" means the confidential and/or proprietary information belonging to either (1) the Acquirer or (2) a Third Party that is gathered pursuant to a TCH Merchant Agreement (or any agreement whereby TCH grants a Third Party access to its TCH Fuel Card Payment System) including, but not limited to, the identity of merchant's customers, the location of customer purchases, products or services purchased or sold, prices of products or services, volumes of diesel, discounts, and other transaction terms; *provided, however*, this provision shall not include information already within the public domain or that subsequently falls within the public domain through no violation of this Order.
- Y. "TCH Executive Board" means those persons appointed to the TCH LLC board of directors or executive committee by either Respondents Pilot or Flying J.

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- Z. “TCH Firewall Protocol” means the firewall contemplated in Paragraph II.D of this Order.
- AA. “TCH Fuel Card System” means the Transportation Clearing House Fuel Card payment system.
- BB. “TCH Merchant Agreement” means:
1. the TCH Merchant Agreement between TCH LLC and Love’s, dated May 19, 2010, and any attachments, amendments, exhibits, and schedules related thereto. This TCH Merchant 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 (or a Divestiture Trustee) and an Acquirer for access and use of the TCH Fuel Card System for a period of three (3) years from the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto.
- CC. “Third Party(ies)” means any non-governmental Person other than Respondents or the Acquirer.
- DD. “Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Travel Centers Businesses Assets.
- EE. “Travel Center Acquisition Agreement” means any agreement between Respondent(s) Pilot and/or Propeller and any Third Party for the acquisition of any stock, share capital, equity, or other ownership interest in a travel center.
- FF. “Travel Center(s) Business(es)” means the business of operating a travel center at the locations identified in Appendix I of this Order, including, without limitation,

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the distribution, marketing, promotion and sale of all products and services offered at such locations.

GG. “Travel Center(s) Business(es) Assets” means all of Respondents’ rights, title and interest in and to, all assets used in the Travel Centers Business to the extent legally transferable including, without limitation:

1. all real property interests (including fee simple interests and real property leasehold 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. at the Acquirer’s option, all machinery, fuel equipment, tools, furniture, fixtures, office equipment, computer hardware, point-of-sale terminal systems, supplies, materials, billboards, 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 maintenance records and other documents relating thereto;
3. all consents, licenses, certificates, registrations, or permits issued, granted, given or otherwise made available by or under the authority of any Agency or pursuant to any legal requirement, and all pending applications therefore or renewals thereof, to the extent assignable;
4. all Third Party agreements related to the operation or management of a business affiliated with a Travel Center Business; *provided, however*, this provision shall not include Third Party agreements that the Acquirer elects to decline;

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5. all inventories including, but not limited to, petroleum inventory;
 6. at the Acquirer's option, a license to all Respondents' Trademarks for transitional purposes of up to thirty (30) days from the Closing Date; and
 7. all of 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.
- HH. "Travel Centers Businesses Divestiture Agreement" means:
1. the Asset Purchase Agreement by and between Pilot Travel Centers LLC and Love's Travel Stops & Country Stores, Inc., dated June 10, 2010, and any attachments, amendments, exhibits, and schedules related thereto. This Asset Purchase 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 (or a Divestiture Trustee) and an Acquirer for the divestiture of the Travel Centers Businesses Assets entered into pursuant to Paragraph II.A (or Paragraph IV) of this Order, and any attachments, amendments, exhibits, and schedules related thereto.
- II. "Travel Center(s) Business(es) Employee(s)" means all employees of Respondent Pilot, including the Travel Centers Businesses Key Employees, who are currently working at a relevant Travel Center Business, or who have, within the twelve (12) months prior to the Closing Date, worked at a relevant Travel Center Business; *provided, however*, this provision

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does not include Respondent Pilot's employees affiliated with the Wendy's Restaurants.

- JJ. "Travel Center(s) Business(es) Key Employee(s)" means employees of Respondent Pilot who are designated as a general manager or a restaurant general manager of a Travel Center Business; *provided, however*, this provision does not include Respondent Pilot's employees affiliated with the Wendy's Restaurants.
- KK. "Wendy's Operating Agreement" means:
1. the Master Lease and Operating Agreement entered into by and between Pilot and Love's, dated June 10, 2010, and any attachments, amendments, exhibits, and schedules related thereto. This Wendy's Operating Agreement is attached to this Order and contained in non-public Appendix IV; or
 2. any agreement that receives the prior approval of the Commission between Respondents (or a Divestiture Trustee) and an Acquirer for the management and operation of the Wendy's Restaurants affiliated with the Travel Centers Businesses.
- LL. "Wendy's Restaurants" means the six (6) fast food service facilities affiliated with the Travel Centers Businesses operating under the Wendy's brand name.

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

- A. Not later than one (1) day after the Acquisition Date, Respondents Pilot and Propeller shall divest the Travel Centers Businesses Assets, absolutely and in good faith, to Love's pursuant to, and in accordance with, the Travel Centers Businesses Divestiture Agreement

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(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 Love's or to reduce any obligations of Respondents under such agreement), and such agreement, if it becomes a Remedial Agreement related to the Travel Centers Businesses Assets is incorporated by reference into this Order and made a part hereof;

provided, however, that if Respondents Pilot and Propeller have divested the Travel Centers Businesses Assets to Love's 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 Love's is not an acceptable purchaser of the Travel Centers Businesses Assets, then Respondents shall immediately rescind the transaction with Love's, in whole or in part, as directed by the Commission, and shall divest the Travel Centers Businesses 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 Pilot and Propeller have divested the Travel Centers Businesses Assets to Love's 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 Travel Centers Businesses Assets to Love's (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.

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- B. Prior to divesting the Travel Centers Businesses Assets, Respondents Pilot and Propeller shall secure all consents and waivers from all Third Parties (including, without limitation, all landlords) that are necessary to permit Respondents to divest the Travel Centers Businesses Assets to the Acquirer, and/or to permit such Acquirer to continue the operations of the Travel Centers Businesses at those respective locations; *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. At the Acquirer's option and upon reasonable notice, Respondents shall provide the Acquirer non-discriminatory access and use of the TCH Fuel Card System for a period of up to three (3) years pursuant to a TCH Merchant Agreement.
- D. Respondents shall, within ten (10) days of the date this Order becomes final, develop and implement a TCH Firewall Protocol whereby:
1. Respondents' employees affiliated with the TCH Fuel Card System are prohibited from providing TCH Customer Confidential Business Information to either the TCH Executive Board or to Respondents' employees not affiliated with the TCH Fuel Card System; and
 2. Respondent Pilot shall appoint an internal compliance officer who will be responsible for assuring that the TCH Firewall Protocols are complied with and who will report to the Commission pursuant to the reporting obligations pursuant to Paragraph VI.D or as requested by Commission staff.
- E. For a period of one (1) year, Respondent Pilot shall manage and operate the Wendy's Restaurants pursuant to a Wendy's Operating Agreement.

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- F. At the Acquirer's option, and upon reasonable notice and request, Respondent Pilot shall provide, for a period no longer than six (6) months after the Closing Date, at no greater than Direct Cost, assistance from knowledgeable employees of Respondent Pilot in the transfer of the Travel Centers Businesses from Respondents to the Acquirer in a timely and orderly manner.
- G. For a period of six (6) months after the Closing Date and within ten (10) days of request by an Acquirer, Respondent Pilot shall, to the extent permitted by law, provide to such Acquirer or proposed Acquirer, the following information regarding each Travel Center Business Employee whose duties relate to a Travel Center Business:
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, value of vested and unvested deferred compensation including when any unvested portions are due to vest, 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

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7. at the option of the Acquirer, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.
- H. For a period of one (1) year from the Closing Date, Respondents Pilot and Propeller shall not interfere with the hiring or employing by the Acquirer of the related Travel Centers Businesses Employees, and shall remove any contractual impediments within the control of Respondents 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 Respondents that would affect the ability of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Travel Center Business Employee who receives a written offer of employment from such Acquirer; *provided, however*, this Paragraph shall not prohibit Respondents from continuing to employ any Travel Center Business 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.
- I. Respondent Pilot shall provide reasonable financial incentives to the Travel Centers Businesses Employees as needed to facilitate the employment of such employees by the Acquirer.
- J. For a period of six (6) months from the Closing Date, Respondents Pilot and Propeller shall not, directly or indirectly, solicit, induce or attempt to solicit or induce any Travel Center Business Employee(s) who have accepted offers of employment with an Acquirer, to terminate their employment relationship with the Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the Travel Center Business Employee's employment has been terminated by an Acquirer; (2) Respondents advertise for

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employees in newspapers, trade publications, or other media not targeted specifically at such Travel Center Business Employee(s); or (3) a Travel Center Business Employee independently applies for employment with Respondents, so long as such employee was not solicited by Respondents in violation of this Paragraph.

- K. Respondents Pilot and Propeller shall:
1. submit to the Acquirer, at Respondents' expense, all Confidential Business Information related to the Travel Centers Businesses Assets;
 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 (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 Travel Centers Businesses 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 operation or management of the Travel Centers

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Businesses other than as necessary to comply with the following:

- a. the requirements of this Order;
 - b. Respondents' obligations to the Acquirer under the terms of any Remedial Agreement related to the Travel Centers Businesses Assets; or
 - c. applicable law; and
5. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except the Acquirer or other Persons specifically authorized by such Acquirer to receive such information.
- L. Until Respondents Pilot and Propeller complete the divestiture required by Paragraph II.A,
1. Respondents shall take such actions as are necessary to:
 - a. maintain the full economic viability and marketability of the Travel Centers Businesses;
 - 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 Travel Centers Businesses;
 - d. ensure the assets required to be divested are transferred and delivered to the Acquirer in a manner without disruption, delay, or impairment of the Travel Centers Businesses; and
 2. Respondents shall not sell, transfer, encumber or otherwise impair the assets required to be divested

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(other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Travel Centers Businesses.

- M. The purpose of the divestiture of the Travel Centers Businesses Assets and the related obligations imposed on the Respondents by this Order is:
1. to ensure the continued use of such assets in the distribution, sale, and marketing of over-the-road diesel fuels for long-haul fleets within the Geographic Territory; and
 2. 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. 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, "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.

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- 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 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 of completion by Respondent Pilot of the divestiture of all Travel Centers Businesses Assets in a manner that fully satisfies the requirements of the Orders; *provided, however*, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.

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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.
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.

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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 their obligations under the Orders.
 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.

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- H. The Interim Monitor appointed pursuant to this Order may be the same person appointed as: (1) an Interim Monitor pursuant to Paragraph III of the Order to Maintain Assets; or (2) a Divestiture Trustee pursuant to Paragraph IV 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 the Travel Centers Businesses Assets as required by this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to assign, grant, license, divest, transfer, deliver or otherwise convey these assets in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to assign, grant, license, divest, transfer, deliver or otherwise convey 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

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the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

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

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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 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

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

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

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pursuant to this Paragraph may be the same Person appointed as an Interim Monitor pursuant to Paragraph III of this Order or pursuant to Paragraph III 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.

V.

IT IS FURTHER ORDERED that:

- A. Each Remedial Agreement, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof. Further, nothing in any Remedial 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

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shall be construed to reduce any rights or benefits of an Acquirer or to reduce any obligations of Respondents under a Remedial Agreement. Respondents shall comply with the terms of each Remedial Agreement, and a breach by Respondents of any term of a Remedial Agreement shall constitute a violation of this Order. To the extent that any term of a Remedial 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.

- B. Respondents shall include in each Remedial Agreement related to the Travel Centers Businesses Assets 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. Between the date the Commission grants provisional approval of the Remedial Agreements and the Closing Date, Respondents shall not modify or amend any material term of any Remedial Agreement without the prior approval of the Commission. Further, any failure to meet any material condition precedent to closing (whether waived or not) shall constitute a violation of this Order.
- D. After the Closing Date and during the term of each Remedial Agreement, Respondents shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Remedial Agreement. Further, Respondents shall seek Commission approval of such modification (material or otherwise) within ten (10) days of filing such notification. If the Commission denies approval, the Commission will notify Respondents and Respondents shall expeditiously rescind the modification or make such other changes as are required by the Commission.

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VI.**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 date this Order becomes final, and every sixty (60) days thereafter until Respondents have fully complied with its obligations under Paragraphs II.A through II.E 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. For a period of three (3) years from the date this Order becomes final, Respondents Pilot and Propeller shall, on a quarterly basis, submit a Diesel Agreement Summary Report to the Commission. After the initial three (3) year period, Respondents Pilot and Propeller shall submit a Diesel Agreement Summary Report annually on the anniversary date of this Order for a period of seven (7) years, and such report may be submitted in accordance with Paragraph VI.D below. Respondents Pilot and Propeller shall also appoint a designated employee who, at the request of Commission staff, will compile and submit Diesel

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Agreement Information between quarterly or annual reports.

- D. 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.

VII.

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.

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, 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

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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.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on November 15, 2020.

By the Commission, Commissioner Brill not participating.

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APPENDIX I**TRAVEL CENTERS BUSINESSES TO BE DIVESTED**

The Travel Centers at the following locations:

1. Pilot Store No. 86, operating under the Pilot trade name, located at 1703 I-10, Baytown, Texas.
2. Pilot Store No. 451, operating under the Pilot trade name, located at 11332 Cedar Lake Road, Biloxi, Mississippi.
3. Pilot Store No. 170, operating under the Pilot trade name, located at 2 Industrial Park Drive, Binghamton, New York.
4. Pilot Store No. 382, operating under the Pilot trade name, located at 2008 State Highway 206 South, Bordentown, New Jersey.
5. Pilot Store No. 379, operating under the Pilot trade name, located at 2766 US Highway 17 South, Brunswick, Georgia.
6. Pilot Store No. 342, operating under the Pilot trade name, located at 1165 Harrisburg Pike, Carlisle, Pennsylvania.
7. Flying J Store No. 0500154, operating under the Flying J trade name, located at 2120 South Avenue, Corning, California.
8. Flying J Store No. 0500314, operating under the Flying J trade name, located at 11820 Hickman Road, Des Moines, Iowa.
9. Pilot Store No. 55, operating under the Pilot trade name, located at 3948 Hodges Chapel Road, Dunn, North Carolina.
10. Pilot Store No. 389, operating under the Pilot trade name, located at 1512 Highway 97, Ellensburg, Washington.
11. Pilot Store No. 395, operating under the Pilot trade name, located at I-64 and U.S. 41, Exit 25, Haubstadt, Indiana.

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12. Pilot Store No. 327, operating under the Pilot trade name, located at 7150 Okeechobee Road, Ft. Pierce, Florida.
13. Flying J Store No. 0500024, operating under the Flying J trade name, located at 3150 Grant Street, Gary, Indiana.
14. Pilot Store No. 364, operating under the Pilot trade name, located at 750 N. Carol Malone Boulevard, Grayson, KY.
15. Pilot Store No. 383, operating under the Pilot trade name, located at 210 Patton Street, Houston, Texas.
16. Pilot Store No. 450, operating under the Pilot trade name, located at 730 Highway 80 East, Jackson, Mississippi.
17. Pilot Store No. 292, operating under the Pilot trade name, located at 130 West Trinity Lane, Nashville, Tennessee.
18. Flying J Store No. 0500124, operating under the Flying J trade name, located at 9650 S. 20th Street, Oak Creek, Wisconsin.
19. Pilot Store No. 291, operating under the Pilot trade name, located at 23845 Rogers Clark Boulevard, Ruther Glen, Virginia.
20. Pilot Store No. 194, operating under the Pilot trade name, located at 25 N. Redwood Road, Salt Lake City, Utah.
21. Pilot Store No. 139, operating under the Pilot trade name, located at 29025 West Plaza Drive, Santa Nella, California.
22. Pilot Store No. 349, operating under the Pilot trade name, located at 5301 North Cliff Avenue, Sioux Falls, South Dakota.
23. Flying J Store No. 0500060, operating under the Flying J trade name, located at 1501 33rd Avenue East, Tacoma, Washington.
24. Flying J Store No. 0520019, operating under the Flying J trade name, located at 400 NW Frontage Road, Troutdale, Oregon.

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25. Pilot Store No. 272, operating under the Pilot trade name, located at 800 Martin Luther King Drive, West Memphis, Arkansas.

26. Pilot Store No. 397, operating under the Pilot trade name, located at 5115 North 300 East, Whiteland, Indiana.

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CONFIDENTIAL APPENDIX II

**TRAVEL CENTERS BUSINESSES DIVESTITURE
AGREEMENT**

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

Decision and Order

CONFIDENTIAL APPENDIX III

TCH MERCHANT AGREEMENT

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

Decision and Order

CONFIDENTIAL APPENDIX IV

WENDY'S OPERATING 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 Pilot Corporation (“Pilot”) and Propeller Corp. (“Propeller”), of certain Flying J Inc. (“Flying J”) (collectively, “Respondents”) assets, stock, and other interests (collectively, “Flying J Assets”), 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 Pilot is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its headquarters address at 5508 Lonas Drive, Knoxville, Tennessee 37909.

Order to Maintain Assets

2. Respondent Propeller is a privately held corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address at 712 5th Avenue, 43rd Floor, New York, New York 10019.
3. Respondent Flying J is a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah, with its headquarters address at 1104 Country Hills Drive, Ogden, Utah 84403.
4. 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. “Pilot” means Pilot Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Pilot (including, but not limited to, Pilot Travel Centers LLC and CTP Holdings LLC), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- B. “Propeller” means Propeller Corp., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Propeller (including, but not limited to, Pilot Travel Centers LLC and CTP Holdings LLC), and the respective directors, officers, employees,

Order to Maintain Assets

agents, representatives, predecessors, successors, and assigns of each.

- C. “Flying J” means Flying J Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Flying J (including, but not limited to, Travel Plaza LLC and TCH LLC), and the respective directors, officers, employees, agents, representatives, predecessors, successors, and assigns of each.
- D. “Respondent(s)” means Pilot, Propeller, and Flying J individually and collectively.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer(s)” means the following:
 - 1. Love’s; 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.
- G. “Acquisition” means the acquisition of the Flying J Assets by Pilot and Propeller as contemplated by the Acquisition Agreements.
- H. “Acquisition Agreements” means:
 - 1. Contribution Agreement by and among Pilot Travel Centers LLC, Flying J Inc., and Pacific Sunstone Inc., dated December 18, 2009, and all attachments, amendments, exhibits, and schedules related thereto; and
 - 2. Purchase Agreement by and among Pilot Travel Centers LLC, Douglas Oil Company of California, Kayo Oil Company, and ConocoPhillips Company,

Order to Maintain Assets

dated December 18, 2009, and all attachments, amendments, exhibits, and schedules related thereto.

- I. “Acquisition Date” means the date on which the Acquisition occurs pursuant to the Acquisition Agreements.
- J. “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 diesel fuel. The term “Agency” includes, without limitation, the United States Environmental Protection Agency (“EPA”).
- K. “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 the Travel Center Businesses Assets to an Acquirer pursuant to this Order.
- L. “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 operation and management of a Travel Center Business including information related to the cost, supply, sales, sales support, distribution and marketing of diesel fuel to long-haul fleets; *provided, however*, this provision shall not include information that subsequently falls within the public domain through no violation of this Order; *provided further, however*, this provision shall not include information related to pricing.
- M. “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.

