

FEDERAL TRADE COMMISSION DECISIONS

**FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2008, TO JUNE 30, 2008**

PUBLISHED BY THE COMMISSION

VOLUME 145



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MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD JANUARY 1, 2008, TO JUNE 30, 2008

DEBORAH PLATT MAJORAS, *Chairman**
Took oath of office August 16, 2004.

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

JON LEIBOWITZ, *Commissioner*
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.

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

*Resigned, effective March 29, 2008

***Chairman*, effective March 30, 2008

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JANUARY 1, 2008, TO JUNE 30, 2008

IN THE MATTER OF

BUDGET RENT-A-CAR SYSTEM, INC.

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

Docket C-4212; File No. 062 3042
Complaint, January 2, 2008 – Decision, January 2, 2008

This consent order addresses allegations that Budget Rent-A-Car, Inc., a vehicle-rental company, engaged in deceptive practices relating to its EZ Fuel program. The order prohibits Budget from misrepresenting (1) that renters who return their vehicle with a full tank of gas will not incur any fuel-related charges; (2) any fuel-related charge, fee, cost, or requirement; or (3) any charge, fee, or cost, or term or condition, relating to the rental of any vehicle. The order requires that Budget disclose, clearly and conspicuously, at the time of rental transaction any fuel-related charges, fee, or costs; any material requirements related to the fuel-related charge; and the manner, if any, in which the renter can avoid such fuel-related charges. The order prohibits Budget from making any representation about the benefits, costs, or parameters of any fuel-related option unless it discloses clearly and conspicuously, and in close proximity to the representation, any material terms or conditions relating to that fuel option. These provisions do not prohibit Budget from imposing fuel-related charges, so long as such charges are disclosed as required by the order. The order also requires Budget to retain documents relating to its compliance with the order, to disseminate the order to persons with responsibilities relating to the subject matter, to notify the Commission of changes in corporate status, and to submit compliance reports to the Commission.

Participants

For the Commission: *Aaron Gershbock, Frank Gorman, Kerry O'Brien, Evan Rose, Lisa D. Rosenthal, and Sarah Schroeder.*

For the Respondent: *John Hutchins, Amy Mudge, Richard Rosen, and Randal Shaheen, Arnold & Porter.*

COMPLAINT

Complaint

The Federal Trade Commission, having reason to believe that Budget Rent-A-Car, Inc., a corporation (“Budget” or “Respondent”), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware corporation with its principal office or place of business at 6 Sylvan Way, Parsippany, New Jersey.

2. Respondent has advertised, offered for rent, and rented, directly and through franchisees, vehicles to consumers.

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 traditionally has offered customers three options with respect to refueling their rental vehicle. Customers have been able to: (1) return the vehicle with as much fuel as was in the tank upon rental and not pay any fuel or service charge; (2) return the vehicle with less fuel than was in the tank upon rental, and pay the specified per-mile or per-gallon rate for the difference; or (3) prepay for a full tank of gas up-front at a discounted rate, and forego credit for any fuel still in the tank upon return.

5. In November of 2004, Respondent launched a pilot program at six non-franchise locations to charge consumers who drove their rental vehicles fewer than 75 miles an automatic fee of \$5 or \$6, depending on the location, unless the consumer refueled the gas tank and presented a fuel receipt. Respondent refers to this program as the “EZ Fuel” program and the fee as the “EZ Fuel fee.”

6. In June of 2005, Respondent expanded the EZ Fuel program to all of its non-franchise U.S. locations, except for Hawaii.

Complaint

7. In September of 2005, Respondent increased the EZ Fuel fee to \$9.50 for all locations that used the EZ Fuel program.

8. From November of 2004 to June of 2005, customers who were charged the EZ Fuel fee could have the charge reversed only if they refueled the gas tank and, after returning the rental vehicle and being checked out on the rental lot, went inside to the rental counter and presented a fuel receipt.

9. In June of 2005, Respondent began allowing customers with a corporate account who had been charged the EZ Fuel fee to have the charge reversed on the return lot if they refueled the gas tank and presented a receipt. Customers without a corporate account still had to present their fuel receipt inside at the rental counter to have the EZ Fuel fee reversed.

10. In March of 2006, Respondent began allowing all customers who had been charged the EZ Fuel fee to have the charge reversed on the return lot, without having to go inside to the rental counter, if they refueled the gas tank and presented a receipt.

11. Throughout the period Respondent ran the EZ Fuel program, Respondent continued to promote the traditional three fuel options described in Paragraph 4.