Order to Maintain Assets

- N. “Divestiture Trustee” means any trustee appointed by the Commission pursuant to Paragraph IV of the Decision and Order.
- O. “Geographic Territory” means the contiguous United States of America.
- P. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets.
- Q. “Love’s” means Love’s Travel Stops & Country Stores, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oklahoma, with its headquarters address at 10601 N. Pennsylvania Ave, Oklahoma City, Oklahoma 73120.
- R. “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.
- S. “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.
- T. “Remedial Agreement(s)” 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

Order to Maintain Assets

determination to make the Decision and 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 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.
- U. “TCH Customer Confidential Business Information” means the Acquirer’s confidential and/or proprietary information gathered pursuant to a TCH Merchant Agreement including, but not limited to, the identity of merchant’s customers, the location of customer purchases, products or services purchased or sold, prices of products or services, volumes, discounts, and other transaction terms; *provided, however*, this provision shall not include information already within the public domain or that subsequently falls within the public domain through no violation of this Order.
- V. “TCH Executive Board” means those persons appointed to the TCH LLC board of directors or executive committee by either Respondents Pilot or Flying J.
- W. “TCH Firewall Protocol” means the firewall contemplated in Paragraph II.D of the Decision and Order.
- X. “TCH Fuel Card System” means the Transportation Clearing House Fuel Card payment system.
- Y. “TCH Merchant Agreement” means:

Order to Maintain Assets

1. the TCH Merchant Agreement between TCH LLC and Love's, dated May 19, 2010, and any attachments, amendments, exhibits, and schedules related thereto. This TCH Merchant 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 (or a Divestiture Trustee) and an Acquirer for access and use of the TCH Fuel Card System for a period of three (3) years from the Closing Date, and any attachments, amendments, exhibits, and schedules related thereto.
- Z. "Third Party(ies)" means any non-governmental Person other than Respondents or the Acquirer.
- AA. "Trademark(s)" means all proprietary names or designations, trademarks, service marks, trade names, and brand names, and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Travel Centers Businesses Assets.
- BB. "Travel Center(s) Business(es)" means the business of operating a travel center at the locations identified in Appendix I of the Decision and Order, including, without limitation, the distribution, marketing, promotion and sale of all products and services offered at such locations.
- CC. "Travel Center(s) Business(es) Assets" means all of Respondents' rights, title and interest in and to, all assets used in the Travel Centers Business to the extent legally transferable including, without limitation:
1. all real property interests (including fee simple interests and real property leasehold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other

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structures, facilities, and improvements located thereon, owned, leased, or otherwise held;

2. at the Acquirer's option, all machinery, fuel equipment, tools, furniture, fixtures, office equipment, computer hardware, point-of-sale terminal systems, supplies, materials, billboards, 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 maintenance records and other documents relating thereto;
3. all consents, licenses, certificates, registrations, or permits issued, granted, given or otherwise made available by or under the authority of any Agency or pursuant to any legal requirement, and all pending applications therefore or renewals thereof, to the extent assignable;
4. all Third Party agreements related to the operation or management of a business affiliated with a Travel Center Business; *provided, however*, this provision shall not include Third Party agreements that the Acquirer elects to decline;
5. all inventories including, but not limited to, petroleum inventory;
6. at the Acquirer's option, a license to all Respondents' Trademarks for transitional purposes of up to thirty (30) days from the Closing Date;
7. all of 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.

Order to Maintain Assets

- DD. “Travel Centers Businesses Divestiture Agreement” means:
1. the Asset Purchase Agreement by and between Pilot Travel Centers LLC and Love’s Travel Stops & Country Stores, Inc., dated June 10, 2010, and any attachments, amendments, exhibits, and schedules related thereto. This Asset Purchase 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 (or a Divestiture Trustee) and an Acquirer for the divestiture of the Travel Centers Businesses Assets entered into pursuant to Paragraph II.A (or Paragraph IV) of the Decision and Order, and any attachments, amendments, exhibits, and schedules related thereto.
- EE. “Travel Center(s) Business(es) Employee(s)” means all employees of Respondent Pilot, including the Travel Centers Businesses Key Employees, who are currently working at a relevant Travel Center Business, or who have, within the twelve (12) months prior to the Closing Date, worked at a relevant Travel Center Business; *provided, however*, this provision does not include Respondent Pilot’s employees affiliated with the Wendy’s Restaurants.
- FF. “Travel Center(s) Business(es) Key Employee(s)” means employees of Respondent Pilot who are designated as a general manager or a restaurant general manager of a Travel Center Business; *provided, however*, this provision does not include Respondent Pilot’s employees affiliated with the Wendy’s Restaurants.
- GG. “Wendy’s Operating Agreement” means:

Order to Maintain Assets

1. the Master Lease and Operating Agreement entered into by and between Pilot and Love's, dated June 10, 2010, and any attachments, amendments, exhibits, and schedules related thereto. This Wendy's Operating Agreement is attached to this Order and contained in non-public Appendix IV; or
 2. any agreement that receives the prior approval of the Commission between Respondents (or a Divestiture Trustee) and an Acquirer for the management and operation of the Wendy's Restaurants affiliated with the Travel Centers Businesses.
- HH. "Wendy's Restaurants" means the six (6) fast food service facilities affiliated with the Travel Centers Businesses operating under the Wendy's brand name.

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 Travel Centers Businesses Assets, and shall prevent the destruction, removal, wasting, deterioration, or impairment of the Travel Centers Businesses Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Travel Centers Businesses 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 businesses related to the Travel Centers Businesses Assets.
- B. Respondents shall maintain the operations of the Travel Centers Businesses Assets in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such businesses) and shall use their

Order to Maintain Assets

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

1. providing the Travel Centers Businesses Assets 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 Travel Centers Businesses Assets;
2. continuing, at least at their scheduled pace, any additional expenditures for the Travel Centers Businesses Assets, authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all marketing and sales expenditures;
3. providing such resources as may be necessary to respond to competition against the Travel Centers Businesses Assets and/or to prevent any diminution in sales of the over-the-road diesel fuel at the Travel Centers Businesses, prior to divestiture;
4. making available for use by the Travel Centers Businesses Assets funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of the Travel Centers Businesses Assets;
5. providing the Travel Centers Businesses Assets with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of the Travel Centers Businesses;

Order to Maintain Assets

6. providing such support services to the Travel Centers Businesses Assets as were being provided to such business by Respondent(s) as of the date the Consent Agreement was signed by Respondents; and
 7. maintaining a work force at least equivalent in size, training, and expertise to what has been associated with the Travel Centers Businesses Assets for each asset's last fiscal year.
- C. Pending divestiture of the Travel Centers Businesses Assets, Respondents shall:
1. not use, directly or indirectly, any Confidential Business Information related to Travel Centers Businesses 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 the Travel Centers Businesses; or (3) applicable law; and
 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 Acquirer or the Commission to receive such information.
- D. 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.
- E. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Travel Centers Businesses Assets within the Geographic Territory through their

Order to Maintain Assets

full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Travel Centers Businesses Assets within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Travel Centers Businesses 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 (“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.

Order to Maintain Assets

- 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 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 of completion by Respondents Pilot and Propeller of the divestiture of all Travel Centers Businesses Assets in a manner that fully satisfies the requirements of the Orders; *provided, 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

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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.
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

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performance by Respondents of their obligations under the Orders.

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 may be the same person appointed as: (1) an Interim Monitor pursuant to Paragraph III of the proposed Decision and Order; or (2) a Divestiture Trustee pursuant to Paragraph IV of the proposed Decision and Order.

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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 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 VI 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 Respondents made to their principal United States offices or headquarters'

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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 of authorized representative(s) of the Commission and at the expense of the Respondents; 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 Travel Centers Businesses, as required by and described in the proposed Decision and Order, has been completed and the Interim Monitor (if one is appointed), in consultation with Commission staff and the Acquirer, 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

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2. The day the related Decision and Order becomes final.

By the Commission, Commissioner Brill not participating.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Pilot Corporation and Propeller Corp. (collectively, “Pilot”), and Flying J Inc. (Pilot and Flying J Inc., collectively, “Respondents”). Pursuant to agreements dated December 18, 2009, Pilot intends to acquire the interests and assets of Flying J Inc.’s travel center and related businesses for approximately \$1.8 billion (the “acquisition”). The Commission’s Complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by removing actual, direct, and substantial competition between Pilot and Flying J and increasing the likelihood that Pilot will exercise market power unilaterally. The proposed Consent Agreement would resolve the competitive concerns from the acquisition by requiring the divestiture of 26 travel centers to Love’s Travel Stops and Country Stores. The divestiture will make Love’s a stronger competitor and replace competition weakened by the acquisition.

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 review the proposed Consent Agreement again

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

The sole purpose of this analysis is to facilitate public comment on the Consent Agreement. The analysis does not constitute an official interpretation of the Consent Agreement or the proposed Decision and Order (“Order”), nor does the analysis modify their terms in any way.

I. Respondents and Other Relevant Entities**A. Pilot and Propeller**

Pilot Travel Centers LLC is the largest travel center operator in the United States. Pilot Travel Centers LLC is a privately held, for-profit limited liability company and is controlled equally by Pilot Corporation and Propeller Corp.

Respondent Pilot Corporation holds 52.5 percent of the non-corporate interests of Pilot Travel Centers LLC and a right to 50 percent representation on Pilot Travel Centers LLC’s Board of Managers. Pilot Corporation is a privately held, for-profit corporation.

Respondent Propeller Corp. holds 47.5 percent of the non-corporate interests of Pilot Travel Centers LLC and a right to 50 percent representation on Pilot Travel Centers LLC’s Board of Managers. Propeller Corp. is a for-profit corporation, privately held in its entirety by five stockholders managed by CVC European Equity V Limited and three stockholders managed by CVC European Equity Tandem Fund Limited.

B. Flying J

Respondent Flying J Inc., a privately held, for-profit corporation, is a fully integrated oil company with operations throughout the United States and Canada. Flying J Inc. owns and operates, among other things, travel center, trucking, fuel card, and related businesses. Flying J Inc., its wholly-owned subsidiary, and wholly-owned subsidiaries of ConocoPhillips jointly control the CFJ Entities.

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The CFJ Entities own Flying J-branded travel centers operated by Flying J Inc. in 36 U.S. states. It is jointly controlled by Flying J Inc., its wholly-owned subsidiary, and wholly-owned subsidiaries of ConocoPhillips. The CFJ Entities consist of: (1) CFJ Properties, a general partnership that is 50% owned by wholly-owned subsidiaries of ConocoPhillips and 50% owned by a wholly-owned subsidiary of Flying J Inc.; (2) CFJ I Management Inc., CFJ II Management Inc., and CFJ III Management Inc. (“CFJ Management Companies”), each of which is 50% owned by a wholly-owned subsidiary of ConocoPhillips and 50% owned by Flying J Inc.; and (3) CFJ Plaza Company I LLC, CFJ Plaza Company II LLC, and CFJ Plaza Company III LLC, each of which is 49.5% owned by a wholly-owned subsidiary of ConocoPhillips, 49.5% owned by Flying J Inc., and 1% owned by its corresponding CFJ Management Company.

II. The Proposed Complaint

Pilot’s acquisition of Flying J presents substantial antitrust concerns in the market for over-the-road sale of diesel to long-haul fleets by national travel center operators in the contiguous United States. Travel centers provide locations for long-haul trucks to fuel and serve as the long-haul driver’s home away from home, offering amenities including parking for tractor-trailers, truck service centers, truck washes, certified automated truck scales, fast food restaurants, shower facilities, internet access, and financial services for drivers. Four travel center operators – Pilot, Flying J, TravelCenters of America (“TA”), and Love’s (collectively, “national travel center operators”) – have the scale and scope to compete for any substantial portion of long-haul over-the-road diesel business although not all the major travel center operators are able to compete for all customers. Pilot and Flying J are the first and second choices for a number of long-haul fleets.

The acquisition may substantially lessen competition in the relevant market by, among other things: (a) eliminating actual, direct, and substantial competition between Pilot and Flying J; and (b) increasing the likelihood that Pilot will exercise market power unilaterally.

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De novo entry or fringe expansion into the relevant market is unlikely to deter or counteract the likely anticompetitive effects. Entry is difficult and time-consuming and potential entrants would face substantial barriers.

III. The Proposed Consent Agreement

The proposed Consent Agreement is intended to remedy the acquisition's alleged anticompetitive effects by, among other things, requiring the divestiture of travel center assets to Love's. Love's is a growing national travel center operator that is currently concentrated in the South. It is the smallest of the four national travel center operators and some long-haul fleets do not encounter Love's on the routes they travel, especially in the Midwest and the Eastern portion of the United States.

Respondents have reached an agreement to sell to Love's 26 specific travel center sites, the majority of which are located in the Midwest or the Eastern portion of the United States. These sites, along with Love's aggressive and independent expansion plan, will enhance Love's market position as a national travel center operator, allowing it to compete for more long-haul over-the-road diesel business. Love's possesses the existing infrastructure, resources, and capability to acquire the divested sites and operate them within Love's existing network. The divestiture will allow Love's to replace competition lost because of the acquisition of Flying J by Pilot. In particular, Love's will now be able to compete for those customers who viewed Pilot and Flying J as their first and second choices and who did not encounter Love's on their routes prior to the divestiture.

The Order contains provisions designed to ensure the successful implementation and remedial intent of the proposed Consent Agreement. Some of these provisions are highlighted below.

A. Access to and Use of the TCH Fuel Card System

The Order requires Respondents to provide access to and use of the TCH LLC ("TCH") Fuel Card System upon request from Love's. Paragraph II.C. of the Order provides that at Love's

Analysis to Aid Public Comment

option, and upon reasonable notice, Respondents shall provide non-discriminatory access to and use of the TCH Fuel Card System for a period of up to three years pursuant to a TCH Merchant Agreement. If Love's elects to use the TCH Fuel Card System, Respondents shall institute a firewall protocol whereby: (a) Respondents' employees affiliated with the TCH Fuel Card System are prohibited from providing TCH Customer Confidential Business Information to either the TCH Executive Board or to a Respondent; and (b) Pilot shall appoint an internal compliance officer who will be responsible for assuring that the firewall protocols are met.

B. Continued Operation of Restaurants

The Order also provides for the continuity of operation at Wendy's restaurants affiliated with the sites acquired by Love's. Paragraph II.E. of the Order provides that, for a period of one year, Pilot shall manage and operate the Wendy's Restaurants affiliated with those sites.

To assure the efficient transfer and continuity of operation of the divested travel centers, the Order requires Respondents to provide assistance for, and information regarding, employees of those travel centers. Paragraphs II.F. and II.G. of the Order require Respondents to provide, for a period no longer than six months, assistance for, and employment and salary information regarding, knowledgeable employees of Respondents in the transfer of the travel centers from Respondents to Love's. Paragraphs II.H. and II.I. of the Order provide that, for a period of one year, Respondents shall not interfere with the hiring or employing of employees by Love's relating to the divested sites, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with Love's. Paragraph II.J. of the Order prohibits Respondents from directly or indirectly soliciting, inducing, or attempting to solicit or induce any employees of the divested travel centers who have accepted offers of employment with Love's to terminate that employment.

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C. Transfer of Confidential Businesses Information and Maintenance of Economic Viability

To further assure the efficient transfer and economic viability of the acquired travel centers, Paragraphs II.K. and II.L. of the Order require Respondents to provide all Confidential Business Information relating to the Travel Centers Businesses and to maintain the full economic viability and marketability of such assets until Respondents complete the divestiture required by the Order.

D. Compliance and Notification Requirements

Paragraph III. of the Order allows the Commission to appoint an Interim Monitor to assure that Respondents expeditiously comply with their obligations and perform all of their responsibilities as required by the Order.

To assure that Respondents fully comply with the obligations of the Order, Paragraph IV. of the Order allows the Commission to appoint a Divestiture Trustee to assign, grant, license, divest, transfer, deliver, or otherwise convey the travel centers.

Paragraph V. of the Order provides that each Remedial Agreement related to the divested sites shall be incorporated by reference into the Order and that Respondents shall not modify or amend the terms of any Remedial Agreement without prior approval of the Commission.

Paragraphs VI.A. and VI.B. of the Order require official notification of the date on which the acquisition occurs and subsequent periodic reports until the Commission is satisfied that the divestiture has been completed in a timely manner and in good faith. Paragraph VI.C. of the Order requires annual written reports of compliance, upon the Commission's request, until the Order terminates in ten years.

Paragraph VII. of the Order requires Respondents to give the Commission prior notice of certain events that might affect compliance obligations arising from the Order.

Analysis to Aid Public Comment

E. Additional Provisions

Paragraph VIII. of the Order provides that the Commission shall, with proper notice, have access to documents and personnel at the offices of Respondents for the purpose of determining or securing compliance with the Order.

Paragraph IX. of the Order provides that the Order shall terminate after ten years.

IV. Order to Maintain Assets

The Commission also has issued an Order to Maintain Assets in this proceeding. The purpose of the Order to Maintain Assets is: (a) to maintain the full economic viability, marketability and competitiveness of the travel centers through their full transfer and delivery to Love's; (b) to minimize any risk of loss of competitive potential for the travel centers; (c) to prevent the destruction, removal, wasting, deterioration, or impairment of any of the travel centers, except for ordinary wear and tear; and (d) to prevent disclosure of any Confidential Business Information related to the travel centers to any person except Love's or persons specifically authorized by Love's to receive such information. The Commission may appoint an 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.

Complaint

IN THE MATTER OF

**REVERB COMMUNICATIONS, INC. AND
TRACIE SNITKER**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4310; File No. 092 3199**Complaint, November 22, 2010 — Decision, November 22, 2010*

The consent order addresses allegations that Reverb Communications and its sole owner, Tracie Snitker, (collectively “Respondents”) engaged in deceptive advertising by having employees pose as ordinary consumers and post video game reviews on iTunes, while failing to disclose that Respondents were hired to provide the reviews or that they often received a percentage of the sales. The consent order requires Respondents to remove all reviews that misrepresent the authors as independent users or ordinary consumers, and that fail to disclose a connection between Respondents and the seller of a product or service. The consent order also prohibits Respondents from misrepresenting that the user or endorser is an independent, ordinary consumer, and from making any claims about a product or service unless they disclose any relevant connections that they have with the seller of the product or service.

Participants

For the *Commission*: Victor DeFrancis and Stacey Ferguson.

For the *Respondents*: Trevor J. Zink, Omni Law Group, LLP.

COMPLAINT

The Federal Trade Commission, having reason to believe that Reverb Communications Inc., a corporation, and Tracie Snitker, an officer and director of the corporation (“respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Reverb Communications, Inc. (“Reverb”) is a California corporation with its principal office or place of business at 18711 Tiffeni Drive, Twain Harte, CA 95383.

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2. Respondent Tracie Snitker is the 100% owner and the only officer and director of Reverb. At all times relevant to this complaint, Tracie Snitker, individually or in concert with others, formulated, directed, controlled, or participated in the acts or practices of the corporation, including the acts or practices alleged in this complaint.

3. The acts and practices of respondents, as alleged herein, have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

4. Reverb provides sales, marketing, and public relations services to clients, including clients that develop gaming applications offered for sale to consumers via the iTunes store, an electronic retail platform operated by Apple Inc. Reverb’s fee often includes a percentage of the sales of its clients’ gaming applications.

5. The iTunes store allows users to publicly review gaming applications available for purchase via the iTunes store. Such reviews are accomplished by means of a rating (of between one and five stars) and also written commentary. Readers of these reviews have the opportunity to confirm on the site whether or not they found them useful.

6. From approximately November 2008 through May 2009, Reverb employees, including individual Respondent Tracie Snitker, and company managers, posted public reviews about Reverb’s clients’ gaming applications in the iTunes store. These reviews were posted using account names that would give the readers of these reviews the impression they had been submitted by disinterested consumers.

7. In these reviews, Reverb employees endorsed the products by consistently giving Reverb’s clients’ gaming applications four and five star ratings. Reverb employees also submitted positive written comments, including but not limited to the following examples:

“Amazing new game”

Complaint

“ONE of the BEST”

“[Developer of gaming application being reviewed] hits another home run with [gaming application being reviewed]”

“Really Cool Game”

“GREAT, family-friendly board game app”

“One of the best apps just got better” and

“[Developer of gaming application being reviewed] does it again!”

8. Through the means described in Paragraphs 5-7, respondents have represented, expressly or by implication, that reviews of certain gaming applications were independent reviews reflecting the views of ordinary consumers.

9. In truth and in fact, the reviews for those gaming applications were not independent reviews reflecting the views of ordinary consumers. The reviews were created by employees of Reverb, a company hired to promote the gaming applications and often paid a percentage of the applications' sales. Therefore, the representation set forth in Paragraph 8 was, and is, false and misleading.

10. Through the means described in Paragraphs 5-7, respondents have represented, expressly or by implication, that reviews for certain gaming applications reflected endorsements from persons who had used those gaming applications. Respondents failed to disclose that those reviews were written by employees of Reverb, a company hired to promote the gaming applications and often paid a percentage of the applications' sales. These facts would have been material to consumers in their purchasing decision regarding the gaming applications. The failure to disclose these facts, in light of the representation made, was, and is, a deceptive practice.

11. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices in or

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affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this twenty-second day of November, 2010, has issued this Complaint against respondents.

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft 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 respondents with violation of the Federal Trade Commission Act, 15 U.S.C § 45 *et seq.*; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the 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 the respondents that the law has been violated as alleged in the 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 respondents have 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 consent agreement on the public record for a

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period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed 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 Reverb Communications, Inc. (“Reverb”) is a California corporation with its principal office or place of business at 18711 Tiffeni Drive, Twain Harte, CA 95383.
2. Respondent Tracie Snitker is the 100% owner and the only officer and director of Reverb. At all times relevant to this complaint, Tracie Snitker, individually or in concert with others, formulated, directed, controlled, or participated in the acts or practices of the corporation, including the acts or practices alleged in this complaint.

ORDER**DEFINITIONS**

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

1. Unless otherwise specified, “respondents” shall mean Reverb Communications, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees; and Tracie Snitker, individually, and as an officer and director of Reverb.
2. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. “Material connection” shall mean any relationship that materially affects the weight or credibility of any endorsement and that would not be reasonably expected by consumers.

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4. “Endorsement” shall mean as defined in the Commission’s Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0.
5. “Clearly and prominently” shall mean:
 - a. In textual communications (e.g., printed publications or words displayed on the screen of a computer), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts with the background on which they appear;
 - b. In communications disseminated orally or through audible means (e.g., radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;
 - c. In communications disseminated through video means (e.g., television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (A) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and comprehend them, and in the same language as the predominant language that is used in the communication;
 - d. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (A) of this definition, in addition to any audio or video presentation of them; and
 - e. In all instances, the required disclosures are presented in an understandable language and syntax, and with nothing contrary to, inconsistent

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with, or in mitigation of the disclosures used in any communication of them.

6. The term “including” in this order shall mean “without limitation.”
7. The terms “and” and “or” in this order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the status of any user or endorser of a product or service, including, but not limited to, misrepresenting that the user or endorser is an independent user or ordinary consumer of the product or service.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the manufacturing, advertising, labeling, promotion, offering for sale, sale, or distribution of any product or service, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about any user or endorser of such product or service unless they disclose, clearly and prominently, a material connection, when one exists, between such user or endorser and the respondents or any other individual or entity manufacturing, advertising, labeling, promoting, offering for sale, selling, or distributing such product or service.

III.

IT IS FURTHER ORDERED that respondents shall, within seven (7) days of the date of service of this order, take all

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reasonable steps to remove any product review or endorsement, currently viewable by the public, that does not comply with Parts I and II of this order.

IV.

IT IS FURTHER ORDERED that respondents shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon reasonable notice make available to the Federal Trade Commission for inspection and copying, any documents, whether prepared by or on behalf of respondents, that:

- A. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning any endorsement made by respondents, and any responses to those complaints or inquiries;
- B. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, terms of this order, and all reports submitted to the Commission pursuant to this order;
- C. Contradict, qualify, or call into question respondents' compliance with this order; and
- D. Are acknowledgments of receipt of this order obtained pursuant to Part V.

V.

IT IS FURTHER ORDERED that respondent Reverb Communications, Inc., its successors and assigns, and respondent Tracie Snitker shall deliver a copy of this order 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 person a signed and dated statement acknowledging receipt of this order. For current personnel,

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delivery shall be within five (5) days of the date of service of this order. For new personnel, delivery shall occur prior to their first assuming their responsibilities.

VI.

IT IS FURTHER ORDERED that respondent Reverb Communications, Inc., 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, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondents learn less than thirty (30) days prior to the date such action is to take place, the respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission, all notices required by this Part shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line In the Matter of Reverb Communications, Inc. *Provided, however,* that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov.

VII.

IT IS FURTHER ORDERED that respondent Tracie Snitker, for a period of five (5) years after the date of issuance of this order, shall notify the Commission of the discontinuance of her current business or employment, or of her affiliation with any new business or employment. The notice shall include respondent Snitker's new business address and telephone number and a description of the nature of the business or employment and her duties and responsibilities. Unless otherwise directed by a representative of the Commission, all notices required by this Part

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shall be sent by overnight courier (not the U.S. Postal Service) to the Associate Director of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580, with the subject line In the Matter of Reverb Communications, Inc. *Provided, however*, that, in lieu of overnight courier, notices may be sent by first-class mail, but only if an electronic version of such notices is contemporaneously sent to the Commission at DEbrief@ftc.gov.

VIII.

IT IS FURTHER ORDERED that respondent Reverb Communications, Inc., its successors and assigns, and respondent Tracie Snitker, within sixty (60) days after the date of service of this order, shall each 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, they shall submit additional true and accurate written reports.

IX.

This order will terminate on November 22, 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:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any proposed 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.

Analysis to Aid Public Comment

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

By the Commission.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Reverb Communications, Inc. and Tracie Snitker, 100% owner and the only officer and director of the corporation (“respondents”).

The proposed consent order (“proposed order”) has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission 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 involves the public relations, marketing, and sales services that respondents provided to companies that developed video game applications. The Commission’s complaint alleges that, from November 2008 through May 2009, respondents’ employees, posing as ordinary consumers, posted positive product reviews online for their clients’ gaming applications. These postings did not disclose the compensated nature of the

Analysis to Aid Public Comment

relationship between the reviewers and the publishers of the gaming applications. The complaint alleges that the respondents violated Section 5 by misrepresenting that reviews of certain gaming applications were those of independent, ordinary consumers. The complaint further alleges that the respondents violated Section 5 by failing to disclose the material connections between the product reviewers and the sellers of the reviewed products.

Part I of the proposed order prohibits the respondents, in connection with the advertising of any product or service, from misrepresenting their status as independent users or ordinary consumers of that product or service.

Part II prohibits the respondents from making any representation about any user or endorser of a product or service unless they disclose, clearly and prominently, a material connection, when one exists, between the user or endorser of the product or service and any other party involved in promoting that product or service. The proposed order defines “material connection” as any relationship that materially affects the weight or credibility of any endorsement and would not be reasonably expected by consumers.

Part III requires the respondents to take all reasonable steps to remove, with seven days of service of the order, any previously posted endorsements that do not comply with Parts I and II of the order.

Parts IV through IX of the proposed order require respondents: to keep copies of relevant consumer complaints and inquiries, documents demonstrating order compliance, and any documents relating to any representation covered by this order; 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 corporate business or employment as to proposed respondent Tracie Snitker individually; and to file compliance reports with the Commission. Part IX provides that the order will terminate after twenty (20) years, with certain exceptions.

Analysis to Aid Public Comment

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

MINNESOTA RURAL HEALTH COOPERATIVECONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4311; File No. 051 0199**Complaint, December 28, 2010 — Decision, December 28, 2010*

The consent order addresses allegations that the Minnesota Rural Health Cooperative (“MRHC”) eliminated competition between individual doctors and hospitals in southwest Minnesota by orchestrating illegal agreements to fix the prices at which they contract with health insurance plans and by refusing to deal with health plans that did not agree to MRHC’s desired reimbursement rates. The consent order prohibits MRHC from using coercive tactics to extract favorable contract terms from health plans and requires MRHC to offer to renegotiate all current contracts with health plans and to submit any revised contracts to the state for approval.

Participants

For the *Commission*: *Robert S. Canterman and Randall David Marks.*

For the *Respondent*: *Mike Hatch, Blackwell Burke; Stephen L. Hill, Blackwell Sanders Peper Martin LLP; David Balto, Law Offices of David Balto; and Jeff Miles and Christie Braun, Ober Kaler.*

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 Minnesota Rural Health Cooperative (“MRHC”) 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:

Complaint

I. NATURE OF THE CASE

1. This matter concerns agreements among competing hospitals, physicians, and pharmacies in rural Minnesota to fix prices and collectively negotiate contracts, including price terms, with health insurers and other third-party payers in Minnesota. The hospitals, physicians, and pharmacies orchestrated these agreements through the MRHC. The MRHC, originally composed of hospitals and physicians, has fixed prices of hospital and physician services since 1996. After the Congress enacted the Medicare prescription drug program in 2003, the MRHC recruited pharmacies as members and began to negotiate prices collectively on their behalf. The MRHC has not undertaken any efficiency-enhancing integration that could justify the challenged conduct. By collectively negotiating prices without any legitimate justification, the MRHC has engaged in unfair methods of competition.

II. RESPONDENTS AND JURISDICTION

A. Respondent

2. The Minnesota Rural Health Cooperative is a for-profit corporation that is organized, exists, and does business as a health provider cooperative under and by virtue of the laws of the State of Minnesota with its principal address at 190 E. 4th Street N., PO Box 155, Cottonwood, MN 56229-9902.

3. The MRHC has approximately 22 hospital members and 114 physician members, who practice in approximately 47 clinics. During the relevant time period, the hospital members included most of the hospitals, with two-thirds of hospital beds, in the area of southwestern Minnesota in which the MRHC operates.

4. Between early 2005 and late 2007, the MRHC had approximately 70 pharmacist members. These pharmacists operated in rural Minnesota, outside of the Minneapolis-St. Paul area. The MRHC terminated these pharmacist memberships in November 2007.

Complaint

B. Jurisdiction

5. The MRHC is a corporation within the meaning of Section 4 of the Federal Trade Commission Act.

6. At all times relevant to the Complaint, the MRHC has been engaged in the business of contracting with payers, on behalf of its members, for the provision of physician, hospital, and pharmacy services to persons for a fee. Except to the extent that competition has been restrained as alleged herein, MRHC's physician, hospital, and pharmacy members have been in competition with one another for the provision of physician, hospital, or pharmacy services.

7. The general business practices of the MRHC, including the acts and practices alleged herein, affect the interstate movement of patients, the interstate purchase of supplies and products, and the interstate flow of funds, and are in or affect "commerce" as defined in Section 4 of the Federal Trade Commission Act.

III. OVERVIEW OF HEALTH CARE PROVIDER CONTRACTING

A. Nature of Provider Contracting

8. Physicians, hospitals, and pharmacists often contract with third-party payers — including health insurers and managed care organizations — to establish the terms and conditions, including price and other competitively significant terms, under which they will provide services to subscribers of health plans. To negotiate for pharmacy services, payers often use pharmacy benefit managers (PBMs) to create networks of pharmacies and administer pharmacy benefit programs.

9. Physicians, hospitals, and pharmacists entering into payer contracts often agree to discount or lower their prices in exchange for access to additional patients made available by the payers' relationship with their subscribers. These contracts with physicians, hospitals, and pharmacies may reduce payers' costs

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and enable payers to lower the price of health insurance and reduce patients' out-of-pocket medical care expenditures.

10. Absent agreements among physicians, hospitals, or pharmacists on prices and other contract terms on which they will provide services to subscribers of health plans, competing physicians, competing hospitals, and competing pharmacists decide individually whether to enter into contracts with payers, and at what prices they will accept payment for services rendered pursuant to such contracts.

11. To be competitively marketable in southwestern Minnesota, a payer's health plan must include in its provider network a large number of primary care physicians and hospitals at accessible locations and at affordable prices. Because so many physicians and hospitals in southwestern Minnesota are MRHC members, any payer doing business there cannot offer competitive health plans serving patients without having at least a substantial portion of MRHC members in its provider network.

B. The Medicare Part D Program

12. Medicare is the federal government health insurance program for senior citizens. In 2003, Congress created the Medicare Part D program to provide coverage for prescription drugs. In establishing the Medicare Part D program, Congress decided to rely on competing third-party payers to provide pharmacy benefits for senior citizens, rather than having the federal government run the program directly.

13. To participate in the Medicare Part D program, a third-party payer must submit a network of pharmacies willing to dispense pharmaceuticals to its Part D clients. Each pharmacy network must contain enough pharmacies to meet a specified level of access for beneficiaries, depending on their urban, suburban, or rural location. For example, the access standard applicable to rural areas requires each network to include enough pharmacies so that 70 percent of rural beneficiaries live no more than 15 miles from at least one participating pharmacy.

14. The need to satisfy network access requirements gave pharmacies leverage in their dealings with the third-party payers,

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as well as the incentive to act collectively. If they acted collectively to deny third-party payers enough pharmacies to meet the access standards, they would more easily force third-party payers to raise their reimbursement rates.

IV. ANTICOMPETITIVE CONDUCT

15. The MRHC, acting as a combination of its members, and in conspiracy with them, has acted to restrain competition by, among other things, negotiating, entering into, and implementing agreements to fix the prices on which their members contract with payers and threatening to terminate contracts with payers who refuse to deal with the MRHC on the terms it demands. Moreover, in furtherance of this conduct, members of the MRHC have refrained from negotiating individually with payers.

A. Agreement among MRHC Members to Negotiate Collectively

16. Pursuant to the MRHC by-laws, MRHC members elect physicians and hospital representatives to serve on the MRHC's Board of Directors and manage the MRHC's operations. The Board oversees all contract negotiations and approves all contracts between the MRHC and third-party payers.

17. MRHC members, in joining MRHC, agree to participate in the MRHC's contracts with payers. In accordance with their MRHC membership and provider participation agreements, MRHC members grant MRHC the authority to contract on their behalf and they agree to accept payment for their services according to the terms that the MRHC negotiates with payers.

18. MRHC committees have handled these contract negotiations. Its contracting committee, which is composed of physician clinic and hospital administrators and the MRHC's executive director, negotiates contracts with third-party payers for hospital and physician services. The pharmacy contracting committee, which was composed of pharmacists and its executive director, negotiated contracts with payers for pharmacy services. The Board of Directors oversees all contract negotiations and approves all contracts between the MRHC and third-party payers.

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B. Price Agreements on Physician and Hospital Services

19. Since at least 1996, the MRHC, acting through its contracting committee and executive director, has negotiated prices and other competitively significant terms, on behalf of MRHC physician and/or hospital members, with the major payers in Minnesota, including BlueCross BlueShield of Minnesota, HealthPartners, Medica Health Plans, MultiPlan, Inc., Preferred One, and America's PPO. Upon completion of contract negotiations with each of these payers, the MRHC Board of Directors approved each contract and the MRHC entered into and administered each contract.

20. When negotiating new rates, the MRHC threatened to terminate contracts with payers to pressure them to increase prices for physician and hospital services. For example, during its 2003 contract renewal negotiations with HealthPartners, the MRHC notified HealthPartners that it would terminate the contract unless HealthPartners agreed to higher reimbursement rates. HealthPartners acceded to the MRHC's demands, eventually agreeing to pay MRHC physician members 27 percent more than comparable non-MRHC physicians and MRHC hospital members ten percent more than comparable non-MRHC hospitals. A similar tactic forced Preferred One to pay MRHC members higher rates.

21. To further its bargaining leverage in contact negotiations, MRHC informed payers that the MRHC "expect[s] our group to be accepted or rejected as a group" and, as recently as March 2009, that payers would be unable to negotiate individually with MRHC members. When payers attempted to negotiate separately with particular members, the members rebuffed these efforts.

22. Through its collective negotiations and coercive tactics, the MRHC succeeded in extracting increased payments to MRHC members in at least three forms: higher reimbursement rates than comparable providers, more favorable payment methods, and increased reimbursements for new MRHC members.

23. First, the MRHC obtained higher prices from payers. Indeed, the MRHC told its members at the 2005 annual member meeting that improvements in its contract with Preferred One

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would be “worth \$100,000s annually for MRHC members.” Five payers — HealthPartners, Medica, MultiPlan, Preferred One, and America’s PPO — have paid MRHC members more than comparable rural hospitals and/or physicians elsewhere in Minnesota.

24. Second, the MRHC’s agreements with two payers — Medica and Preferred One — require them to pay MRHC hospital and physician members based on a percentage of billed charges, rather than a fixed fee for each service. Payers generally prefer a fixed fee schedule because it prevents providers from increasing their billed charges at will. By obtaining reimbursement rates based on a percent of billed charges, MRHC providers can unilaterally increase their reimbursement, by increasing their billed charges up to the maximum specified in the contract.

25. Third, the MRHC has forced payers to reimburse new MRHC members at the higher MRHC rates, even though the members had existing contracts with the payer that paid lower rates. For example, MultiPlan had to increase one hospital’s reimbursement rate from 78 percent of billed charges to a significantly higher percent of billed charges merely because it joined the MRHC. Moreover, Medica told the MRHC that “because of the Co-op relationship all of the clinics and hospitals, except Rice, are being paid higher reimbursement than they were prior to our Medica agreement with the Co-op.”

C. Price Agreements on Pharmacy Services

26. After pharmacists approached it, the MRHC recruited pharmacies by offering to increase Medicare prescription drug program (Part D) reimbursement levels, urged pharmacies not to deal individually with PBMs, and negotiated collectively and contracted with at least six PBMs.

27. To participate in the new Medicare Part D program, each PBM or other payer had to find enough pharmacies to meet the “Tricare access standard.” This standard required that each network include a sufficient number of pharmacies to ensure that 70 percent of rural beneficiaries lived no more than 15 miles from at least one participating pharmacy.

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28. By “stand[ing] together and speak[ing] with ONE voice to the PBMs,” the MRHC believed it could leverage the federal access requirements for Part D networks to obtain higher reimbursement rates. The MRHC repeatedly stressed the benefits of standing together and negotiating as a block in letters to members and prospective members. A June 27, 2005, letter explained that:

With our membership in MRHC comes the opportunity to stand together and speak with ONE voice to the PBMs. . . . We have to stand together in this effort or once again the PBMs will intimidate us and pick us off one by one with contracts we don’t want.

The letter included the precise reimbursement levels that the MRHC would seek from PBMs, which were above the levels that PBMs were offering.

29. To maximize the pharmacies’ negotiating leverage, the MRHC urged its pharmacy members not to deal individually with PBMs:

Do NOT sign and return your Medicare Part D PBM contracts. MRHC will review and negotiate these for you during the next few weeks. The contracting deadline is not until later this summer and our best leverage is to take our time to negotiate as a block. The bigger block the better [sic].

The MRHC repeated this message to prospective members:

We are asking all MRHC members NOT to sign and return their Medicare Part D PBM contracts. MRHC will review and negotiate these for them during the next couple of weeks. Our best leverage is to take our time to negotiate as a block, and the bigger block the better. . . . [sic]

Don’t sign contracts but notify the PBMs who will act as your agent – the MRHC!

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30. To “speed up” the PBMs’ acceptance of the MRHC as the pharmacies’ bargaining agent, the MRHC provided each pharmacy member with labels that referred the PBM to MRHC to attach to offers that PBMs sent them. Many member pharmacies followed the MRHC’s instructions to return the offers to the PBMs with such labels attached.

31. The MRHC negotiated with at least eight PBMs over Part D reimbursement levels and reached agreements on behalf of the MRHC establishing prices and other competitively significant terms with six of them. The MRHC transferred management of these agreements to a pharmacy services administration organization in early 2008.

V. LACK OF JUSTIFICATION FOR THE CONDUCT

32. The MRHC and its physician members have not undertaken any programs or activities that create integration in the delivery of physician services and thus cannot justify the acts and practices described in the foregoing paragraphs.

33. The MRHC’s physician members do not share significant financial risk in providing physician services under the contracts between the MRHC and payers discussed above. Four of these contracts with commercial insurers have no financial risk-sharing mechanisms whatsoever. The withholding arrangements in the remaining three contracts withhold at most ten percent of physician charges and return money to the MRHC members regardless of whether they achieve cost-containment goals.

34. Nor have the MRHC and its physician members undertaken any clinical programs or activities that create any significant integration among its members’ clinical practices. The MRHC provides its physician members with certain practice management programs (including two quality improvement projects, clinic inspections, and quarterly quality council meetings) and support services (including delegated credentialing, patient satisfaction surveys, and collection of patient complaints). These activities, however, do not involve collaboration to monitor and modify clinical practice patterns to control costs and ensure quality or otherwise integrate their delivery of care to patients.

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Moreover, their price fixing is not reasonably necessary to engage in these activities.

35. The MRHC and its hospital members have not undertaken any programs or activities that create integration in the delivery of hospital services and thus cannot justify their acts and practices described in the foregoing paragraphs. Hospital members do not share any financial risk in providing hospital services. Further, they do not collaborate in programs to monitor and modify their clinical practice patterns, to control costs and ensure quality, or to integrate otherwise their delivery of care to patients. Indeed, the only services that the MRHC provides to its hospital members are certain practice support services (including delegated credentialing, patient satisfaction surveys, and collection of patient complaints) and attending quality council meetings. Moreover, their price fixing is not reasonably necessary to engage in these activities.

36. The MRHC did not undertake any programs or activities to create integration in the delivery of pharmacy services and thus cannot justify their acts and practices described in the foregoing paragraphs. Pharmacist members did not share any financial risk in providing pharmacy services, collaborate in programs to monitor and modify their clinical practice patterns, to control costs and ensure quality, or to integrate otherwise their delivery of care to patients. Indeed, aside from inviting pharmacists to attend continuing education programs it already provided for its non-pharmacist members, the MRHC's sole service for its pharmacy members was jointly negotiating and administering contracts.

37. The MRHC's conduct has not been, and is not, reasonably related to any efficiency-enhancing integration among its members.