12. In connection with the renting of vehicles, Respondent has disseminated or caused to be disseminated promotional and informational material through its website, *budget.com*; its telephone reservation system; point-of-sale disclosures; and the rental contract.

13. Until March of 2006, Respondent did not inform consumers who reserved a rental car by telephoning Budget or via *budget.com* about the EZ Fuel program at any point during the reservation process.

Complaint

14. Certain of Respondent's promotional and informational material including, but not limited to, the website disclosures, the point-of-sale disclosures, and the rental contract, (attached as Exhibits A through D), describe the various charges renters will pay to rent a vehicle and the renters' options and obligations with respect to refueling the vehicle. These disclosures contain the following statements:

A. [BUDGET.COM]

"Common Questions

...

Will any other fees apply? ... On budget.com, all additional charges are quoted as part of your total online rate so there aren't any surprises when you get to the rental counter. ... The rate you reserve is the rate you pay!

...

Does the cost of the rental include the fuel?

Our prices do not include the cost of fuel. Your rental location will discuss the various fuel options available to you at time of rental. You will have the option to purchase a tank of gas at a discounted rate, or simply return the vehicle with a full tank of gas to avoid additional charges.

...

What is your fuel policy?

You have three options:

1. Pay in advance for the fuel . . .
2. If you aren't sure how far you'll be driving, but plan to stop for gas, don't pay Budget in advance for fuel. Simply bring the car back full to avoid any refueling service charge.
3. If you won't be using a full tank, and don't have time to stop for gas, pay us only for the fuel you use,

Complaint

based on the renting location’s per-gallon refueling service charge. Budget customer service representatives can tell you what the renting location’s refueling service charge is when you pick up the car. “

(Exhibit A).

B. [POINT-OF-SALE SIGN]

“YOUR FUEL OPTIONS

ONE: PAY US NOW... BRING IT BACK EMPTY	TWO: DON'T PAY US FOR GAS... BRING IT BACK FULL.	THREE: PAY US TO FILL IT UP WHEN YOU'RE THROUGH.
New! Save Money And Time!	Save Money! Don't pay us for any fuel!	Save time! Pay us only for the fuel you use!
Pay us for your fuel at the time of rental.	Start with a full tank. If you have the time, and want to save on refueling charges, refill the car before returning it.	You'll pay more per galls, but it's a smart option if you won't have time to refuel the car before returning.
...	No fuel charge will be added to your contract.	
ADVANCE FUEL RATE	LOCAL AVG FUEL RATE	REFUELING SERVICE
\$2.70	\$2.85	\$6.75
per gallon	per gallon	per gallon “

(Exhibit B, typically larger than 8.5”x11” with blue background and white lettering).

Complaint

C. [DIFFERENT VARIATIONS OF DISCLOSURE IN RENTAL AGREEMENT FOOTER]

“If car is returned with less fuel than when rented a service charge applies.”

“00-74 miles, \$9.50 refueling chge applies.”

(Exhibit C, text included in the footer of rental agreement, in the first of two columns, typically on the thirteenth line of 15 to 16 lines of text).

D. [RENTAL AGREEMENT JACKET]

“**Fuel Service Charges**. Most Budget rentals come with a full tank of gas, but that is not always the case. There are 3 fueling options:

- (1) IF YOU DO NOT PURCHASE FUEL FROM BUDGET AT THE BEGINNING OF YOUR RENTAL AND YOU RETURN THE CAR WITH AT LEAST AS MUCH FUEL AS WAS IN IT WHEN YOU RECEIVED IT, YOU WILL NOT PAY BUDGET A FUEL AND SERVICE CHARGE.
- (2) IF YOU DO NOT PURCHASE FUEL FROM BUDGET AT THE BEGINNING OF YOUR RENTAL AND YOU RETURN THE CAR WITH LESS FUEL THAN WAS IN IT WHEN YOU RECEIVED IT, Budget will charge you a Fuel and Service Charge at the applicable per mile or per gallon rate specified in the Rental Document. . . .
- (3) IF YOU CHOOSE TO PURCHASE FUEL FROM BUDGET AT THE BEGINNING OF YOUR RENTAL BY SELECTING THE GAS SERVICE OPTION, YOU WILL BE CHARGED AS SHOWN ON THE RENTAL DOCUMENT FOR THAT PURCHASE. . . .”

Complaint

(Exhibit D).

15. Through the means described in Paragraph 14, including but not limited to the representations in Exhibits A-D, Respondent has represented, expressly or by implication, that, if consumers return their rental vehicle with a full gas tank, they will not have to pay any fuel-related charge, fee, or cost.

16. In truth and in fact, in numerous instances, if consumers return their rental vehicle with a full gas tank, they will have to pay a fuel-related charge, fee, or cost. Consumers who drive their rental vehicle fewer than 75 miles will have to pay the EZ Fuel fee, regardless of whether they return the vehicle with a full gas tank, unless they present a gas receipt. Therefore, the representations set forth in Paragraph 14 were, and are, false or misleading.

17. In connection with the renting of vehicles, Respondent has represented that consumers can avoid paying any fuel or fuel-related service fee by returning their rental vehicle with a full gas tank. Respondent has failed to disclose, or failed to disclose adequately, that consumers who drive their rental vehicle fewer than 75 miles and refuel will have to pay the EZ Fuel fee unless they present a fuel receipt. In addition, Respondent failed to disclose that, prior to March of 2006, consumers without corporate accounts who drove their rental vehicle fewer than 75 miles and refueled would have to pay the EZ Fuel fee unless they presented their fuel receipt inside at the rental counter after returning their rental vehicle and checking out on the return lot. These facts would be material to consumers in their rental transaction. The failure to disclose, or failure to disclose adequately, the existence and the terms and conditions of the EZ Fuel program, in light of the representations made, was, and is, a deceptive practice.

18. The acts and practices of Respondent as alleged in this Complaint constitute unfair or deceptive acts or practices, in or

Complaint

affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this second day of January, 2008, has issued this complaint against Respondent.

By the Commission.

Complaint

**Common Questions**

Helpful information about rental requirements, locations, options and terms and conditions.

These frequently-asked questions have been assembled to help you understand Budget's fast and friendly rental process. If your question isn't answered here, please [contact us](#).

**Requirements for Renting**

- [Are there age requirements for renting?](#)
- [Will you check my driving record?](#)
- [What if I have traffic infractions?](#)
- [What kind of credentials and driving record do I need?](#)
- [Do you require a deposit to rent a vehicle?](#)
- [Am I required to take the insurance?](#)
- [What happens if I do not elect to take your insurance?](#)
- [Does my own insurance protect me in the event of an accident?](#)
- [What are the benefits of purchasing coverages?](#)
- [Can I rent a car to take a driving test?](#)
- [Will you accept a citation or summons in lieu of a driver's license?](#)

Reserving My Car

- [Is a credit card minimum required to rent a vehicle?](#)
- [Is a credit card needed to hold my reservation?](#)
- [What kind of deposit is required when I pick up my car?](#)
- [What credit, charge and debit cards do you accept?](#)
- [Can you reserve a specific make/model car for me?](#)
- [How do I know if special terms or conditions apply to my rental?](#)
- [Do you lease vehicles?](#)
- [Do you rent cars by the hour?](#)
- [What additional benefits do you offer when renting with Budget?](#)
- [Do you deliver vehicles?](#)
- [Do you offer a pick-up service?](#)
- [Do you provide cab or bus reimbursement to get to your Budget location?](#)
- [How do I modify my existing reservation?](#)
- [How do I cancel my existing reservation?](#)
- [How can I view my reservation on budget.com?](#)
- [What are the benefits of purchasing the insurance?](#)
- [Can I use another person's credit card if I have their permission?](#)
- [Will my credit/debit card be charged when I make the reservation?](#)

Complaint Exhibit A

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What is your cancellation policy?
Can I take the vehicle out of state/country?
What does "SPGR" mean?
What does "APC" mean?

My Rental Rate
How is my rental rate calculated?
Do late-return fees apply?
Will any other fees apply?
What is the cost of a child safety seat?
What is the cost of a ski rack?
Does the cost of the rental include the fuel?
What is the cost of snow chains?
What is the cost of a towing hitch?

Renting Options: Locations, Products and Extras
Where are your locations?
What types of vehicles do you offer?
What types of discounts and upgrades are available?
Can I pick up at one location and return at another?
Can I rent additional accessories?
Can you confirm availability of additional accessories?
What's the difference between an infant seat, toddler safety seat and a child booster seat?
Do you offer vehicles for drivers with disabilities?
What is your fuel policy?
What insurance do you offer while I'm renting?
Do you offer insurance replacement while the car I own is being serviced?
If I rent, may another person drive?
Can I earn frequent flyer miles when I rent with Budget?
Do you offer hand controls?
Do you offer wheelchair-accessible vehicles?