VI. MINNESOTA POLICY CONCERNING HEALTH CARE COOPERATIVES

38. In 1994, Minnesota authorized the formation of health care cooperatives. The enabling legislation provided that, with certain limitations, a cooperative was "not a combination in restraint of trade" and any cooperative contracts or agreements with a payer "are not contracts that unreasonably restrain trade." 2009

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Minnesota Statutes, § 62R.06, subd. 3. Among the limitations, the law declared it “unlawful for any health care provider cooperative to engage in any acts of coercion, intimidation, or boycott of, or any concerted refusal to deal with, any health plan company seeking to contract with the cooperative on a competitive, reasonable, and nonexclusive basis.” 2009 Minnesota Statutes, § 62R.08(d).

39. As alleged above, the MRHC and its members engaged in acts of coercion and intimidation, boycotts, and concerted refusals to deal in response to payers’ offers of terms identical or similar to terms the payers were offering to comparable rural providers in other parts of Minnesota.

40. Prior to May 16, 2009, when Minnesota enacted new legislation concerning health care cooperatives, Minnesota officials did not have the power to approve or disapprove contacts between health care cooperatives and payers. At least until then, state officials neither reviewed nor approved any MRHC contracts with payers.

VII. ANTICOMPETITIVE EFFECTS

41. The MRHC’s actions have the purpose and/or had, or tended to have, the effect of unreasonably restraining trade and hindering competition in the provision of hospital and physician services in Minnesota in the following ways, among others:

- a. Unreasonably restraining price and other competition among the MRHC hospital members and among the MRHC physician members;
- b. Increasing prices for hospital and physician services; and
- c. Depriving third-party payers and consumers of the benefits of such competition.

42. The MRHC recruited pharmacists to negotiate collectively agreements with PBMs. Their actions had the purpose of unreasonably restraining trade and hindering competition in the

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provision of pharmacy services in Minnesota by unreasonably restraining price and other competition among the MRHC's pharmacy members, and thereby had the potential to harm consumers by depriving them of the benefits of such competition.

VIII. VIOLATION OF THE FTC ACT

43. The acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such 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 twenty-eighth day of December, 2010, issues its Complaint against the Minnesota Rural Health Cooperative.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission ("Commission"), having initiated an investigation of the Minnesota Rural Health Cooperative ("MRHC"), hereinafter sometimes collectively 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

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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 an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings, and issues the following Order:

1. The Minnesota Rural Health Cooperative is a for-profit corporation organized, existing, and doing business under and by virtue of the laws of the State of Minnesota with its principal address at 190 E.4th Street N, PO Box 155, Cottonwood, Minnesota 56229-9902.
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. "MRHC" shall mean the Minnesota Rural Health Cooperative; its officers, directors, employees, agents,

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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. “Distribute” means to provide a copy of the specified documents by (1) personal delivery, with a signed receipt of confirmation; (2) first-class mail with delivery confirmation or return receipt requested; (3) facsimile with return confirmation; or (4) electronic mail with electronic return confirmation.
- C. “Hospital” means a health care facility licensed by the State of Minnesota as a Hospital.
- 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, Hospital, or Pharmacy services to itself or any other Person, as well as any Person that develops, leases, or sells access to networks of Physicians, Hospitals, or Pharmacies.
- F. “Person” means both natural persons and artificial persons, including, but not limited to corporations, unincorporated entities, and governments.
- G. “Pharmacy” means any Person licensed by the State of Minnesota to dispense pharmaceuticals.
- H. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).

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- I. “Preexisting Contract” means a contract for the provision of Physician, Hospital, or Pharmacy 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 MRHC pursuant to Paragraph III.A.2 of this Order of such Payor’s right to terminate such contract.
- J. “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.

II.

IT IS FURTHER ORDERED that MRHC, directly or indirectly, or through any corporate or other device, in connection with the provision of Physician, Hospital, or Pharmacy 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, Hospitals, or Pharmacies with respect to the provision of Physician, Hospital, or Pharmacy services:
 - 1. to refuse to deal, or threaten to refuse to deal with any Payor regarding any term, condition, or requirement upon which any Physician, Hospital, or Pharmacy deals, or is willing to deal with any Payor, including, but not limited to, price terms; or
 - 2. not to deal individually with any Payor, or not to deal with any Payor other than through MRHC;
- B. Submitting to the Minnesota Department of Health for approval any agreement with any Payor if the MRHC or any of its officers, directors, members, or employees engaged in any acts of coercion, intimidation, or

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boycott of, or any concerted refusal to deal with, any Payor seeking to contract with the MRHC;

- C. Exchanging or facilitating in any manner the exchange or transfer of information to facilitate any action prohibited by Paragraphs II.A and II.B;
- D. Attempting to engage in any action prohibited by Paragraphs II.A through II.C above; and
- E. 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.D above.

Provided, however, that it shall not of itself constitute a violation of Paragraph II of this Order for MRHC, when negotiating with any Payor in compliance with Minnesota Annotated Code § 62R.01, *et seq.*, to:

- (1) reject any offer or counter-offer or refuse to contract; or
- (2) exchange such information as is reasonably necessary to contract pursuant to negotiating or contracting with any Payor.

III.

IT IS FURTHER ORDERED that MRHC shall:

- A. Within thirty (30) days from the date this Order becomes final:
 - 1. Distribute this Order and the Complaint to each current officer, director, member, or employee of MRHC; and
 - 2. Send by first-class mail, with return receipt requested, with the letter attached as the Appendix, to the chief executive officer of each Payor with

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which MRHC has contracted at any time since January 1, 2005.

- B. Terminate, without penalty or charge, and in compliance with any applicable laws, any Preexisting Contract with any Payor, at the earlier of: (1) receipt by MRHC of a written request from a Payor to terminate such contract, or (2) the earliest termination or renewal date (including any automatic renewal date) of such contract.

Provided, however, a Preexisting Contract for Physician services or Hospital services 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:

1. the Payor submits to MRHC 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
2. MRHC 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 III.B of this Order, to terminate the Preexisting Contract at any time.

- C. Within ten (10) days of receiving notification from a Payor to terminate, pursuant to Paragraph III.B of the Order, notify in writing, by first class mail with return receipt requested, each Physician, Hospital, or Pharmacy that provides services through that contract to be terminated.
- D. For three (3) years after the date on which this Order becomes final:

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1. Distribute this Order and the Complaint to each person who becomes an officer, director, member, or employee of MRHC, and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that he or she becomes an officer, director, member, or employee;
2. send by first class mail, return receipt requested, a copy of this Order and the Complaint to each Payor who contracts with MRHC for the provision of Physician services or Hospital services and who did not previously receive a copy of this Order and the Complaint, within thirty (30) days of the time that such Payor enters into such contract; and
3. annually publish in the MRHC Newsletter, or any successor publication sent to all Physician and Hospital members of MRHC, this Order and the Complaint with such prominence as is given to regularly featured articles.

IV.

IT IS FURTHER ORDERED that MRHC 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.

- A. Each report shall include, among other information that may be necessary:
 1. a detailed description of the manner and form in which MRHC has complied and is complying with this Order;
 2. the name, address, and telephone number of each Payor with which each MRHC has had any contact during the one (1) year period preceding the date for filing such report; and

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3. the status of each contract required to be terminated.
- B. The sixty day report shall also include, in addition to the information required by Paragraph IV.A:
1. the identity of each Payor sent a copy of the letter in the Appendix to the Order and the response of each Payor to that letter;
 2. a copy of each verification of Distribution required by Paragraph III.A.1; and
 3. a copy of each return receipt required by Paragraph III.A.2 and Paragraph III.C
- C. Each annual report shall also include, in addition to the information required by Paragraph IV.A:
1. a copy of each verification of Distribution required by Paragraph III.D.1;
 2. a copy of each return receipt required by Paragraph III.D.2; and
 3. evidence that the copy of the Order and Complaint has been published, as required by Paragraph III.D.3.

V.

IT IS FURTHER ORDERED that MRHC 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: (1) any proposed dissolution of MRHC; (2) any proposed acquisition, merger, or consolidation of MRHC; or (3) any other change in MRCH including, but not limited to,

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assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VI.

IT IS FURTHER ORDERED that, for 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 MRHC, that MRHC shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. Access, during office hours of MRHC 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 MRHC relating to compliance with this Order, which copying services shall be provided by MRHC at its expense; and
- B. To interview officers, directors, or employees of MRHC, who may have counsel present, regarding such matters.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on December 28, 2030.

By the Commission.

Decision and Order

APPENDIX

[letterhead of MRHC]

[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 Minnesota Rural Health Cooperative ("MRHC").

Pursuant to Paragraph III.B. of the Order, MRHC must allow you to terminate, upon your written request, without any penalty or charge, any contracts with MRHC 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 III.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 MRHC 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,

[MRHC to fill in information in brackets]

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with the Minnesota Rural Health Cooperative (MRHC).

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 order has been entered into for the settlement purposes only and does not constitute an admission by MRHC that it violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

I. The Complaint

The MRHC is a for-profit corporation of physicians and hospitals located in southwestern Minnesota. In addition, between early 2005 and late 2007, the MRHC also had pharmacy members. The complaint charges that the MRHC has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by, among other things, orchestrating and implementing agreements among competing MRHC members to fix the price at which they contract with health plans and to refuse to deal except on collectively-determined price terms. . The allegations of the complaint are summarized below.

A. Price Fixing For Hospital And Physician Services

The MRHC has approximately 25 hospital members, which constitute the vast majority of hospitals in the area of southwestern Minnesota in which the MRHC operates. The organization has approximately 70 physician members practicing

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in 41 clinics, who represent roughly half of the primary care physicians in southwestern Minnesota. The MRHC is controlled by a Board of Directors composed of physicians and hospitals elected by the members.

When providers join MRHC, they agree that MRHC will negotiate and contract with health plans on their behalf and agree to participate in all MRHC contracts. The Board oversees contract negotiations undertaken by a contracting committee of physician and hospital representatives and approves all contracts between MRHC and health plans.

The MRHC has negotiated prices and other competitively significant terms, on behalf of MRHC physician and hospital members, with numerous payers in Minnesota, including Blue Cross Blue Shield of Minnesota, HealthPartners, Medica Health Plans, MultiPlan, Inc., Preferred One, and America's PPO. After its Board of Directors approved, the MRHC entered into and administered each contract.

The MRHC has threatened to terminate these group contracts with payers to pressure them to increase prices for physician and hospital services. For example, during 2003 contract renewal negotiations with HealthPartners, the MRHC notified HealthPartners that it would terminate the contract unless HealthPartners agreed to higher reimbursement rates. HealthPartners acceded to the MRHC's demands, eventually agreeing to pay MRHC physician members 27 percent more than comparable non-MRHC physicians and to pay MRHC hospital members ten percent more than comparable non-MRHC hospitals. A similar tactic forced Preferred One to pay MRHC members higher rates than it paid comparable non-MRHC providers.

The MRHC informed payers that the MRHC "expect[s] our group to be accepted or rejected as a group." It told payers that resisted the MRHC's price demands that they would be unable to negotiate individually with MRHC members. When these payers attempted to contract directly with individual MRHC hospitals or physicians, the members referred the payers back to MRHC.

Analysis to Aid Public Comment

Through its collective negotiations and coercive tactics, the MRHC succeeded in obtaining higher payments to MRHC members by obtaining higher reimbursement rates than comparable providers, more favorable payment methods, and increased reimbursements for new MRHC members.

(1) Higher Rates: Five payers — HealthPartners, Medica, MultiPlan, Preferred One, and America’s PPO — paid MRHC members more than they paid comparable rural hospitals and physicians elsewhere in Minnesota. Indeed, the MRHC told its members at the 2005 annual member meeting that improvements in its contract with Preferred One would be “worth \$100,000s annually for MRHC members.”

(2) Favorable Payment Methods: Two payers — Medica and Preferred One — pay MRHC hospital and physician members based on a percentage of billed charges, rather than a fixed fee for each service. This mechanism allows MRHC members to increase unilaterally their reimbursement, by increasing their billed charges up to the maximum specified in the contract. (3) Increased New Member Reimbursements: The MRHC has forced payers to reimburse new MRHC members at the higher MRHC rates, even though these new members had existing contracts with the payer at lower rates. For example, Medica told the MRHC that “because of the Co-op relationship all of the clinics and hospitals, except Rice, are being paid higher reimbursement than they were prior to our Medica agreement with the Co-op.”

B. Price Fixing For Pharmacy Services

In 2004, after being approached by pharmacies, MRHC expanded its membership to include pharmacies and began recruiting pharmacists for the purpose of collectively negotiating agreements with pharmacy benefit managers (PBMs). The MRHC encouraged pharmacies to join to increase the reimbursement levels they would receive under the new Medicare Part D prescription drug program. Between early 2005 and late 2007, the MRHC had approximately 70 pharmacist members.

The MRHC urged pharmacies not to deal individually with PBMs and instead to act together through MRHC. The MRHC repeatedly reminded pharmacies of the benefits of acting

Analysis to Aid Public Comment

collectively, advising them to “stand together and speak with ONE voice to the PBMs.” For example, in letters to members and prospective members, MRHC stated:

- “We have to stand together in this effort or once again the PBMs will intimidate us and pick us off one by one with contracts we don’t want.”
- “Do NOT sign and return your Medicare Part D PBM contracts. MRHC will review and negotiate these for you during the next few weeks. The contracting deadline is not until later this summer and our best leverage is to take our time to negotiate as a block. The bigger block the better [sic].”
- “We are asking all MRHC members NOT to sign and return their Medicare Part D PBM contracts. MRHC will review and negotiate these for them during the next couple of weeks. Our best leverage is to take our time to negotiate as a block, and the bigger block the better [sic]. . . . Don’t sign contracts but notify the PBMs who will act as your agent – the MRHC!”

To “speed up” the PBMs’ acceptance of the MRHC as the pharmacies’ bargaining agent, the MRHC provided each pharmacy member with pre-printed labels stating that MRHC would act as the pharmacy’s contracting agent. Many member pharmacies followed the MRHC’s instructions to return contract offers from PBMs with these labels attached.

The MRHC negotiated with at least eight PBMs over Medicare Part D reimbursement levels and reached agreements on behalf of the MRHC establishing prices and other competitively significant terms with six of them. The MRHC terminated the pharmacist memberships in November 2007 and transferred management of these agreements to a pharmacy services administration organization in early 2008.

Analysis to Aid Public Comment

C. Lack Of Justification

Price agreements among competing sellers, as a general rule, are price fixing and are summarily condemned by the antitrust laws as per se illegal. But joint price setting by provider networks is not per se illegal if: (1) the participants have integrated their activities through the network (whether financially, clinically, or otherwise) in a way that is likely to produce significant efficiencies that benefit consumers; and (2) the price agreements are reasonably necessary to realize those efficiencies. The MRHC's price fixing for hospital, physician, and pharmacy services, however, was unrelated to any efficiency-enhancing integration of its members' clinical services.

1. Hospital And Physician Services

One form of efficiency-enhancing integration among otherwise competing health care providers involves arrangements in which the participants share with one another substantial financial risk for the services provided through the network. Such risk sharing occurs when mechanisms are in place that make the network providers as a group accountable for the total cost of defined services delivered to a group of covered individuals, so that the providers have incentives to cooperate in controlling costs and improving quality by managing the provision of services. The Statements of Antitrust Enforcement Policy in Health Care issued by the FTC and the Department of Justice provide several examples of types of arrangements through which participants can potentially share substantial financial risk.

MRHC's hospital and physician members have not shared, and do not share, substantial financial risk in the provision of patient care. MRHC considers only three of its contracts with payers to be "risk" contracts, and these contracts pertain only to physician services. Moreover, these contracts do not provide significant financial incentives for members to collaborate to improve the performance of the group as a whole. For example, under two of the three "risk" contracts, the payers withheld a relatively modest portion of the payments owed to participating physicians (typically no more than 10 percent), and return of these sums did not depend on the group meeting cost containment or quality improvement performance targets. Instead, physicians

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merely had to participate in a quality improvement project in which they reported their compliance with clinical practice guidelines for treatment of a few specific conditions. These arrangements, while perhaps benefitting some physicians' individual delivery of health care, would thus be unlikely to create incentives to motivate MRHC physicians to work together to improve significantly group-wide care to patients. Health Care Statements at 68.

Arrangements among competing health care providers that do not involve the sharing of financial risk may also involve integration that has the potential to create significant efficiencies in the provision of health care services. The Health Care Statements discuss an example of such integration: a "clinically integrated" program, which involves "an active and ongoing program to evaluate and modify practice patterns by the network's physician participants and create a high degree of interdependence and cooperation among the physicians to control costs and ensure quality." Health Care Statements at 72-73.

The MRHC has not undertaken any integration regarding its members' provision of services, clinical or otherwise, that might justify its members' jointly negotiated fees with health plans. It verifies the qualifications of its members, conducts patient satisfaction surveys, collects patient complaints, and organizes meetings to discuss quality of care issues. In addition, it has a few programs that relate solely to physicians: quality improvement projects involving diabetes and preventative services and inspections of physician clinics. Although these activities may be beneficial, they do not involve any integration among MRHC members that could significantly improve the quality and efficiency of the services MRHC members provide.

First, the scope of these activities is very limited. The clinical programs most likely to improve the quality of patient care do not involve the hospital members at all, and the activities involving physicians are limited to just a few of the many medical conditions the physicians treat. Moreover, even in these limited areas, the programs do not create any collaborative activity or interdependence among the physician members. Although the activities may lead individual physicians to modify their behavior,

Analysis to Aid Public Comment

none of the programs creates enforceable obligations for physicians to improve their clinical operations or provides members with a shared stake in the performance of the group as a whole. Indeed, all of these activities are essentially informational and each physician clinic could engage in them on its own without any involvement from the other clinics. Finally, the challenged conduct — jointly negotiating with payors and agreeing on prices and other competitively sensitive terms — is unnecessary for members to engage in any of these activities.

2. Pharmacy Services

Similarly, the MRHC's joint price setting for pharmacy services was not related to any integration among its members. The MRHC recruited pharmacies for the purpose of increasing the pharmacies' bargaining leverage in negotiations with PBMs. Aside from inviting pharmacists to attend continuing education programs that it was already providing for its non-pharmacist members, the MRHC's sole activity relating to its pharmacy members was negotiating and administering contracts.

In sum, MRHC's horizontal price fixing does not plausibly promote any efficiency-enhancing integration of its members services and so violates Section 5 of the FTC Act.

D. Lack Of Protection From The State Action Doctrine

The MRHC's anticompetitive conduct is not shielded by the state action doctrine because there was no active supervision of MRHC's conduct and Minnesota does not appear to have articulated a policy to immunize concerted refusals to deal or other forms of coercive conduct.

Since 1999, Minnesota law has authorized health care provider cooperatives to contract with purchasers on a fee-for-service basis and specified that, with certain limitations, such contracts "are not contracts that unreasonably restrain trade." Although state economic regulation can immunize private parties from federal antitrust liability, states may not simply authorize private parties to violate the antitrust laws. Instead, a state must substitute its own control for that of the market. Thus, as the Supreme Court explained in *California Retail Liquor Dealers*

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Assen v. Midcal Aluminum, Inc., private parties claiming the protection of the state action doctrine must demonstrate that their challenged conduct was both (1) undertaken pursuant to a clearly articulated state policy to displace competition with regulation and (2) actively supervised by state officials.

First, it is undisputed that state officials did not supervise the MRHC's anticompetitive conduct. Active state supervision requires that state officials "exercise ultimate control over the challenged anticompetitive conduct." A private party must therefore demonstrate that state officials have "exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." But, until recently, Minnesota law did not provide for state review and approval of health care provider cooperative contracting. No review or approval of MRHC's anticompetitive conduct, or the prices that resulted from that conduct, took place during the relevant time period.

In 2009, Minnesota enacted a law establishing a process by which the state Department of Health is to review and approve or disapprove health care provider contracts with third-party payers. The prospect of state review of MRHC's contracts in the future does not provide antitrust immunity for MRHC's prior unsupervised conduct, and the absence of state supervision by itself establishes that the conduct challenged in the complaint is not protected by the state action doctrine.

Second, the Minnesota statute does not appear to articulate a policy to protect MRHC's activities insofar as they involved concerted refusals to deal or other forms of coercive conduct. The statutory provision declaring that health care provider cooperative contracts are not unreasonable restraints of trade is expressly limited, for it is made "[s]ubject to Section 62R.08," a provision entitled "Prohibited Practices" that bars certain types of conduct by provider cooperatives. That provision, among other things, states:

It shall be unlawful for any health care provider cooperative to engage in any acts of coercion, intimidation, or boycott of, or any

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concerted refusal to deal with, any health plan company seeking to contract with the cooperative on a competitive, reasonable, and nonexclusive basis.

Thus, to successfully assert a state action defense, MRHC would have to demonstrate not only active state supervision, but also that the Minnesota Legislature expressed a policy to supplant competition with regulation with respect to all of MRHC's challenged conduct, including acts of "coercion." Given the express limitations placed on the state policy regarding health care provider contracting, the Minnesota legislature does not appear to have expressed such a broad policy.

II. The Proposed Order

The proposed order takes into account the change in Minnesota law that occurred during the pendency of the investigation.

A. Impact Of The New Statute

As noted above, the Minnesota Legislature in 2009 enacted legislation designed to provide state supervision of the contracts that health care provider cooperatives enter into with health plans. The Commission cannot, at this time, determine whether this new law will result in that state engaging in the detailed, substantive review that the Supreme Court has held is required for "active supervision." Determining whether the active supervision prong of the state action doctrine has been met will require a factual inquiry into the Departments of Health's actual implementation of its new authority in specific instances. Although there is no single prescribed method for a state to conduct an adequate review of private anticompetitive conduct, such as the price fixing by the MRHC, such review must include an assessment of the substantive merits of the pricing conduct, based on a factual record that enables the state to exercise "sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention."

Although it is too early to assess the state's implementation of the new statute, the Commission believes the circumstances here make it appropriate to defer to Minnesota's expressed intention to

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actively supervise the contracts that result from the MRHC's price fixing. The Commission has in the past taken a different remedial approach where state officials had authority to actively supervise private conduct but failed to exercise it. Here Minnesota officials have only been recently granted that authority, and it is appropriate to allow them an opportunity to utilize that authority.

As a result, the proposed order does not bar collective price negotiations. At the same time, there is certain anticompetitive activity that the state will not supervise and would not be protected under the state action doctrine and the order prohibits such activity. The key prohibitions in the proposed order are aimed at preventing MRHC from using concerted refusals to deal or other coercive tactics to extract favorable contract terms from payers. This relief is appropriate because the new statute only authorizes the Department of Health to supervise the final contracts, not the negotiating process itself, which is where coercive tactics would occur. Further, the new statute does not authorize the Department of Health to reject a contract on the ground that it is the product of coercion. Thus the order is drafted to protect consumers from coercion by the MRHC. In addition, the proposed order provides a remedy for past conduct by requiring renegotiation of all existing contracts and their submission for state approval consistent with the recently enacted Minnesota statute.

B. Order Provisions

Paragraph II.A bars MRHC from organizing or implementing agreements to refuse to deal, or to threaten to refuse to deal, with a payer over contract terms, as well as agreements not to deal individually with payers, or to deal only through the MRHC. Paragraph II.B prohibits the MRHC from submitting for state approval any payer contract that it negotiated using acts of coercion, intimidation, or boycott, or any concerted refusal to deal. The prohibitions apply to agreements for hospital, physician, or pharmacy services.

The remaining portions of Paragraph II prohibit conduct that would facilitate a violation of Paragraph II.A. Paragraph II.C bars information exchanges to further conduct that violates the core

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prohibitions of Paragraph II. Paragraphs II.D and II.E ban attempts and encouragement of such violations.

The order also includes a proviso designed to clarify the scope of the prohibitions in Paragraph II. First, it provides that the provisions of Paragraph II do not prohibit the MRHC, in exercising its business judgment, from rejecting a contract on behalf of its members, so long as there is no agreement between the MRHC and any of its members that the member will refuse to deal individually (or will deal only through the MRHC), with a payer whose contract the MRHC rejects. Second, the order does not prevent the MRHC from exchanging information when necessary to conduct joint payer contract negotiations on behalf of its members. Such information would not, however, ordinarily include whether an individual member is participating in a particular contract or the terms on which it is negotiating with a payer independently of the MRHC.

As this proviso reflects, nothing in the order prohibits the MRHC, in the exercise of its business judgment, from rejecting a contract on behalf of its members, so long as there is no agreement between the MRHC and any of its members that the members refuse to deal individually with the payer whose contract the MRHC rejected, or that the members will only deal with that payer through the MRHC. Additionally, the order does not address any actions taken by any individual MRHC member, acting alone in exercising its business judgment. Thus, for example, the order does not bar any member from unilaterally declining to contract with any payer.

Paragraph III.A requires MRHC to send a copy of the complaint and consent order to its members, its management and staff, and any payers who communicated with MRHC, or with whom MRHC communicated, with regard to any interest in contracting for physician services, at any time since January 1, 2001.

Paragraph III.B requires MRHC to terminate, without penalty, pre-existing payer contracts that it had entered into since 2001, at the earlier of (1) receipt by MRHC of a written request for termination by the payer; or (2) the termination date, renewal date, or anniversary date of the contract. This provision is

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intended to eliminate the effects of MRHC's past alleged illegal collective behavior. The payer can delay the termination for up to one year by making a written request to MRHC.

Paragraph III.D contains notification provisions relating to future contact with members, payers, management and staff. For three years after the date on which the consent order becomes final, MRHC is required to distribute a copy of the complaint and consent order to each member who begins participating in MRHC; each payer who contacts MRHC regarding the provision of member services; and each person who becomes an officer, director, manager, or employee. In addition, Paragraph III.D requires MRHC to publish a copy of the complaint and consent order, annually for three years, in any official publication that it sends to its participating members.

Paragraphs IV, V, and VI impose various obligations on MRHC to report or provide access to information to the Commission to facilitate the monitoring of compliance with the order.

Finally, Paragraph VII provides that the proposed order will expire in 20 years.

INTERLOCUTORY, MODIFYING,
VACATING, AND MISCELLANEOUS
ORDERS

SOLVAY, S.A.

Docket No. C-4046. Order, July 19, 2010

Order granting Respondent's application for approval to terminate the Solvay/Alventia HCFC-142b Agreement, in accordance with the Commission's order.

LETTER APPROVING TERMINATION AGREEMENT

Dear Mr. Pepperman:

On June 21, 2002, the Federal Trade Commission ("Commission") issued a Decision and Order ("Order") to remedy the effects on competition of the acquisition of Ausimont S.p.A. by Solvay SA ("Solvay"). The Order requires, inter alia, Solvay to divest the Solvay Fluoropolymers Business and the Solvay VF2 Joint Venture Business to an acquirer and in a manner approved by the Commission. See Order ¶¶ IIA., II.B. The Order further requires Solvay to comply with all terms of the Solvay/Alventia HCFC-142b Agreement pursuant to which Solvay is obligated to supply HCFC-142b to Alventia to manufacture VF2. See Order ¶ II.I. The Solvay/Alventia HCFC-142b Agreement is incorporated into and made a part of this Order, and the Order provides that any modification of the Solvay/Alventia HCFC-142b Agreement without the prior approval of the Commission constitutes a failure to comply with the Order. *Id.*

On April 26, 2010, Solvay filed the Petition Of Solvay S.A. For Approval Of Termination Agreement ("Petition") seeking Commission approval to terminate the Solvay/Alventia HCFC-142b Agreement. As set forth more fully in the Petition, Solvay represents that Alventia's repeated exercise of a "meet or release" clause has effectively released Solvay from any contractual obligation to supply HCFC-142b to Alventia. Consequently, Solvay and Alventia have agreed to terminate the supply agreement.

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The Commission has considered Solvay's Petition, as well as other available information, and has determined to grant the Petition to approve the Termination Agreement. In making its determination, the Commission has relied upon the information submitted and the representations made by Solvay and has assumed them to be accurate and complete.

By direction of the Commission.

POLYPORE INTERNATIONAL, INC.

Docket No. 9327. Order, July 19, 2010

Order denying Respondent's motion to reopen the record. Respondent sought leave to conduct additional discovery and requested a hearing before the Commission to permit the introduction of additional evidence. In its order, the Commission denied Respondent's motion, finding that Respondent did not provide a bona fide explanation for its failure to introduce the additional evidence at trial. The Commission further found that any further procedural delay may increase the risk of ongoing injury to consumers and competition. The Commission, however, agreed to admit into evidence the four affidavits accompanying Respondent's motion.

ORDER ON RESPONDENT'S THIRD MOTION TO REOPEN THE
HEARING RECORD

Respondent Polypore International, Inc. has filed a Third Motion to Reopen the Hearing Record, in which it seeks leave to conduct additional discovery and for a hearing before the Commission to permit the introduction of new evidence. Respondent asserts that it has uncovered evidence that Entek recently entered the deep-cycle and motive markets, thus calling into question the Administrative Law Judge's (ALJ) conclusion that Daramic's acquisition of Microporous eliminated Daramic's

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only competitor in these markets.¹ Complaint Counsel oppose the motion. For the reasons described below, the Commission will deny Respondent's motion, but will as a matter of discretion admit into evidence the four affidavits submitted in support of Respondent's motion and the declaration submitted in support of Complaint Counsel's opposition to Respondent's motion.

Under Commission Rules 3.51(e)(1) and 3.54(a), 16 C.F.R. §§ 3.51(e)(1), 3.54(a),² a party may move to "reopen the proceeding for the reception of further evidence" at any time before the Commission issues its decision. The parties agree that *Brake Guard Products* sets forth the applicable standard for reopening the record. Under that test, "the Commission considers: (1) whether the moving party can demonstrate due diligence (that is, whether there is a bona fide explanation for the failure to introduce the evidence at trial); (2) the extent to which the proffered evidence is probative; (3) whether the proffered evidence is cumulative; and (4) whether reopening the record would prejudice the non-moving party. *Brake Guard Products, Inc.*, 125 F.T.C. 138, 248 n.38 (1998) (citing *Chrysler Corp. v. FTC*, 561 F.2d 357, 362-63 (D.C. Cir. 1977)); *see also Rambus Inc.*, FTC Docket No. 9302, 2006 WL 2522715 (Aug. 1, 2006) (relying on *Brake Guard Products* standard). Complaint Counsel

¹ Respondent and Complaint Counsel redacted the identity of certain companies in their briefs, even though confidential treatment appears unnecessary and neither party filed a motion for in camera treatment. In the interest of public disclosure, we omit only those identities deemed confidential by the ALJ. Accordingly, this Order will be placed on the public record in its entirety ten calendar days after it has been served upon Respondent and Complaint Counsel, consistent with Section 21(d)(2) of the Federal Trade Commission Act, 15 U.S.C. § 57b-2(d)(2), and Commission Rule of Practice 3.45, 16 C.F.R. § 3.45. *See also* Notice of Intent to Disclose Provisionally Redacted Information, *Intel Corporation*, FTC Docket No. 9341 (Jan. 26, 2010); *Orkin Exterminating Co.*, 108 F.T.C. 147 (1986); *General Foods Corp.*, 95 F.T.C. 352, 355 (1980); *RSR Corp.*, 88 F.T.C. 206 (1976); *RSR Corp.*, 88 F.T.C. 734, 735 (1976); *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961).

² 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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concede that the proffered evidence is probative (Brief of Complaint Counsel at 7), so we focus on the other three factors. None militates in favor of reopening the hearing in this matter.

First, Respondent has not acted with due diligence in presenting evidence of the competitor's alleged entry into the deep-cycle markets.³ Respondent asserts that it was unaware of Entek's entry until informed by two battery manufacturers, JCI and Superior, in May and June of this year and that it then promptly filed its motion to reopen. However, the record demonstrates that Respondent was aware of Entek's development of a deep-cycle product prior to the hearing before the ALJ. Specifically, a large battery manufacturer testified in a January 2009 deposition that Entek had designed a deep-cycle separator. (Pfanner Dep. at 77-80 (Jan. 28, 2009) (confidential).) Respondent did not call this witness at trial, but did put this information into its expert report. (RX00945-132, *in camera*.) In addition, a different witness testified at the hearing that Entek was developing a deep-cycle separator. (Bacerzak, Tr. 4130-31, 4138-39.) In short, Respondent has not offered a bona fide explanation for its failure to introduce additional evidence at trial regarding Entek's attempts to develop a deep-cycle separator product.

Second, Respondent's evidence is cumulative of what was presented at the hearing. As previously noted, there was evidence before the ALJ regarding Entek's development of a deep-cycle separator. Respondent's witness from Crown Battery testified at the hearing that it had plans to test a deep-cycle separator sample from Entek. (Bacerzak, Tr. 4130-31 ("I've asked him to make us golf car material, which he's working on right now."); *see also id.* at 4138-39.)

³ Respondent's brief asserts that Entek has also entered the motive market, as evidenced by JCI's request for motive separators from that company. However, none of the affidavits accompanying Respondent's motion refers to motive separators or motive batteries. In addition, Complaint Counsel have submitted a declaration from JCI indicating that JCI does not make motive batteries. (Gruenstern Dec. ¶ 2; *see also* Hall, Tr. 2665 ("Q. Does JCI make any motive power batteries? A. No. Johnson Controls isn't in that segment."))

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Third, reopening the record to permit additional discovery and a hearing before the Commission would prejudice Complaint Counsel. Although Respondent claims to seek only “limited discovery,” it is in fact seeking broad discovery that could require significant time and expense by Complaint Counsel. Specifically, Respondent requests the right to issue subpoenas for documents and testimony relating to the manufacture, development, marketing, purchase, or testing of deep-cycle and motive battery separators in the United States since the close of discovery. (Respondent’s Proposed Order at 1-2.) Furthermore, 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. That risk is heightened here, given the ALJ’s findings that the acquisition of Microporous by Daramic resulted in higher prices to customers. (Findings of Fact 897-922; Initial Decision at 261-62.) Respondent has therefore failed to establish that reopening the record is warranted.

Notwithstanding the denial of Respondent’s request to reopen the hearing record to conduct additional discovery and to hold an evidentiary hearing, the four affidavits accompanying Respondent’s motion shall be admitted into evidence and considered by the Commission when rendering its decision. While the probative value of these affidavits is limited, their admission into evidence will not delay these proceedings or prejudice Complaint Counsel. Indeed, Complaint Counsel have already submitted a rebuttal declaration, which will also be admitted into evidence and considered by the Commission.

Much of the content of these affidavits and declarations is, of course, hearsay, but the Commission has held that “all relevant and material evidence—whether hearsay or not—is admissible, as long as it is reliable.” *American Home Products Corp.*, 98 F.T.C. 136, 368 n.9 (1981). *See also Kellogg Co.*, 99 F.T.C. 8, 31-32 (1982) (“Section 3.43(b) of the Commission’s Rules of Practice provides for the admission of relevant, material, and reliable evidence. It does not exclude hearsay evidence, and hearsay evidence may be received.”); *Philadelphia Carpet Co.*, 64 F.T.C. 762, 773 (1964) (“[I]t is long settled that hearsay evidence is not to be out of hand rejected or excluded by administrative

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tribunals.”).⁴ Respondent’s affidavits have sufficient indicia of reliability as to the deep-cycle market on account of their consistency with existing evidence in the record, in particular the testimony of Crown Battery.

Accordingly,

IT IS ORDERED THAT the affidavits of Robert B. Toth, S. Tucker Roe, Randy A. Hanschu, and Steve McDonald accompanying Respondent’s Third Motion to Reopen the Hearing Record shall be admitted into evidence;

IT IS FURTHER ORDERED THAT the declaration of Robert Gruenstern accompanying Complaint Counsel’s Response to Respondent’s Third Motion to Reopen the Hearing Record shall be admitted into evidence;

IT IS FURTHER ORDERED THAT Respondent’s Third Motion to Reopen the Hearing Record is otherwise denied; and

IT IS FURTHER ORDERED THAT oral argument shall take place according to the Notice Scheduling Oral Argument issued on June 28, 2010.

By the Commission.

⁴ The Commission recently revised Rule 3.43(b) of its Rules of Practice to acknowledge that hearsay evidence may be considered if it is relevant, material, and reliable. *See* note 2, *supra*.

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INTEL CORPORATION

Docket No. 9341. Order, July 21, 2010

Order extending the time period during which the matter is withdrawn from adjudication for an additional two weeks to facilitate settlement discussions.

ORDER EXTENDING WITHDRAWAL FROM ADJUDICATION

On June 21, 2010, this matter was by order withdrawn from adjudication for the purpose of considering a proposed consent agreement. Under the June 21, 2010 order, this matter is scheduled to revert to Part 3 adjudicative status at 12:01 a.m. on Friday, July 23, 2010. To facilitate further consideration of a proposed consent agreement, the Commission has decided to further extend the withdrawal of this matter from adjudication. Accordingly,

IT IS ORDERED THAT, pursuant to 3.25(c) of the Commission's Rules of Practice, 16 C.F.R. § 3.25(c) (2010), this matter will remain withdrawn from adjudication until 12:01 a.m. on Friday, August 6, 2010, at which time it will return to adjudicative status under Part 3 of the Commission's Rules of Practice.

By the Commission.

Interlocutory Orders, Etc.

CARILION CLINIC

Docket No. 9338. Order, August 12, 2010

Order approving Respondent's request to divest the Center for Advanced Imaging to InSight Health Corp., in accordance with the Commission's order.

LETTER APPROVING APPLICATION FOR DIVESTITURE OF ASSETS

This letter responds to the May 10, 2010, Application for Approval of Divestiture of the Center for Advanced Imaging ("Application") requesting that the Commission approve Carilion Clinic's ("Carilion") divestiture of the Center for Advanced Imaging ("CAI") to InSight Health Corp. ("InSight") pursuant to the order in this matter. The Application was placed on the public record for comments for thirty days, until June 21, 2010, and no 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 CAI to InSight. 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.

Interlocutory Orders, Etc.

THE DUN & BRADSTREET CORPORATION

Docket No. 9342. Order, August 13, 2010

Order withdrawing the matter from adjudication to permit the Commission to consider a joint settlement proposal by the parties.

ORDER WITHDRAWING THE MATTER FROM ADJUDICATION FOR THE
PURPOSE OF CONSIDERING A PROPOSED CONSENT AGREEMENT

Complaint Counsel and Counsel for 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 Counsel for Respondent having submitted a proposed Consent Agreement containing a proposed Agreement Containing Consent Order and 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 Tuesday, September 14, 2010, and that all proceedings before the Administrative Law Judge are hereby stayed during that time period so that the Commission, pursuant to Rule 3.25(f), 16 C. F.R. § 3.25(f), may evaluate the proposed Consent Agreement; and

IT IS FURTHER ORDERED, pursuant to Rule 3.25(b) of the Commission Rules of Practice, 16 C.F.R. § 3.25(b), that the proposed Consent Agreement shall not be placed on the public record unless and until it is accepted by the Commission.

By the Commission.

Interlocutory Orders, Etc.

POLYPORE INTERNATIONAL, INC.

Docket No. 9327. Order, September 2, 2010

Order granting motion for *in camera* treatment by third party Johnson Controls, Inc. through June 1, 2014.

ORDER GRANTING MOTION FOR IN CAMERA TREATMENT FILED BY
NON-PARTY JOHNSON CONTROLS, INC.

I.

Pursuant to Commission Rule 3.45, 16 C.F.R. § 3.45,¹ non-party Johnson Controls, Inc. (“JCI”), has filed a motion (“JCI Motion”) requesting *in camera* treatment for a portion of the Declaration of Robert Gruenstern, dated July 12, 2010 and filed as Attachment B to Complaint Counsel’s Response to Respondent’s Third Motion to Reopen the Hearing Record. Neither Complaint Counsel nor Respondent opposes the JCI Motion. For the reasons described below, the Commission grants the JCI Motion.

II.

On July 8, 2010 Respondent Polypore International, Inc. (“Polypore”) filed Respondent’s Third Motion to Reopen the Hearing Record. On July 15, 2010, Complaint Counsel filed its Response to Respondent’s Third Motion to Reopen the Hearing Record, which included as Attachment B the Declaration of Robert Gruenstern, Executive Director of Product Engineering, Power Solutions – Americas for JCI. JCI requests *in camera* treatment for the last clause in the last sentence in paragraph two of Mr. Gruenstern’s declaration, which states that JCI [redacted] JCI requests that *in camera* treatment for this phrase extend until

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.

Interlocutory Orders, Etc.

June 1, 2014, which is the date on which *in camera* treatment for other JCI materials filed in this matter will expire.²

The Commission recognizes the substantial public interest in a full and open record of its adjudicative proceedings. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). However, the Commission may order that material “be placed *in camera* after finding that its public disclosure will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment.” 16 C.F.R. § 3.45(b). The Commission treats non-party requests for *in camera* treatment with “special solicitude.” *In re Crown Cork & Seal Co.*, 71 F.T.C. 1714, 1715 (1967). Where the Commission grants *in camera* treatment for strategic business information, it typically does so for a period of two to five years. *In re Union Oil Co. of Cal.*, 2004 FTC LEXIS 223, at *2 (2004).