While I'm renting
What should I do if I'm involved in an accident?
What should I do if I have problems with my car?
Do you have any other rental tips?
Can I add an additional driver after I have picked up the rental vehicle?
Can I change where or when I return a vehicle after I have picked it up?

Other
Do I need to have a RapidRez number to make a reservation online?
Can I store a debit or prepaid card on my Fastbreak profile?
Where on budget.com do I enter a discount code (BCD) or coupon number?
How do I receive a discount code (BCD)?

Complaint Exhibit A

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Complaint

Will any other fees apply?

For Budget and all other rental car companies at many airport locations, concision recovery and facility fees may be charged. A vehicle license recovery fee may be charged as well. For U.S. Government rentals, the government imposes a \$6/day Administrative Rate Supplement (GARS/GA). Please check for fees that apply to your rental in the rates section during your reservation process. On budget.com, all additional charges are quoted as part of your total online rate so there aren't any surprises when you get to the rental counter. And, if any fees go up between the time you reserve and rent your car, just submit our [rate guarantee form](#) and we will reimburse you for any additional fees that you were charged over your reserved rate. The rate you reserve is the rate you pay!

[^ back to top](#)

What is the cost of a child safety seat?

Rates vary by location but average about \$9 per day with a maximum of \$80 per rental. You can obtain the exact price of the baby seat on step 3 of the [online reservation process](#).

[^ back to top](#)

What is the cost of a ski rack?

The cost and availability of ski racks varies by location but usually average about \$7 per day. We display availability and the cost of the ski rack at your chosen location in step 3 of the [online reservation process](#).

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Does the cost of the rental include the fuel?

Our prices do not include the cost of fuel. Your rental location will discuss the various fuel options available to you at time of rental. You will have the option to purchase a tank of gas at a discounted rate, or simply return the vehicle with a full tank of gas to avoid additional charges.

[^ back to top](#)

What is the cost of snow chains?

Snow chains are not offered or available as optional equipment because of local restrictions or the potential damage to the rental vehicle.

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What is the cost of a towing hitch?

Tow hitches are not offered or available as optional equipment because of the potential damage to

Complaint Exhibit A

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Does the cost of the rental include the fuel?

Our prices do not include the cost of fuel. Your rental location will discuss the various fuel options available to you at time of rental. You will have the option to purchase a tank of gas at a discounted rate, or simply return the vehicle with a full tank of gas to avoid additional charges.

[← back to top](#)

What is the cost of snow chains?

Snow chains are not offered or available as optional equipment because of local restrictions or the potential damage to the rental vehicle.

[← back to top](#)

What is the cost of a towing hitch?

Tow hitches are not offered or available as optional equipment because of the potential damage to the rental vehicle.

[← back to top](#)

Renting Options: Locations, Products and Extras**Where are your locations?**

Budget has thousands of worldwide locations, so it's easy to find a quality rental car in your area.

[← back to top](#)

What types of vehicles do you offer?

Budget features Ford and Lincoln products, as well as other fine cars and trucks. Since each location decides which vehicles best fit its customers' needs, all locations do not offer every vehicle. We cannot guarantee that you will receive a certain make, model or color because these specifications are based on availability at time of pickup. When necessary, we will substitute another brand of car within your car class with similar amenities. Upon arrival, however, you may advise the counter representative of your preference and, if possible, we will be happy to accommodate your request. And you'll be glad to know that any Budget car you rent at a corporate location is guaranteed to be less than one year old. Also, we can promise that, if you order an intermediate, for example, we'll have an intermediate available for you -- or upgrade you to a larger vehicle at no extra charge.

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What types of discounts and upgrades are available?

Complaint Exhibit A

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Complaint

What is your fuel policy?

You have three options:

1. Pay in advance for the fuel, and bring the car back empty. Budget will fill the car at, or sometimes below, the current retail pump price. Regardless of how much fuel is left in the tank, credits will not be given for unused gasoline.
2. If you aren't sure how far you'll be driving, but plan to stop for gas, don't pay Budget in advance for fuel. Simply bring the car back full to avoid any refueling service charge.
3. If you won't be using a full tank, and don't have time to stop for gas, pay us only for the fuel you use, based on the renting location's per-gallon refueling service charge. Budget customer service representatives can tell you what the renting location's refueling service charge is when you pick up the car.

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What insurance do you offer while I'm renting?

Purchasing any one of our coverages provides you with the added peace of mind and assurance that you are protected against any damage or theft to your rental vehicle. Below is a brief description of the types of coverages that you'll be offered when you reserve online or pick up your vehicle. Here also is a summary of the optional insurance plans available for an additional daily charge at most Budget locations in the U.S.