JCI supports its motion with a declaration from Mr. Robert Gruenster. Mr. Gruenster states that the phrase over which JCI seeks protection reflects JCI’s current business strategy for product development. Mr. Gruenster also states that (1) he is familiar with JCI’s confidentiality policies surrounding this information, (2) JCI does not disclose this information to the public or competitors, and (3) public disclosure would cause JCI to suffer serious competitive injury.

Based on the JCI Motion and Mr. Gruenster’s supporting declaration, the Commission finds that JCI has met the standards for *in camera* treatment for a period to expire on June 1, 2014.

Accordingly,

IT IS ORDERED THAT *in camera* treatment be, and it hereby is, granted (1) to the last clause in the last sentence of paragraph two in the Declaration of Robert Gruenster, dated July 12, 2010, and filed as Attachment B to Complaint Counsel’s Response to Respondent’s Third Motion to Reopen the Hearing

² See Order on Non-Parties’ Motions for *In Camera* Treatment, FTC Docket No. 9327 (May 6, 2009); Order on Non-Parties’ Supplemental Motions for *In Camera* Treatment, FTC Docket No. 9327 (June 4, 2009).

Interlocutory Orders, Etc.

Record, and (2) to the last sentence of the first page of the JCI Motion, which includes the same phrase; and

IT IS FURTHER ORDERED THAT *in camera* treatment for the above materials will expire at 12:01 a.m. Eastern Daylight Time on June 1, 2014.

By the Commission.

EL PASO ENERGY CORPORATION AND THE COASTAL
CORPORATION

Docket No. C-3996. Order, October 4, 2010

Order modifying consent order requiring El Paso Energy Corporation (“El Paso”) to establish a \$40 million development fund for use by Williams Field Services (“Williams”) in connection with the divestiture of two natural gas pipelines to Williams. As circumstances surrounding the divestiture have changed and as Williams has not needed to use any portion of the fund within the last 9 years, the Commission modified the order to set aside the development fund requirement and return any unused funds to El Paso.

ORDER REOPENING AND MODIFYING ORDER

On June 28, 2010, El Paso Energy Corporation (“El Paso”) filed a Petition of El Paso Corporation to Reopen and Modify (“Petition”), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission’s Rules of Practice, 16 C.F.R. § 2.51, asking that the Commission reopen and modify the consent order in Docket No. C-3996 (“Order”) issued by the Commission on March 19, 2001. The Order requires El Paso, among other things, to establish a \$40 million development fund (to remain in effect for 20 years) in connection with the divestiture to Williams Field Services (“Williams”) of two natural gas pipelines in the central Gulf of Mexico.

Interlocutory Orders, Etc.

In its Petition, El Paso asks that the Commission reopen the Order and set aside the development fund requirement to allow El Paso to recover any money remaining in the fund. El Paso asserts that its sale of the ANR natural gas pipeline, along with a shift in natural gas production and exploration from the Gulf of Mexico to on-shore reserves, eliminates the need for the development fund. El Paso submits that these circumstances constitute changed conditions of fact sufficient to warrant reopening and modifying the Order to set aside the development fund requirement. El Paso also claims that the proposed Order modification would be in the public interest. For the reasons stated below, the Commission has determined to grant the Petition.

BACKGROUND

On January 17, 2000, El Paso entered into an agreement to acquire The Coastal Corporation (“Coastal”). Both El Paso and Coastal owned natural gas pipelines in a number of locations in the United States, which raised competitive concerns. One such area was a central portion of the Gulf of Mexico where El Paso owned several pipelines and Coastal owned the ANR pipeline, which is a major natural gas pipeline in the relevant area. On March 19, 2001, the Commission issued an Order (with El Paso’s consent) to resolve its concerns, including a requirement that El Paso divest the Green Canyon and Tarpon pipelines and related assets to Williams.

In connection with these divestitures, Paragraph V.D. of the Order also required El Paso to establish a \$40 million development fund, to remain in effect for a twenty-year period.¹ The purpose of the development fund was to encourage expansions of the Green Canyon and Tarpon pipelines and thereby expand the reach of Williams into “an area of competitive concern and to compete against the Respondents in that area.”² The Order set forth specific conditions, including geographic location, that would permit Williams to access the fund. The Order also provided that any money remaining in the fund after twenty years would be returned to El Paso.

¹ The funds are being held in an escrow account, pursuant to the Order.

² Analysis of the Complaint and Proposed Consent Orders to Aid Public Comment, p. 7 (Jan. 29, 2001).

Interlocutory Orders, Etc.

After the Commission accepted the consent agreement for public comment, El Paso consummated its merger with Coastal, divested the Green Canyon and Tarpon pipelines to Williams in January 2001, and established the development fund. Since establishment of the fund, Williams has not found an opportunity to use any of the money for construction projects that comply with the Order's conditions.

In 2007, El Paso sold the ANR pipeline to Trans-Canada, Inc. ("TransCanada"). The sale to TransCanada introduced a new competitor into the market and restored ANR to its pre-merger status as an alternative to El Paso, but this time under the ownership of TransCanada instead of Coastal.

As explained in the Petition, in addition to El Paso's sale of ANR to TransCanada, there have been other developments in the Central Gulf area since 2001. To a great extent, the focus of natural gas exploration and discovery has shifted away from the Gulf of Mexico to other areas of the country. In particular, natural gas exploration over the last few years has focused on lower-cost on-shore shale production. The number of producing gas wells in the Gulf dropped by over 50 percent from 2001 to 2008, while at the same time the number of such wells in the United States increased overall by about 28 percent.³ In the specific geographic area for which the development fund is available, production dropped by about 76 percent from 2000 to 2009.⁴ Exploration activities also have shifted away from the Gulf. The number of rigs drilling for gas has declined from 105 in 2000 to 25 in early 2010.⁵

El Paso incorporated the Order's development fund requirement into the purchase agreement with Williams when it sold the Green Canyon and Tarpon pipelines. Because termination of the fund would result in El Paso breaching the agreement, El Paso has negotiated a settlement with Williams. In exchange for giving up the development fund, Williams will

³ Petition at 16.

⁴ *Id.* at 16-17.

⁵ *Id.* at 19.

Interlocutory Orders, Etc.

receive a payment from El Paso as well as other non-monetary consideration.⁶

STANDARDS FOR REOPENING AND MODIFYING

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent “makes a satisfactory showing that changed conditions of law or fact” so require.⁷ A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes either eliminate the need for the order or make continued application of it inequitable or harmful to competition.⁸

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.⁹ In the case of “public interest” requests, FTC Rule of Practice 2.51(b) requires an initial “satisfactory showing” of how modification would serve the public interest before the Commission determines whether to reopen an order and consider all of the reasons for and against its modification.

A “satisfactory showing” requires, with respect to public interest requests, that the petitioner make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a “satisfactory

⁶ We need not spell out the details of the settlement for purposes of this Order, thereby allowing us to publish a single public version of this Order without redaction.

⁷ See Supplementary Information, Amendment to 16 CFR 2.51(b), announced Aug. 15, 2001, (“Amendment”).

⁸ S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Dkt. No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) (“Hart Letter”). See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992).

⁹ Hart Letter at 5; 16 C.F.R. § 2.51.

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showing” if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.¹⁰ This showing requires the petitioner to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. In addition, this showing must be supported by evidence that is credible and reliable.

If, after determining that the petitioner has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,¹¹ and the burden remains on the petitioner in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.¹² All information and material that the petitioner wishes the Commission to consider shall be contained in the request at the time of filing.¹³

CHANGED CIRCUMSTANCES OF FACT WARRANT MODIFICATION OF THE ORDER

The Commission has determined that (i) changed circumstances in the central Gulf of Mexico require that the Order be reopened; and (ii) in light of these changed circumstances, the order should be modified to set aside the development fund requirement imposed by Paragraph V.D.

The Commission previously has modified orders to eliminate a divestiture requirement when a respondent subsequently sold off

¹⁰ 16 C.F.R. § 2.51.

¹¹ See *Louisiana-Pacific Corp.*, 967 F.2d at 1376-77 (reopening and modification are independent determinations).

¹² See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

¹³ 16 C.F.R. § 2.51(b).

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one of the “offending assets” that prompted the divestiture in the first place.¹⁴ In this instance, El Paso’s acquisition of ANR from Coastal gave rise to the Green Canyon and Tarpon divestitures and the establishment of the development fund. El Paso’s 2007 sale of ANR to TransCanada introduced a new competitor to take the place of Coastal, and seemingly would eliminate any concern if El Paso were to be relieved of its development fund obligation.

In previous matters, however, the respondents have sold the offending assets and petitioned the Commission to reopen and modify the order within a time period much shorter than the almost ten years that have passed in this matter. Because market conditions may have changed or other considerations may have become relevant since the Commission issued its Order, it is appropriate to consider whether elimination of the development fund would affect competition in the relevant market today. If removal of the development fund would substantially lessen competition today, then an argument might exist for denying El Paso’s Petition notwithstanding the sale of ANR.

Whether competition might be substantially reduced in the market today if the Commission terminated El Paso’s fund obligation depends on the likelihood that the fund would ever be used by Williams.¹⁵ We do not believe that removing the fund obligation would reduce significantly Williams’ reach in the development area and thereby potentially reduce competition. To date, Williams has not found any opportunities to draw on the fund. The recent focus on shale natural gas development has led to a decline in the exploitation of offshore natural gas reserves. Natural gas production and exploration in the Central Gulf area has dropped dramatically (with both activities declining by approximately 76 percent) since the fund was established. Declining production and exploration thus supports the conclusion that Williams is unlikely to use the development fund before the Order expires in another ten years. El Paso’s settlement with

¹⁴ See *In the Matter of Midcon Corporation*, Dkt. No. 9198, Order Modifying Order, 111 F.T.C. 100 (Feb. 6, 1986); *In the Matter of Entergy Corporation*, Dkt. No. C-3998, 140 F.T.C. 1125, Order Reopening and Setting Aside Order (July 1, 2005).

¹⁵ The development fund is contingent – available to Williams only for specific uses, and only until 2021.

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Williams is consistent with this conclusion. The negotiated settlement amount is not a substantial percentage of the total, which suggests that Williams itself thinks it is unlikely to use a substantial portion of the fund. Considering that the fund has never been used, and market conditions suggest expansion is unlikely, modifying the Order would allow El Paso simply to get back (after its settlement with Williams) what is expected to remain when the Order terminates.¹⁶

CONCLUSION

For the reasons explained above, the Commission has determined to reopen and modify the Order to set aside the development fund required by Paragraph V.D. of the Order. Therefore, the Order will be modified to set aside the development fund requirement and to set aside the related definitions.

Accordingly, **IT IS ORDERED** that this matter be, and it hereby is, reopened; and

IT IS FURTHER ORDERED that Paragraphs I.F., I.I., I.YY., and V.D. of the Order be, and hereby are, set aside as of the effective date of this order.

By the Commission.

¹⁶ El Paso also claims that reopening and modifying the Order is in the public interest. Having determined to grant El Paso's Petition due to changed conditions, the Commission need not decide the separate public interest question.

Interlocutory Orders, Etc.

GEMTRONICS, INC. AND WILLIAM H. ISELY

Docket No. 9330. Order, October 7, 2010

Order holding that oral argument on Respondents' appeal of the Chief Administrative Law Judge's Initial Decision regarding attorney fees is unnecessary.

ORDER DISPENSING WITH ORAL ARGUMENT

In this matter, Respondents appeal from the Chief Administrative Law Judge's Initial Decision on Respondents' Application for an Award of Attorney Fees and Other Expenses. Commission Rule 3.52(h) contemplates oral argument in cases on appeal to the Commission, "unless the Commission otherwise orders on its own initiative."¹

In this case, the Commission has received extensive briefing from the parties on the issues presented by Respondents' appeal, as well as briefing from a third party as *amicus curiae*. It is unlikely that oral argument would provide any additional information the parties have not already thoroughly addressed in their briefs, and the Commission has therefore determined that oral argument in this matter is not necessary. Accordingly,

IT IS ORDERED THAT no oral argument will be held in this matter.

By the Commission.

¹ 16 C.F.R. § 3.52(h) (2010); *see also* 16 C.F.R. § 3.52(b)(2) (2010) (applicable to cases which were initiated after Jan. 13, 2009); 74 Fed. Reg. 1804, 1834 (Jan. 13, 2009).

Interlocutory Orders, Etc.

THE DOW CHEMICAL COMPANY

Docket No. C-4243. Order, October 26, 2010

Letter approving the application by The Dow Chemical Company to amend its license agreement.

LETTER APPROVING APPLICATION TO AMEND LICENSE
AGREEMENT

Dear Mr. Cary:

Pursuant to Rule 2.41(f) of the Commission's Rules of Practice and Paragraph III.G. of the Decision and Order in this matter, the Commission has determined to approve the request of The Dow Chemical Company (June 8, 2010) to approve the Amendment of the License of Dow Operating Systems and Tools, Exhibit J to the Asset Purchase Agreement.

By direction of the Commission.

AGILENT TECHNOLOGIES, INC.

Docket No. C-4292. Order, November 12, 2010

Letter approving the application by Agilent Technologies, Inc. to modify its divestiture documents.

LETTER APPROVING APPLICATION TO CHANGE DIVESTITURE
DOCUMENT

Dear Mr. Skitol:

This is in reference to the Application for Approval of Change in Divestiture Document ("Application"), dated September 10, 2010 and filed by Agilent Technologies, Inc. ("Agilent"). Pursuant

Interlocutory Orders, Etc.

to the Decision and Order in File No. 091-0135, Agilent requests approval of a proposed change in one divestiture document relating to the Consent Order.

After consideration of Agilent's Application and other available information, the Commission has determined to approve the proposed change as set forth in Agilent's Application. In according its approval, the Commission has relied upon the information submitted and the representations made in connection with Agilent's Application and has assumed them to be accurate and complete.

By direction of the Commission.

FIDELITY NATIONAL FINANCIAL, INC.

Docket No. C-4300. Order, November 12, 2010

Letter approving application by Fidelity National Financial, Inc. to divest certain assets to Data Trace Information Services, Inc., in accordance with the requirements of the consent order.

LETTER APPROVING APPLICATION FOR DIVESTITURE

Dear Mr. Simons:

This letter responds to Fidelity National Financial, Inc.'s ("Fidelity") September 7, 2010, "Petition for Approval of Proposed Divestiture to Data Trace Information Services, Inc." ("Petition") requesting that the Commission approve Fidelity's divestiture of the Michigan Title Plant Assets to Data Trace Information Services, Inc. ("Data Trace") pursuant to the order in this matter. The Petition was placed on the public record for comments for thirty days, until October 16, 2010, and no comments were received.

Interlocutory Orders, Etc.

After consideration of the proposed transaction as set forth in the Petition and supplemental documents, as well as other available information, the Commission has determined to approve the divestiture of the Michigan Title Plant Assets to Data Trace. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Fidelity's Petition, and has assumed them to be accurate and complete.

By direction of the Commission.

THE NORTH CAROLINA BOARD OF DENTAL
EXAMINERS

Docket No. 9343. Order, November 15, 2010

Order granting Complaint Counsel an extension of time to file a response to Respondent's Motion to Dismiss and granting Respondent an extension of time to file a response to Complaint Counsel's Motion for Partial Summary Decision.

ORDER GRANTING JOINT MOTION FOR EXTENSION OF TIME

On November 2, 2010, Complaint Counsel filed a Motion For Partial Summary Decision in this matter, and on November 3, 2010, Respondent filed a Motion To Dismiss. Under the Commission Rules of Practice governing adjudicative proceedings, the responses to these Motions would respectively be due on November 17, 2010, and November 15, 2010.¹ On November 5, 2010, Complaint Counsel and Respondent filed a Joint Motion For Extension of Time ("Joint Motion"), proposing an alternative schedule pursuant to which their respective

¹ See Commission Rule 3.24(a)(2), 16 C.F.R. § 3.24(a)(2)(2010), and Commission Rule 3.22(d), 16 C.F.R. § 3.22(d); see also Commission Rule 4.3, 16 C.F.R. § 4.3.

Interlocutory Orders, Etc.

responses would be due on November 30, 2010, and their respective replies to those responses would be due on December 10, 2010.

The Commission has determined to grant the Joint Motion. The time periods prescribed by the Commission Rules of Practice ordinarily should afford parties to Commission proceedings sufficient time to effect filings of sufficient quality and detail to aid in the preparation of Commission opinions and orders. In this case, however, the virtually simultaneous filing of two dispositive motions -- a Motion For Partial Summary Decision and a Motion To Dismiss -- means that the parties will consequently need to file virtually simultaneous responses and replies. To ensure that the parties can fully address all relevant issues arising from these two Motions in their respective filings, the Commission has determined to grant the extensions the parties have requested. Accordingly,

IT IS ORDERED THAT Respondent must file any response to Complaint Counsel's Motion For Partial Summary Decision -- and Complaint Counsel must file any response to Respondent's Motion To Dismiss -- on or before November 30, 2010; and

IT IS FURTHER ORDERED THAT Respondent and Complaint Counsel must file any replies to the foregoing responses on or before December 10, 2010.

By the Commission, Commissioner Brill recused.

Interlocutory Orders, Etc.

THE NORTH CAROLINA BOARD OF DENTAL
EXAMINERS

Docket No. 9343. Order, November 15, 2010

Order denying motion to stay the adjudicative proceeding before the Administrative Law Judge pending the Commission's decisions on Complaint Counsel's Motion for Partial Summary Decision and Respondent's Motion to Dismiss.

ORDER DENYING MOTION FOR STAY OF PROCEEDING

On November 2, 2010, Complaint Counsel filed a Motion For Partial Summary Decision in this matter, and on November 3, 2010, Respondent filed a Motion To Dismiss. On November 3, 2010, Respondent also filed a Motion For Stay of the Proceeding "until the Motion to Dismiss has been determined on the merits. . . ." ("Motion For Stay" at 1), and on November 5, 2010, Complaint Counsel filed a Response to that Motion advising that Complaint Counsel does not oppose the Motion For Stay. The Commission has issued an Order granting the parties' Joint Motion For Extension of Time, pursuant to which responses to the dispositive Motions will be due on November 30, 2010, and replies to those responses will be due on December 10, 2010. As the Commission stated in that Order, the Joint Motion has been granted in order to ensure that the parties can fully address all relevant issues arising from the dispositive Motions in their respective filings.

The Commission has determined not to stay the proceedings before the Chief Administrative Law Judge in this matter while it considers the Motion To Dismiss and the Motion For Partial Summary Decision. Commission Rule 3.22(b) provides:

A motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders.¹

When the Commission proposed to amend the Commission Rules governing Commission adjudicative proceedings in 2008, it noted:

¹ 16 C.F.R. § 3.22(b) (2010).

Interlocutory Orders, Etc.

Rules 3.22 and 3.24 [if amended as proposed] would provide authority to the Commission to decide in the first instance all dispositive prehearing motions, including motions for summary decision, unless it refers the motion to the ALJ, while at the same time ensuring that the underlying proceedings are not stayed pending resolution of the dispositive motion absent a Commission order.²

The Commission reaffirmed the validity of that approach when it promulgated the final current version of Commission Rule 3.22(b):

The purpose of proposed paragraph [3.22](b) was to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions. . . .³

For similar reasons, the Commission has declined to stay administrative adjudicative proceedings pending the outcome of corollary federal court actions seeking preliminary injunctive relief, based on the concern that staying the administrative proceedings would delay ultimate resolution of the cases at issue.⁴

² *Federal Trade Commission, 16 CFR Parts 3 and 4: Rules of Practice: Proposed Rule Amendments and Request For Public Comment*, 73 Fed. Reg. 58832, 58834 (October 7, 2008); *see also id.* at 58836 (“The Commission anticipates that new paragraphs [3.22](b) and (e) would expedite cases by providing that proceedings before the ALJ will not be stayed while the Commission considers a motion, unless the Commission orders otherwise . . .”).

³ *Federal Trade Commission, 16 CFR Parts 3 and 4: Rules of Practice: Interim Final Rules With Request For Comment*, 74 Fed. Reg. 1804, 1810 (January 13, 2009), *adopted as final*, 74 Fed. Reg. 20205 (May 1, 2009). The amendments thus effected govern all Commission adjudicatory proceedings commenced after January 13, 2009, such as this proceeding. *See* 74 Fed. Reg. at 1804.

⁴ *See, e.g., In the Matter of Whole Foods Market, Inc., Docket No. 9324* (Order Amending Scheduling Order and Denying Respondent’s Motion To Stay Proceedings, Issued December 19, 2008 (<http://www.ftc.gov/os/adjpro/d9324/12192008orderamending.pdf>)); *In the Matter of Inova Health System Foundation, et al., Docket No. 9326* (Order Denying Respondents’ Motion To Stay Administrative Proceedings, Issued May 29, 2008 by Commissioner Rosch) (<http://www.ftc.gov/os/adjpro/d9326/080530orderdenying.pdf>).