These plans are provided by independent insurance companies, and are subject to the provisions, limitations and exclusions contained in the actual policies, which are available for review upon request. Other rental companies may offer similar coverages under different names and at varying limits and costs. As with any optional insurance or protection plan, smart renters will want to do some research before purchasing these options. Budget offers several types of optional insurance plans to protect you during the rental period:

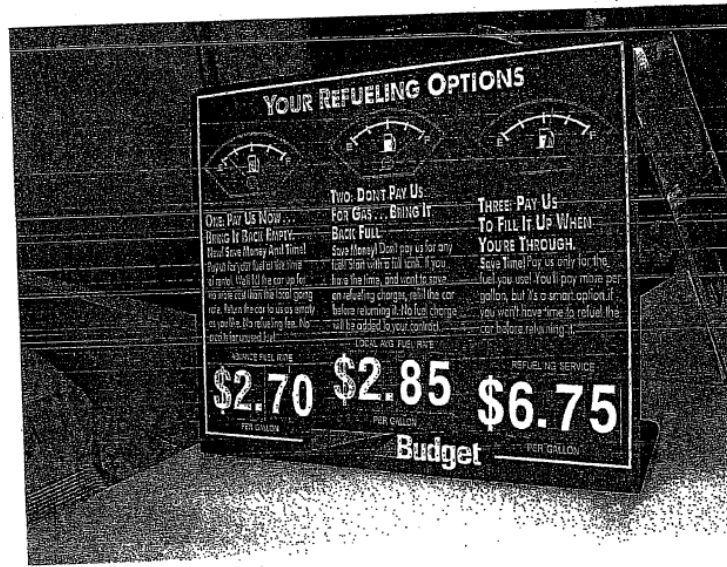
- **Supplemental Liability Insurance (SLI)** is excess automobile liability insurance that protects you and all authorized drivers of the rental vehicle against third-party bodily injury and property-damage claims for which you are legally liable. When SLI is purchased, liability protection provided by Budget and the SLI carrier becomes primary, and applies before other liability protection available to you. This means that you probably won't have to call upon your other protection unless the loss exceeds the SLI limit or results from your use of the vehicle in violation of the terms of the rental agreement. By not having to file a claim under your own policy, you can probably avoid possible premium increases or even cancellation. Another benefit is that SLI provides a high limit of liability protection that might not otherwise be available to the renter. By accepting SLI, the limit of liability protection available to the renter or authorized driver is \$1 million combined single limit.

- **Personal Accident and Effects Insurance (PAE)** protects you and your passengers against accident, injury, and loss to personal property. PAE provides renters and occupants of the rental vehicle with accidental death benefit and coverage for certain medical expenses resulting from an accident. Renters are protected both in and out of the rental vehicle during the entire rental period.

Complaint Exhibit A

pg. 5 of 5

Complaint



Complaint Exhibit B

Complaint

Budget

503945551
Budget Rent A. Car System, Inc.

CHECK # 272727 01/07 9775 AIRPORT BOULEVARD LOS ANGELES, CA, 90045, US 2539

IN DOCUMENT 750942824 F-LEASER 1000 RENTED: 11/09/06/0805 RT: LOS ANGELES RFD PHONE: 210-610-4500 0402E
 CAR# 6 9 7 7 0 6 1 RPT C DUE IN: 12/09/06/0708 RT: LOS ANGELES RFD RATE CODE: BRVC

IN OUT: 0165 FUEL OUT: 3/0 WITH 1 DAY
 PLATES CA 8B4800 FUEL IN: 0/0 MAX 7 DAY
 RES POINT 05 400 SPACES 025

LDK:	15.00/DAY	DECLINED	WEEKLY:	10.00
PRE:	4.00/DAY	DECLINED	DAILY:	55.99
ESP:	3.00/DAY	DECLINED	MONTHLY:	391.95
SL:	12.00/DAY	DECLINED	ANNUAL:	4703.85

RENTED BY PAYMENT: AMEX 1000
 AUTH: Redacted
 PHONE: Redacted
 DRIVERS LIC: Redacted
 RCD: Redacted
 *** RR 7 5 0 9 4 2 8 2 4

BY MY SIGNATURE I ACCEPT AND
 DECLINE ANY OTHER COVERAGE AS
 SHOWN ABOVE. *Y*

ADDITIONAL SERVICES
 ADULT: 10.00
 FUEL SERVICE: 3.00/0.00
 TAX: 8.2500

Redacted

LA, CA, 90045, US

NOTICES

***RENTERS ARE NOT REQUIRED TO PURCHASE LOSS DAMAGE WAIVER (LDW). IT IS NOT MANDATORY. BEFORE PURCHASING LDW, RENTER SHOULD CHECK IF CAR INSURANCE COVERS DAMAGE TO AND LOSS OF THE CAR, THE LIMIT OF COVERAGE AND DEDUCTIBLE. IF THE RENTER DECLINES LDW, RENTER MAY BE LIABLE FOR UP TO THE RETAIL FAIR MARKET VALUE (LESS SALVAGE) OF THE CAR, REGARDLESS OF FAULT, UNLESS ORDINARY NEGLIGENCE IS EXCLUDED BY LAW. REPAIRS ARE AT BUDGET'S COST. READ LDW TERMS ON THE RENTAL DOCUMENT CHECKING TERMS AND CONDITIONS, INCLUDING EXCLUSIONS FROM LDW.

***RENTAL INTO NOTICE IS PROHIBITED UNLESS AUTHORIZED, IN WRITING, BY BUDGET AND OUR REGIONAL SUPERVISOR IS PURCHASED.

***IF CAR IS RETURNED WITH LESS FUEL THAN WHEN RENTED A SERVICE CHARGE APPLIES.

***MINIMUM CHARGE IS 1 DAY (24 HRS) PLUS MILEAGE. FUEL SERVICES APPLY.

***NO ADDITIONAL OPERATORS ARE AUTHORIZED OR PERMITTED WITHOUT BUDGET'S PRIOR WRITTEN APPROVAL, IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE RENTAL AGREEMENT OR APPLICABLE STATE LAW.

***IF I HAVE PRESENTED A CREDIT CARD FOR PAYMENT, ALL CHARGES, INCLUDING PARKING TICKET EXPENSES, MAY BE BILLED TO THE CARD, AND MY SIGNATURE BELOW WILL BE CONSIDERED TO HAVE BEEN MADE ON THE APPLICABLE CARD RECEIPT.

BY MY SIGNATURE, I ACKNOWLEDGE RECEIPT OF ALL NOTICES WHICH APPEAR ON THIS RENTAL DOCUMENT. I AGREE TO THE TERMS AND CONDITIONS INCLUDING AND MAY DRIVE THE CAR. WHICH IS STATED ON THE RENTAL DOCUMENT CHECK PROVIDED.

Redacted

RES # 31861752-06-2C
 PREPARED BY: 70015
 RENTAL# 7 5 0 9 4 2 8 2 4

Complaint

Budget. 517914655
Budget Rent A Car System, Inc.

3471

RA DOCUMENT 768766972 F-133CA 1005 RENTED: 21APR86/1038 Redacted
 CARN 9146841 BHP C DUE IN: 23APR86/1825

MI OUT: 2181
 PLATE# CA STER023 FUEL OFF: 8/8
 RED CHEV MALI 4DR SPIDER 206

*****OPTIONAL SERVICES*****

LIN:	15.00/DAY	DECLINED
PAC:	4.95/DAY	ACCEPTED
ESP:	4.00/DAY	ACCEPTED
SLI:	12.95/DAY	DECLINED

OR BY MY INITIALS I ACCEPT OR
 -DECLINE OPTIONAL SERVICES AS
 SHOWN ABOVE.) Redacted

Redacted

Redacted

***R R 768766972

Redacted

MIN 1 DAY
 *RATE NOT VALID AFTER MON 23:59
 *FRIDAY NIGHT OVERSTAY REQUIRED

MILEAGE CHG: UNLIMITED
 HOURLY: 9.67
 DAILY: 28.99
 ADD'L DV: .58.99
 MONTHLY:
 FUEL SERVICE: .2791/MIL
 6.699/GAL
 *TX 7.75% + \$3.50
 \$3.50/RENTAL SAN DIEGO
 CONVENTION PARKING FEE

NOTICES

***RENTERS ARE NOT REQUIRED TO PURCHASE LOSS DAMAGE WAIVER (LDW). IT IS NOT MANDATORY. BEFORE PURCHASING LDW, RENTER SHOULD CHECK IF OWN INSURANCE COVERS DAMAGE TO AND LOSS OF THE CAR, THE LIMIT OF COVERAGE AND DEDUCTIBLE. IF THE RENTER DECLINES LDW, RENTER MAY BE LIABLE FOR UP TO THE RETAIL FAIR MARKET VALUE (LESS SALVAGE) OF THE CAR, REGARDLESS OF FAULT, UNLESS ORDINARY NEGLIGENCE IS EXCLUDED BY LAW. REPAIRS ARE AT BUDGET'S COST. READ LAW TERMS ON THE RENTAL DOCUMENT JACKET TERMS AND CONDITIONS, INCLUDING EXCLUSIONS FROM LDW.