Interlocutory Orders, Etc.

That same concern is present here, and the parties have given us no reason to depart from our preference to move Part 3 matters expeditiously. Accordingly,

IT IS ORDERED THAT Respondent's Motion For Stay of the Proceeding be, and it hereby is, denied.

By the Commission, Commissioner Brill recused.

THE NORTH CAROLINA BOARD OF DENTAL
EXAMINERS

Docket No. 9343. Order, November 30, 2010

Order granting Complaint Counsel and Respondent a second extension of time to file responses to Respondent's Motion to Dismiss and to Complaint Counsel's Motion for Partial Summary Decision, respectively.

ORDER GRANTING ONE FINAL EXTENSION OF TIME

On November 2, 2010, Complaint Counsel filed a Motion For Partial Summary Decision in this matter, and on November 3, 2010, Respondent filed a Motion To Dismiss.

On November 15, 2010, the Commission issued an Order Granting Joint Motion For Extension of Time, pursuant to which the responses to these Motions must be filed by November 30, 2010, and any replies to these responses must be filed by

<http://www.ftc.gov/os/adjpro/d9322/070524commordstaydiscov.pdf> Although the Commission did determine to stay the proceedings in *In the Matter of South Carolina State Board of Dentistry, Docket No. 9311*, <http://www.ftc.gov/os/adjpro/d9311/031023ordgrntrespmotostaydiscov.pdf> pending its resolution of Respondent's Motion To Dismiss (Order Granting Respondent's Unopposed Motion To Stay Discovery, Issued October 23, 2003) (<http://www.ftc.gov/os/adjpro/d9311/031023ordgrntrespmotostaydiscov.pdf>), that Order was issued several years before the Commission promulgated the current version of Commission Rule 3.22.

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December 10, 2010. On November 29, 2010, Respondent filed a Motion For Extension of Time (“Motion”) requesting that the Commission extend the deadline by which Respondent must file its response to Complaint Counsel’s Motion For Partial Summary Decision until December 10, 2010, and the deadline by which Respondent must file its reply to Complaint Counsel’s response to Respondent’s Motion To Dismiss until December 20, 2010. On November 30, 2010, Complaint Counsel filed an Opposition to Respondent’s Motion (“Opposition”).

The Commission issued its November 15, 2010 Order in order to ensure that the parties can fully address all relevant issues arising from the dispositive Motions in their respective filings. By separate Order issued on November 15, 2010, the Commission determined not to stay the proceedings before the Chief Administrative Law Judge in this matter. As a consequence, since that date a large quantity of additional information has been produced to both Respondent and Complaint Counsel through the discovery process. The Commission has decided to grant one final extension of time so that the parties can address – in their respective responses and replies – all information produced through the discovery process that is relevant to the Commission’s resolution of the two dispositive Motions. Accordingly,

IT IS ORDERED THAT Respondent must file any response to Complaint Counsel’s Motion For Partial Summary Decision – and Complaint Counsel must file any response to Respondent’s Motion To Dismiss – on or before December 10, 2010; and

IT IS FURTHER ORDERED THAT Respondent and Complaint Counsel must file any replies to the foregoing responses on or before December 20, 2010.

By the Commission, Commissioner Brill recused.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

D.R. HORTON, INC.

FTC File No. 102 3050. Order, July 12, 2010

LENNAR CORPORATION

FTC File No. 102 3051. Order, July 12, 2010

RESPONSE TO D.R. HORTON, INC.'S AND LENNAR CORPORATION'S
PETITIONS TO LIMIT OR QUASH CIVIL INVESTIGATIVE DEMANDS

Dear Mr. Kider:

On December 11, 2009, D. R. Horton, Inc. (“DHI”) and Lennar Corporation (“LC”) (collectively, “Petitioners”) filed substantially similar Petitions to Limit or Quash Civil Investigative Demands Issued by the Commission to Petitioners (“Petitions”). On March 9, 2010, Commissioner Pamela Jones Harbour, acting pursuant to Commission Rule 2.7(d)(4), 16 C.F.R. § 2.7(d)(4), issued a Letter Ruling denying the Petitions (“Letter Ruling”). Pursuant to Commission Rule 2.7(f), 16 C.F.R. § 2.7(f), Petitioners filed substantially similar Requests for Full Commission Review of the Letter Ruling (“Requests”). This letter is to advise you that the Commission has completed this review and affirms the Letter Ruling in its entirety. Because neither Petitioner requested a stay pending full Commission review as permitted by Commission Rule 2.7(f), the now expired March 24, 2010, return date set by the Letter Ruling remains in effect.

I. Background

Both Petitioners are multi-state builders of homes, each with several billion dollars of annual revenues.¹ As stated in its Petition, LC “was ranked as the nation’s third largest homebuilder in 2008”; currently, it “builds single-family homes in 41 markets

¹ See *infra* notes 11 and 12.

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in 16 states” and employs 3,900 employees. LC Petition at 2, 6. “[D]uring the time period at issue here, [DHI] was ranked as the largest homebuilder by units sold in the United States”; it “employs approximately 3,000 workers nationwide” and “builds single-family homes in 83 markets in 27 states.” DHI Petition at 3. Through subsidiaries and affiliates, Petitioners also provide mortgage loans and other loan-related services to the buyers of their houses. See LC Petition, Ex. A at 2; DHI Petition, Ex. A at 2-3.

Pursuant to two Commission resolutions,² on November 12, 2009, the Commission issued substantially similar Civil Investigative Demands (“CIDs”) to both Petitioners. Petitioners filed substantially similar Petitions, pursuant to Commission Rule 2.7(d)(1), 16 C.F.R. § 2.7(d)(1). The Petitions asserted, among other arguments, that the CIDs: (1) seek information that is beyond the scope of the investigation authorized by the resolutions; (2) request information that is too indefinite because the CIDs do not identify any specific actions or business practices that the Commission believes Petitioners conducted; (3) require the production of information and materials that are unduly burdensome to produce; and (4) command the production of privileged information. E.g., LC Petition at 5-8, 13, 28-29; DHI Petition at 6-9, 14, 32-33.

The Letter Ruling denied the Petitions in their entirety. It found that: (1) “all of the information sought by the CIDs is reasonably relevant to purposes of the inquiry determined by reference to the resolutions,” Letter Ruling at 5-6; (2) the claims

² Resolution Directing Use of Compulsory Process In Nonpublic Investigation: Unnamed Violators of the Equal Credit Opportunity Act (Aug. 1, 1994) (relating to acts or practices that may violate the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f, and Regulation B, 12 C.F.R. pt. 202, or Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45); 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) (relating to acts or practices that may violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or the Consumer Credit Protection Act, 15 U.S.C. §§ 1601–1693r, including the Truth in Lending Act, 15 U.S.C. §§ 1601–1667f, the Fair Credit Reporting Act, 15 U.S.C. §§ 1681–1681x, and the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f).

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“that the CIDs are too indefinite in their description of the information and materials to be produced are simply without merit,” *id.* at 6 n.16; (3) the evidence supporting the Petitions did not demonstrate that compliance with the CIDs by Petitioners would “unduly disrupt or seriously hinder [their] normal operations,” *id.* at 7; and (4) the “CIDs expressly do not require the production of privileged materials,” *id.* at 8.

In their Requests, Petitioners attribute the following errors to the Letter Ruling: (1) a single decision for the two Petitions was “inappropriate and fundamentally unfair,” DHI Request at 1 n.1; LC Request at 1 n.1; (2) the Letter Ruling reflects a “genuine hostility” towards Petitioners, DHI Request at 2; LC Request at 2; (3) the Letter Ruling held that because Petitioners have decentralized business structures they have no “right to assert burdensomeness objections,” DHI Request at 2; LC Request at 2; (4) the Letter Ruling failed to acknowledge that the CIDs constitute an improper “fishing expedition” into all of Petitioners’ documents, DHI Request at 5; LC Request at 7; (5) the Letter Ruling demonstrates that the FTC has already prejudged the outcome of its investigation by repeated inflammatory statements, DHI Request at 2; LC Request at 3; (6) the Letter Ruling demonstrates that Petitioners were forced to choose between negotiating with Commission staff on scheduling or forfeiting their right to preserve any objections, DHI Request at 2; LC Request at 3; (7) the Letter Ruling did not find that the FTC has conducted itself in an “unfair and overreaching manner” in connection with the issuance and enforcement of the CIDs, DHI Request at 2-4; LC Request at 3-6; and (8) the Letter Ruling permits the Commission to “limit [Petitioners’] ability to assert appropriate privilege objections,” DHI Request at 13; LC Request at 15.

II. Standard of Review

It is well-established that a CID is proper so long as: (1) the investigation is within the scope of the Commission’s jurisdiction; (2) the information sought by the CID is reasonably relevant to the investigation authorized by the Commission’s resolutions; and (3) compliance is not unduly burdensome. *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 652-53 (1950); *United States v.*

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Legal Servs. for New York City, 249 F.3d 1077, 1083 (D.C. Cir. 2001); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992); *FTC v. Texaco Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (*en banc*). If the Commission determines a CID fails to meet these criteria, the Commission has the authority to modify or quash it. 15 U.S.C. § 57b-1(f)(1); 16 C.F.R. §§ 2.7(d)(4) and (f).

III. Analysis**A. The Investigation Is Within The Scope Of The Commission's Jurisdiction.**

Petitioners do not challenge that an investigation of possible violations of the Federal Trade Commission Act³ and the Consumer Credit Protection Act,⁴ including the Equal Credit Opportunity Act and its implementing Regulation B,⁵ the Truth in Lending Act and its implementing Regulation Z,⁶ and the Fair Credit Reporting Act,⁷ is within the scope of the Commission's jurisdiction.

B. The Information Sought By The CIDs Is Reasonably Relevant To The Investigation Authorized By The Commission's Resolutions.

In the context of a CID, the information being sought is "reasonably relevant" so long as it is "not plainly incompetent or irrelevant to any lawful purpose of the agency." *Invention Submission*, 965 F.2d at 1089 (citing *Texaco*, 555 F.2d at 872-73 n.23, and quoting *Morton Salt*, 338 U.S. at 652). In a CID, the Commission "is under no obligation to propound a narrowly focused theory of a possible future case." *Texaco*, 555 F.2d at

³ 15 U.S.C. §§ 41-58.

⁴ 15 U.S.C. §§ 1601-1693r. The Consumer Credit Protection Act has several titles, including the Truth in Lending Act (Title I), 15 U.S.C. §§ 1601-1667f, the Fair Credit Reporting Act (Title VI), 15 U.S.C. §§ 1681-1681x, and the Equal Credit Opportunity Act (Title VII), 15 U.S.C. §§ 1691-1691f.

⁵ 15 U.S.C. §§ 1691-1691f; 12 C.F.R. pt. 202.

⁶ 15 U.S.C. §§ 1601-1667f; 12 C.F.R. pt. 226.

⁷ 15 U.S.C. §§ 1681-1681x.

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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 assert that the CIDs seek information that is beyond the scope of the investigation authorized by the resolutions. They also claim that the CIDs’ specifications are too indefinite because they do not identify any specific actions or business practices of Petitioners that are the focus of the investigation. Both contentions are unfounded.

The two relevant Commission resolutions authorize the issuance of CIDs to investigate potential violations of the Federal Trade Commission Act and the Consumer Credit Protection Act. Specifically, the two resolutions authorize the issuance of the CIDs to investigate whether in the advertising, marketing, or sale of homes and loans Petitioners have engaged in: (1) deceptive or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45; or (2) acts or practices in violation of the Consumer Credit Protection Act, including the Equal Credit Opportunity Act and its implementing Regulation B, the Truth in Lending Act and its implementing Regulation Z, or the Fair Credit Reporting Act. Such acts or practices may include, but are not limited to, discriminating in the extension of credit on the basis of an applicant’s race or national origin; failing to disclose properly consumer credit terms; and failing to provide an appropriate notice of adverse action to the consumer.

The Commission is not required to identify to Petitioners the specific acts or practices under investigation. *Texaco*, 555 F.2d at 874, 877 (“[T]he relevance of the agency’s subpoena requests may be measured only against the general purposes of its investigation.”); *see also Morton Salt*, 338 U.S. at 642-43 (holding that the FTC’s power of inquiry is “more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not”). It is sufficient that a CID identify the subject matter of the investigation, which these CIDs do by stating that the Commission is investigating the sales, marketing and loan

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practices of Petitioners for potential violations of the aforementioned statutes.

Moreover, we agree with Commissioner Harbour that a fair reading of the CIDs does not support Petitioners' claim that the CIDs require the production of every document created by Petitioners during the relevant time period and, therefore, require the production of information irrelevant to the investigation. For example, most of the specifications apply only to either marketing and sales activities or to mortgage lending activities. This limitation alone excludes a large portion of Petitioners' business operations, such as home construction and land development.

C. Compliance Is Not Unduly Burdensome.

Compliance with the requirements of a CID is an undue burden only when compliance would threaten to seriously impair or unduly disrupt the normal operations of the target's business. *See FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980); *Texaco*, 555 F.2d at 882. The target of a CID must expect to incur some burden in responding to a CID and the level of burden required increases when the burden is in large part attributable to the magnitude of the target's business operations and the comprehensive nature of the investigation. *See Texaco*, 555 F.2d at 882 ("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."); *In re FTC Corporate Patterns Report Litig.*, Nos. 76-0126, 76-0127, 1977 WL 1438, at *16 (D.D.C. July 11, 1977) (concluding that "there is no doubt that the relative size and complexity of the corporate parties' business operations contribute to the compliance burden" and noting that "the cost of compliance for the corporate parties, even if high in an absolute sense, is not high compared to other costs borne by such large corporations"). Thus, in *Texaco*, a court of appeals enforced a CID even though *Texaco* claimed it would take 62 work-years and \$4 million (in 1977 dollars) to comply with the Commission's

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CID. 555 F.2d at 922. This amount is equivalent to approximately \$14.4 million in 2010 dollars.⁸

The burden of establishing undue burden rests wholly on Petitioners, *Nat'l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-29 (Jun. 2, 1998), and “the presumption is that compliance should be enforced to further the agency’s legitimate inquiry into matters of public interest.” *Shaffner*, 626 F.2d at 38. At bottom, Petitioners assert four bases for their undue burden claim. First, they assert that the decentralized nature of their businesses means that much of the information responsive to the CIDs is located in regional and divisional offices, not at their corporate headquarters, and that it will take thousands of hours to retrieve this information from those offices and the employees located there.⁹ Second, they claim that the collapse of the new housing market has hurt their companies financially, which amplifies the impact that the CIDs have on Petitioners’ ability to continue to operate. Third, they claim that, due to significant corporate contraction resulting from the housing market collapse, they would be forced to contact thousands of former employees to formulate responses to the CIDs. Finally, both Petitioners contend that the CIDs require them to individually review each of their tens of thousands of loan files.

Even if Petitioners are as decentralized as they contend, a company’s decision as to how to structure itself does not excuse it from compliance with a valid CID. Otherwise, any decentralized

⁸ This figure is derived from the Bureau of Labor Statistics’ average Consumer Price Index for each calendar year and the latest monthly index value for the current year. See Bureau of Labor Statistics, CPI Inflation Calculator, available at http://www.bls.gov/data/inflation_calculator.htm.

⁹ DHI belatedly filed a supplemental declaration with its Request, which raises its estimation of hours required to comply with the CID, based on its self-described “fuller understanding of the demands of the CID,” Hedgepeth Supp. Decl. ¶ 3. DHI’s explanation for its belated filing is not persuasive because DHI’s Petition had already taken the position that the CID “seeks the production of virtually every document created by D.R. Horton.” DHI Petition at 2. Moreover, like the Petition it seeks to supplement, this declaration rests on a misreading of the CID and double-counts many estimated hours. Assuming for argument’s sake, however, that the declaration is timely and its estimate accurate, it still does not warrant a finding that compliance is unduly burdensome.

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business would be exempt from anything more than a cursory investigation by the Commission.¹⁰ As to the impact of the decline of the housing market on Petitioners' ability to comply with the CIDs, even though they have fewer employees and lower revenues than during the housing boom years, DHI¹¹ and LC¹²

¹⁰ Neither of the two "decentralized business operations" cases cited by Petitioners is persuasive here. *EEOC v. McCormick & Schmick's*, No. 07-80065, 2007 WL 1430004 (N.D. Cal. May 15, 2007), involved a company with about one-tenth the revenues of Petitioners, and requiring McCormick & Schmick's to respond to an administrative subpoena would have imposed a far greater relative burden than any imposed on either Petitioner by the Commission's CIDs. Compare McCormick & Schmick's Seafood Restaurants, Inc., Annual Report (Form 10-K for fiscal year ended Dec. 26, 2009), at 25-26 (Mar. 8, 2010) (noting annual revenues of \$308 million, total stockholders' equity of \$160 million, and cash and cash equivalents of \$10.5 million for fiscal year ended 2006), with D.R. Horton, Annual Report (Form 10-K for fiscal year ended Sept. 30, 2009), at 23, 72 (Nov. 20, 2009) (noting consolidated revenues of \$3.66 billion, \$2.3 billion total stockholders' equity, and cash and cash equivalents of \$2.0 billion for fiscal year ended 2009), and Lennar Corporation, Annual Report (Form 10-K for fiscal year ended Nov. 30, 2009), at 20, 36, 66 (Jan. 29, 2010) (noting consolidated revenues of \$3.12 billion, \$2.4 billion total stockholders' equity, and cash and cash equivalents of \$1.5 billion for fiscal year ended 2009).

Bell Fourche Pipeline Co. v. United States, 554 F. Supp. 1350 (D. Wyo. 1983), remanded for lack of subject matter jurisdiction, 751 F.2d 332 (10th Cir. 1984), not only lacks any precedential value, but also is distinguishable. In contrast to the instant Petitions, in *Bell Fourche*, the subpoena respondents presented evidence that compliance with the administrative subpoenas had "severely disrupted" their day-to-day operations because of the presence of Commission investigators on their business premises. 554 F. Supp. at 1362. In addition, the administrative subpoenas at issue in *Bell Fourche* – unlike those at issue here, as discussed above, *see supra* Section III.B – were so extensive as to cover literally every document of the subpoenaed companies. *See id.*

¹¹ D.R. Horton, Annual Report (Form 10-K for fiscal year ended Sept. 30, 2009), at 23 (Nov. 20, 2009) (noting consolidated revenues of \$3.66 billion for fiscal year ended Sept. 30, 2009); D.R. Horton, Quarterly Report (Form 10-Q for quarter ended Mar. 31, 2010), at 3-4 (Apr. 30, 2010) (noting consolidated net income of \$203.4 million and \$11.4 million for the six and three months ended Mar. 31, 2010, respectively; as of Mar. 31, 2010, DHI had \$1.61 billion of unrestricted cash and \$2.59 billion of shareholders' equity, including \$792.8 million of retained earnings).

¹² Lennar Corporation, Annual Report (Form 10-K for fiscal year ended Nov. 30, 2009), at 20 (Jan. 29, 2010) (noting consolidated revenues of \$3.12 billion for fiscal year ended Nov. 30, 2009); Lennar Corporation, Report of Unscheduled Material Events or Corporate Changes (Form 8-K stating results for second quarter ended May 31, 2010), Ex. 99.1 at 8, 11 (June 24, 2010)

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remain Fortune 700 companies with billions of dollars in annual revenues and significant equity and assets. Moreover, an economic downturn cannot bar the Commission from investigating possible illegal acts and practices within the Commission's statutory jurisdiction, especially where, as here, any illegal acts and practices by Petitioners could have affected tens of thousands of home buyers.

In any event, no reasonable interpretation of the CIDs' specifications requires either Petitioner to contact former employees to formulate their responses to the CIDs. Rather, Petitioners need only formulate responses using information and materials in their possession, custody or control. CID Instruction H.

Furthermore, as the CIDs' specifications make clear on their face, they do not require the manual review and production of all of Petitioners' loan files. Indeed, in certain specifications, the CIDs invite Petitioners to contact Commission staff to discuss limiting the scope of the CIDs to the extent responsive information in individual loan files is not stored electronically or if more than a specified number of individual loan files may be responsive to a particular specification. See Specifications P-25, P-26, and Data Request Instructions.

Neither Petitioner provided the Commission in its Petition or Request with sufficient information about what potentially responsive information, at the corporate, regional, and divisional levels, is stored electronically or how that electronically stored information ("ESI") can be searched or reviewed. In an age when most corporate information is maintained as ESI, this failure is highly significant to the Commission's review process. Having offered scant information in their Petitions and Requests about Petitioners' ESI, its storage structure and its ability to be searched, both Petitioners fail to demonstrate undue burden.