***TRAVEL INTO MEXICO IS PROHIBITED UNLESS AUTHORIZED, IN WRITING, BY BUDGET AND OUR MEXICAN INSURANCE IS PURCHASED ***80-74 MILES, \$ 9.58 REFUELING SERVICE CHRG WILL APPLY. ***MINIMUM CHARGE IS 1 DAY (24 HRS) PLUS MILEAGE. FUEL SERVICES ADVL.

***NO ADDITIONAL OPERATORS ARE AUTHORIZED OR PERMITTED WITHOUT BUDGET'S PRIOR WRITTEN APPROVAL IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THE RENTAL AGREEMENT OR APPLICABLE STATE LAW.

***IF I HAVE PRESENTED A CREDIT CARD FOR PAYMENT, ALL CHARGES, INCLUDING PARKING TICKET EXPENSES, MAY BE BILLED TO THE CARD, AND MY SIGNATURE BELOW WILL BE CONSIDERED TO HAVE BEEN MADE ON THE APPLICABLE CARD VOUCHER.

***BY MY SIGNATURE, I ACKNOWLEDGE RECEIPT OF ALL NOTICES WHICH APPEAR ON THIS RENTAL DOCUMENT. I AGREE TO THE TERMS AND CONDITIONS INCLUDING WHO MAY DRIVE THE CAR, WHICH IS STATED ON THE RENTAL DOCUMENT JACKET PROVIDED.