(noting net earnings attributable to Lennar of \$33.2 million and \$39.7 million for the six and three months ended May 31, 2010, respectively; noting that as of May 31, 2010 LC's homebuilding segments had \$1.1 billion of unrestricted cash and LC as a whole had \$2.5 billion of stockholders' equity).

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Moreover, we agree with Commissioner Harbour's finding that Petitioners' estimates for compliance "include unrealistically high estimates of the number of staff hours required to comply because . . . the companies' estimates are based on erroneous, overblown constructions of the CIDs." Letter Ruling at 7. Likewise, we concur with Commissioner Harbour's determination that, "even if those quantified estimates of burden-hours had any credibility, they seem relatively insignificant when measured against the size of the companies." *Id.* Thus, in the end, Petitioners have not demonstrated that compliance with the CIDs would "threaten to seriously impair or unduly disrupt the normal operations of [their] business[es]." *Shaffner*, 626 F.2d at 38 (citing *Texaco*, 555 F.2d at 882).

D. The CIDs Do Not Seek Privileged Information.

Commission Rule 2.8A, 16 C.F.R. § 2.8A, expressly authorizes the target of a CID to withhold information for which it asserts privilege, as does Instruction C of the CIDs. Petitioners' claims that the CIDs seek privileged information, and that Petitioners would waive their privilege objections if they did not file a petition to quash, are therefore without basis.

E. Petitioners' Other Assertions Of Error In The Letter Ruling Are Without Merit.

Petitioners have not produced any credible evidence to support their claims of hostility, bias, or prejudice. The Commission does not find error in Commissioner Harbour conserving resources by using a single letter ruling to dispose of substantially similar petitions from the same counsel involving substantially similar CIDs, the dispositions of which do not turn on any material factual differences. Nor does the issuance of a single letter ruling making findings contrary to positions taken by Petitioners demonstrate any prejudice, impropriety, hostility or bias.

Petitioners further contend that Commission staff did not act in good faith in their negotiations with Petitioners and that they were forced to forego negotiating with staff to file their Petitions. The Commission finds that these contentions are without merit. Before Petitioners filed their Petitions, staff offered to narrow the

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scope of the CIDs and to extend the time for compliance, but Petitioners either ignored or rejected those offers. After the Petitions were filed, staff made themselves available to both Petitioners to discuss the scope and timing of the CIDs, but without success. After the Petitions were denied and Petitioners filed the present Requests, staff continued to attempt to work with Petitioners as to the scope and timing of the CIDs even though they had not yet made any meaningful efforts to comply with the CIDs.

It was only after staff's repeated attempts to discuss the scope and timing of the CIDs and the expiration of the compliance deadline that Petitioners were willing to meaningfully discuss modifications and time lines for production that were consistent with the investigations. During those discussions, Petitioners agreed to several proposed modifications that were designed to reduce their burden of compliance, consistent with the scope of the investigations – a number of which staff had proposed before Petitioners filed their Petitions. The Associate Director for the Division of Financial Practices has recently modified the CIDs to reflect those agreements, and both Petitioners have agreed to comply with the modified CIDs under a tentative production schedule. Thus, contrary to Petitioners' contentions, staff's extensive efforts to work with both Petitioners – even after their noncompliance with the CIDs – demonstrate staff's good faith in this matter.

IV. Conclusion

For all the foregoing reasons, **IT IS ORDERED THAT** the Letter Ruling be, and it hereby is, **AFFIRMED**.

By direction of the Commission.

Responses to Petitions to Quash

FEATURE FILMS FOR FAMILIES, INC.

*FTC File No. 102 3023. Order, September 23, 2010*RESPONSE TO FIREFIGHTERS CHARITABLE FOUNDATION, INC.'S
PETITION TO LIMIT AND/OR QUASH CIVIL INVESTIGATIVE DEMAND

Dear Mr. McCarthy:

On July 30, 2010, the Federal Trade Commission (“FTC” or “Commission”) received your petition to limit or quash a civil investigative demand (“CID”) issued by the Commission on July 14, 2010, and directed to your client, Firefighters Charitable Foundation, Inc. (“FCF”). This letter advises you of the Commission’s disposition of the petition, effected through the issuance of this ruling by Commissioner Julie Brill, acting as the Commission’s delegate. *See* 16 C.F.R. § 2.7(d)(4).

For the reasons explained below, the petition is denied, and the documents required by the CID must now be produced on or before October 8, 2010. FCF has the right to request review of this ruling by the full Commission. 16 C.F.R. § 2.7(f). Any such request must be filed with the Secretary of the Commission within three days after service of this letter ruling.¹ *Id.* The timely filing of a request for review of this ruling by the full Commission shall not stay the return date established by this ruling. *Id.*

I. The Civil Investigative Demand

On July 14, 2010, the Commission issued a CID under Section 20 of the FTC Act, 15 U.S.C. § 57b-1, that required FCF to produce several categories of documents and to designate an individual to provide testimony in furtherance of a Commission investigation. The Commission Resolution Directing Use of Compulsory Process in a Nonpublic Investigation of Telemarketers, Sellers, Suppliers, or Others (“Commission

¹ This ruling is being delivered by e-mail and express mail. The e-mail copy is provided as a courtesy, and the deadline by which an appeal to the full Commission would have to be filed should be calculated from the date on which you receive the original letter by express mail.

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Resolution”), which was attached to the CID, identifies the nature and scope of the Commission’s investigation:

To determine whether unnamed telemarketers, sellers, or others assisting them have engaged in or are engaging in: (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (as amended); and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commission’s Telemarketing Sales Rule, 16 C.F.R. pt. 310 (as amended), including but not limited to the provision of substantial assistance or support — such as mailing lists, scripts, merchant accounts, and other information, products, or services — to telemarketers engaged in unlawful practices. The investigation is also to determine whether Commission action to obtain redress for injury to consumers or others would be in the public interest.

Among other things, the CID requires to FCF to produce:

3. Budgets or other documents describing actual or anticipated uses of [FCF’s] revenue since January 1, 2008, for programs, administrative expenses, salaries or other compensation of staff, officers or directors, and fundraising expenses.
4. Any documents that describe how, since January 1, 2008, [FCF] has invited potential recipients to request grants or other assistance, determined the qualifications of recipients, and selected the recipients of such assistance.

.....
6. Any reports summarizing the grants or other assistance that [FCF] has funded since January 1, 2008, including, but not limited to, any financial assistance to victims and firefighters, support of volunteer fire departments, first aid education, outreach programs for fire safety, and grants to other charitable organizations.

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....

8. Minutes of [FCF's] Board of Directors for any meetings or actions since January 1, 2008.
9. Documents relating to the review of the compensation of the President [of FCF] at any time since January 1, 2008.
10. Agreements for compensation of officers and staff for any salaries, pension contributions or other benefits paid since January 1, 2008.

II. FCF's Petition to Limit and/or Quash the CID

The FCF petition alleges that the documents requested in specifications 3, 4, 6, 8, 9, and 10 "exceed the scope" of the Commission Resolution because "they are unrelated to unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act and/or deceptive or abuse telemarketing acts or practices in violation of the Telemarketing Sales Rule." Pet. 1. Without elaboration or argument, the petition simply repeats that, for each specification at issue, the CID should be "limited to items within the jurisdiction of the Federal Trade Commission." Pet. 2-3.

III. Analysis

A. The Petition Is Denied Because It Fails To State That Counsel For FCF Has Attempted In Good Faith To Resolve The Matter Without Commission Action.

Commission Rule 2.7(d)(2) requires any petition to quash a CID to be "accompanied by a signed statement representing that counsel for the petitioner has conferred with counsel for the Commission in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement." 16 C.F.R. § 2.7(d)(2). FCF's petition is not accompanied by any such statement.

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The obligation imposed upon a CID recipient to meet and confer with Commission counsel regarding the merits of any objection to a CID is neither a pro forma requirement nor one that can or should easily be waived. That affirmative duty supplies a mechanism for discussing adjustment and scheduling issues and resolving disputes in an efficient manner. Requiring reasonable efforts to resolve avoidable compliance issues serves the salutary purpose of facilitating Commission investigations without unduly intruding into incidental matters.

FCF's failure to prove that it has satisfied the meet-and-confer requirement constitutes an adequate and independent reason to deny FCF's petition, and Commissioner Brill has determined to deny the petition on that basis.

B. The Petition Is Denied Because The Commission Possesses The Authority To Require FCF To Produce The Documents Covered By The CID, And Because The Documents Covered By The CID Are Relevant To The Investigation At Issue.

Even if FCF had satisfied the meet-and-confer requirement in Commission Rule 2.7(d)(2), the petition should be denied because it provides no basis for FCF to refuse to produce the documents required by the CID. It is unclear from the petition whether FCF challenges the FTC's legal authority to issue the CID, *see* Pet. 2-3 ("The request should therefore be limited to items within the jurisdiction of the Federal Trade Commission."), or whether FCF challenges the relevance of the requested documents, *see* Pet. 1 ("The documents . . . are unrelated to unfair or deceptive acts or practices in or effecting commerce."). This letter ruling therefore addresses both issues.

1. The FTC Possesses The Authority To Order FCF To Produce Relevant Documents.

Section 20(c)(1) of the FTC Act provides that:

Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material . . . relevant to unfair or deceptive acts or

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practices in or affecting commerce (within the meaning of section 45(a)(1) of this title) . . . the Commission may . . . issue . . . a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction.

15 U.S.C. § 57b-1(c)(1). FCF is a “person” for purposes of Section 20. *See id.* § 57b-1(a) (“The term ‘person’ means any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law.”). The Commission therefore can require FCF to produce any document relevant to a Commission investigation to determine whether any person has engaged or is engaged in the use of unfair or deceptive acts or practices.

As indicated above, the Commission Resolution attached to the CID authorizes the use of compulsory process in Commission investigations to determine whether telemarketers, sellers, or others assisting them have engaged or are engaged in (1) unfair or deceptive acts or practices that violate Section 5 of the FTC Act, 15 U.S.C. § 45(a), or (2) deceptive or abusive telemarketing acts or practices that violate the Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310. In the investigation at issue here, Commission staff is investigating whether a number of different individuals and entities have engaged in deceptive or abusive acts or practices while soliciting contributions for FCF during telemarketing campaigns. As part of the investigation, staff is examining representations made to consumers regarding FCF’s status as a nonprofit organization and its use of revenues for grants and other assistance. Misrepresentations concerning such matters would violate both Section 5 of the FTC Act and the TSR. The Commission investigation therefore plainly falls within the scope of the Commission Resolution.

To the extent that FCF may be claiming that it is not subject to Commission jurisdiction because it is a nonprofit entity, such a claim provides no basis for quashing or limiting the CID. The Commission can require production of material from an entity that is not subject to the Commission’s enforcement authority if that material furthers the Commission’s investigation of possibly illegal conduct by entities that are subject to the agency’s jurisdiction, such as for-profit telefundraisers making calls on FCF’s behalf. *See, e.g., United States v. Morton Salt*, 338 U.S. 632, 652

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(1950) (“[I]t is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.”).

Moreover, the Commission also possesses the authority to investigate whether its jurisdiction extends to FCF. Just as a court has the power to determine whether it possesses jurisdiction to address and resolve any given case, the FTC has the power to determine whether it possesses jurisdiction over a given matter or entity. *See, e.g., Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 627 (1973); *Endicott Johnson Corp., v. Perkins*, 317 U.S. 501, 509 (1943). Administrative agencies have “wide latitude in asserting their power to investigate by subpoena,” *FTC v. Ken Roberts Co.*, 276 F. 3d 583, 586 (D.C. Cir. 2001), and “an individual may not normally resist an administrative subpoena on the ground that the agency lacks regulatory jurisdiction if the subpoena is issued at the investigational stage of the proceeding.” *FTC v. Ernstthal*, 607 F.2d 488, 490 (D.C. Cir. 1979). “[E]nforcement of an agency’s investigatory subpoena will be denied only when there is ‘a patent lack of jurisdiction’ in an agency to regulate or to investigate.” *Ken Roberts*, 276 F.3d at 587.

FCF states that it is a “non-profit non-commercial organization that is recognized to be exempt from taxation by the Internal Revenue Service.” Pet. 1. However, the fact that FCF may have registered with the IRS as a nonprofit entity does not preclude a finding that FCF is organized to “carry on business for its own profit or that of its members,” 15 U.S.C. § 44, and therefore subject to the FTC’s jurisdiction.² Nor would it preclude an alternative finding that FCF constitutes a “person” subject to the prohibitions of Section 5 of the FTC Act.³ *Id.* § 5.

² *See, e.g., California Dental Ass’n v. FTC*, 526 U.S. 756, 765-69 & n.6 (1999); *In re Ohio Christian College*, 80 F.T.C. 815, 949-50 (1972); *In re Nat’l Secretaries Ass’n*, 40 F.T.C. 352, 358-59 (1945).

³ The Commission has previously maintained that its jurisdiction over “persons” under Section 5 of the FTC Act extends to state-chartered nonprofit municipal corporations such as the City of New Orleans and the City of Minneapolis. *See* Federal Trade Commission, *Prohibitions on Market Manipulation and False Information in Subtitle B of Title VIII of The Energy Independence and Security Act of 2007: Notice of Proposed Rulemaking and Request for Public Comment*, 73 Fed. Reg. 48317, 48324 & n. 86 (Aug. 19,

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For these reasons as well, Commissioner Brill has determined to deny FCF's petition.

2. The Requested Documents Are Relevant To The Commission's Investigation.

To the extent that FCF's objection is to the relevance of the requested documents, specifications 3, 4, 6, 8, 9, and 10 of the CID seek records that will assist the Commission in determining whether representations made in soliciting contributions for FCF are deceptive. For example, FCF's budget documents and financial statements will shed light on how contributions are used, and whether the organization operates as a true nonprofit that provides charitable assistance, or instead exists solely to "carry on business for its own profit or that of its members." 15 U.S.C. § 44. Likewise, documents relating to the operation and governance of FCF — such as records demonstrating how FCF's directors and officers are compensated, and any guidelines for the distribution of charitable assistance — will help the Commission determine whether the representations made in FCF's telefunding calls are misleading. Hence, all of the documents identified in specifications 3, 4, 6, 8, 9, and 10 are "relevant to unfair or deceptive acts or practices in or affecting commerce" and therefore must be produced in response to the CID. *Id.* § 57b-1(c)(1).

IV. Conclusion and Order

For the foregoing reasons, **IT IS HEREBY ORDERED** that FCF's Petition to Limit or Quash the CID be, and it hereby is, **DENIED**; and

IT IS FURTHER ORDERED that the documents required by the CID must now be produced on or before October 8, 2010.

By direction of the Commission.

2008) (*citing In re City of New Orleans*, 105 F.T.C. 1, 1-2 (1985); *In re City of Minneapolis*, 105 F.T.C. 304, 305 (1985)).

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CHURCH & DWIGHT CO., INC.

FTC File No. 091 0037. Order, December 8, 2010

RESPONSE TO FIREFIGHTERS CHURCH & DWIGHT CO., INC.'S
PETITION TO QUASH, LIMIT, OR STAY SUBPOENAS AD
TESTIFICANDUM DIRECTED TO EMPLOYEES

Dear Mr. Hittinger:

On November 5, 2010, the Federal Trade Commission received your petition to quash, limit or stay four subpoenas ad testificandum issued by the Commission on October 15, 2010, and directed to employees of your client, Church & Dwight Co., Inc. The Commission issued the subpoenas in connection with its investigation of whether Church & Dwight has engaged in unfair methods of competition in the distribution and sale of condoms or other products. This letter advises you of the Commission's disposition of the petition, effected through the issuance of this ruling by Commissioner Julie Brill, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4).

The petition is denied. The petition advances the same arguments made by Church & Dwight (1) in petitions filed with the Commission in November and December 2009 to quash or limit a subpoena duces tecum and a civil investigative demand ("CID"); and (2) in opposition to the Commission's petition, filed in February 2010 in the United States District Court for the District of Columbia, to enforce the subpoena duces tecum and CID. In those proceedings, as in the current petition, Church & Dwight argued first that information relating to the marketing of condoms in Canada is not reasonably relevant to the Commission's investigation. In support of this argument, Church & Dwight has focused on the language of the Commission resolution authorizing the use of compulsory process, which specifies the investigation's focus as the potential monopolization of the "distribution or sale of condoms *in the United States.*" Pet. at 8 (emphasis added).¹

¹ In full, the Commission resolution specifies the scope of the investigation as "whether Church & Dwight Co., Inc. has attempted to acquire, acquired, or maintained a monopoly in the distribution or sale of condoms in

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Second, Church and Dwight has argued that information relating to products other than condoms is not reasonably relevant to the Commission's investigation. Church & Dwight again maintains that the Commission's authorizing resolution limits the investigation, arguing that its clear focus is on condom products and its reference to "other products" is directed to other non-Trojan brand condom products. Pet. at 11.

Both the Commission and the federal district court have rejected these arguments. The district court held that information relating to Canadian marketing is sufficiently relevant to the FTC's investigation. *FTC v. Church & Dwight Co., Inc.*, No. 10-mc-149, slip op. at 3 (D.D.C. Oct. 29, 2010). The court found Church & Dwight's reading of the Commission's resolution "particularly narrow" and determined that activities in Canada could "shed light on the [FTC's] investigation." *Id.* As the court observed, "[i]t cannot be true that in a globalized economy a federal agency may never investigate the activities of [a] foreign subsidiary of an American company merely because the agency's original grant of authority is the investigation of economic activity that has had an impact on interstate commerce within the United States." *Id.* at 4.

The district court similarly held that information relating to products other than condoms is sufficiently relevant to the FTC's investigation, particularly given the standard for relevancy applicable to an FTC investigation. *Id.* at 9-10. The court noted that the Commission resolution explicitly references "other products distributed or sold by Church & Dwight" and rejected as overly narrow Church & Dwight's reading of this reference as "clearly intended" to address only other non-Trojan brand condom products. *Id.*

the United States, or in any part of that commerce, through potentially exclusionary practices including, but not limited to, conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by Church & Dwight, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. Section 45, as amended."

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The current petition presents no new arguments. Indeed, the petition states that “the basic issues implicated by the instant subpoenas and [the federal district court] Enforcement Action are identical.” Pet. at 14. There is thus no reason to depart from the prior rulings of the district court and the Commission.

Perhaps recognizing this, the petition asks in the alternative that the Commission stay the investigational hearings until all appeals of the district court’s ruling are exhausted. Pet. at 2, 14-15. The petition does not, however, articulate any cognizable harm to Church & Dwight or its employees from holding the hearings as scheduled. The petition states that Church & Dwight’s counsel “will instruct the witnesses to not answer questions” on the disputed topics, and thus the witnesses may have to appear again later if Church & Dwight loses its appeal of the district court’s ruling. *Id.* at 14-15. An instruction not to answer would, however, be improper in light of today’s ruling. It would also violate applicable regulations. *See* 16 C.F.R. § 2.9(b)(2) (allowing for instructions not to answer on privilege grounds, but providing only for brief objections on scope grounds). The theoretical problem that Church & Dwight raises would thus be of its own making. On the other hand, staying the investigational hearings pending Church & Dwight’s appeal would delay the Commission’s investigation for a substantial period. Such a delay is not warranted, given the potential ongoing harm to consumers from Church & Dwight’s conduct.

For the foregoing reasons, **IT IS HEREBY ORDERED** that Church & Dwight’s Petition to Quash, Limit or Stay the Subpoenas Ad Testificandum be, and it hereby is, **DENIED**; and

IT IS FURTHER ORDERED that Adrian Huns and Kelly Zhan appear for investigational hearings on January 13, 2011, and that James Craigie and Paul Siracusa appear for investigational hearings on January 14, 2011, as required by the Commission’s Subpoenas Ad Testificandum; and

IT IS FURTHER ORDERED that counsel shall not instruct any witness not to answer a question posed at the investigational hearings on the grounds that the question relates to the marketing of condoms in Canada or to products other than condoms.

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Church & Dwight has the right to request review of this ruling by the full Commission. *See* 16 C.F.R. § 2.7(f). Any such request must be filed with the Secretary of the Commission within three days after service of this letter ruling.² *Id.* The timely filing of a request for review of this ruling by the full Commission shall not stay the dates for the investigational hearings confirmed by this ruling. *Id.*

By direction of the Commission.

² This ruling is being delivered by e-mail and express mail. The e-mail copy is provided as a courtesy, and the deadline by which an appeal to the full Commission would have to be filed should be calculated from the date on which you receive the original letter by express mail.

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