Redacted

RES # 3189400-15-0C
 PREPARED BY:15857
 6F86/15C5/86111/13:40VF RENTAL# 768766972

Complaint Exhibit C
 pg. 2 of 2

Complaint

7. **Loss Damage Waiver, In and Insurance and not mandatory.** If I accept Loss Damage Waiver (LDW) at the rate per day, pay the LDW fee and the car is operated in accordance with this agreement, you assume all loss or damage to the car except for my amount of "responsibility" as specified on the Rental Document. If I do not accept LDW, I will owe you for all loss or damage to the car as described in the following paragraph and includes vandalism. Loss Damage Waiver does not apply to theft of the vehicle, for which I am not responsible unless it results from failure to use ordinary care while the car is in the possession of myself or the driver, in which case I am responsible regardless of whether or not I accept LDW. I acknowledge I have been advised that my own insurance may cover loss or damage to the car.
8. **Damage/Loss to the Car.** If the law of a jurisdiction covering this rental requires conditions on LDW that are different than the terms in this agreement, that law prevails. If I do not accept LDW, I will owe for all loss or damage to the car regardless of fault (unless the renter's liability for ordinary negligence is prohibited by law) whether due to collision, vandalism, or any other cause except accidental fire or explosion. If the car is damaged, I'll pay its retail fair market value before damage less salvage, unless your repair cost plus the diminution of the car's value after repairs is less and you are not required by law to salvage the car, in which case I'll pay the latter amount. I'll also pay loss of use based on reasonable downtime or as specified by law, plus a reasonable administrative fee determined by you or specified by law, plus towing and storage charges, all of which are also part of the "loss". Whether or not I accept LDW, I'm responsible for loss or damage to the car and loss of use caused by me or an authorized additional driver if I violate paragraph 15 below. If my responsibility for loss or damage is covered by my own insurance or my charge card lessor, as applicable, I will identify my insurer and policy number or my card lessor and its insurer. I authorize you to collect any loss directly from the insurer. I authorize you to collect any loss from a third party responsible for it; you will refund any sum you collect exceeding the loss.
9. **Loss Damage Waiver Fee.** If I accept LDW, I'll pay the LDW rate per day as specified on the Rental Document for a full day, even if I don't have the car for the entire day. LDW fee is the applicable rate per day multiplied by the number of rental days. I acknowledge reading the notice on Loss Damage shown on the Rental Document or in separate notice form.
10. **Fuel Service Charge.** Most Budget rentals come with a full tank of gas, but that is not always the case. There are three refueling options:
 (1) IF YOU DO NOT PURCHASE FUEL FROM BUDGET AT THE BEGINNING OF YOUR RENTAL AND YOU RETURN THE CAR WITH AT LEAST AS MUCH FUEL AS WAS IN IT WHEN YOU RECEIVED IT, YOU WILL NOT PAY BUDGET A FUEL AND SERVICE CHARGE.
 (2) IF YOU DO NOT PURCHASE FUEL FROM BUDGET AT THE BEGINNING OF YOUR RENTAL AND YOU RETURN THE CAR WITH LESS FUEL THAN WAS IN IT WHEN YOU RECEIVED IT, Budget will charge you a Fuel and Service Charge at the applicable per-mile or per-gallon rate specified on the Rental Document.
 (a) The per-mile rate is used if you do not buy fuel during the rental. To estimate this amount, Budget multiplies the number of miles driven, as shown on the car's odometer, times the per-mile rate shown on the Rental Document.
 (b) The per-gallon rate is used if you buy fuel during the rental but the tank is not a full when you return the car as when you received it. To calculate this amount, Budget multiplies the number of gallons needed to refill the fuel tank to the level it was at when you received the car (by reading the factory installed gauge, rounded down to the nearest 1/8 of a tank), times the per-gallon rate shown on the Rental Document.
 ALTHOUGH TWO METHODS ARE USED FOR EASE OF CALCULATION, THE PER-MILE AND PER-GALLON RATES PROVIDE APPROXIMATELY THE SAME RESULT.
 (3) IF YOU CHOOSE TO PURCHASE FUEL FROM BUDGET AT THE BEGINNING OF YOUR RENTAL BY SELECTING THE GAS SERVICE OPTION, YOU WILL BE CHARGED AS SHOWN ON THE RENTAL DOCUMENT FOR THAT PURCHASE. IF YOU CHOOSE THIS OPTION, YOU WILL NOT INCUR AN ADDITIONAL FUEL AND SERVICE CHARGE, BUT YOU WILL NOT RECEIVE ANY CREDIT FOR FUEL LEFT IN THE TANK AT THE TIME OF RETURN. THE PER GALLON COST OF THE GAS SERVICE OPTION WILL ALWAYS BE LOWER THAN THE FUEL AND SERVICE CHARGE. BUT IF YOU ELECT THE GAS SERVICE OPTION YOU WILL NOT RECEIVE CREDIT FOR FUEL LEFT IN THE TANK AT THE TIME OF RETURN. THE COST OF REFUELING THE CAR YOURSELF AT A LOCAL SERVICE STATION WILL GENERALLY BE LOWER THAN THE FUEL AND SERVICE CHARGE OR THE GAS SERVICE OPTION. HOWEVER, THE FUEL AND SERVICE CHARGE AND THE GAS SERVICE OPTION ALLOW FOR THE CONVENIENCE OF NOT HAVING TO STOP AND REFUEL THE CAR PRIOR TO RETURN.
11. **Special Charges.** If I represent I'll return car to another location, I may have to pay "one-way service fee" as specified on the Rental Document. If I return the car to a location different from agreed return location as specified on the Rental Document without your written permission, I'll pay an "unauthorized return location fee". Minimum for this fee is \$45. I'll pay a higher fee, if by multiplying your normal mileage rate by the distance between

Complaint Exhibit D

Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Budget Rent-A-Car System, Inc. (hereinafter referred to as “Respondent”), and Respondent having been furnished thereafter with a copy of the draft of Complaint which the Western Region proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations 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 a consent order (“Consent Agreement”), containing an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said 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 the Respondent has violated the said Act, and that Complaint should issue stating its charges in that respect, and having thereupon accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of comments, now in further conformity with the procedure prescribed 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 Budget Rent-A-Car System, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 6 Sylvan Way, Parsippany, New Jersey.

Decision and Order

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

ORDER

DEFINITIONS

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

1. Unless otherwise specified, “Respondent” shall mean Budget Rent-A-Car System, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees.
2. “Clearly and conspicuously” shall mean as follows:
 - a. In an advertisement communicated through an electronic medium (such as television, video, radio, and interactive media such as the Internet and online services), the disclosure shall be presented simultaneously in both the audio and visual portions of the advertisement. Provided, however, that in any advertisement presented solely through visual or audio means, the disclosure may be made through the same means in which the ad is presented. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The visual disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.
 - b. In a print advertisement, promotional material (including, but not limited to counter signs), or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary

Decision and Order

consumer to read and comprehend it, in print that contrasts with the background against which it appears.

The disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or promotional material.

3. “Commerce” shall mean commerce as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
4. “Fuel-related charge, fee, or cost” shall mean any charge, fee, or cost imposed by Respondent on consumers in connection with the use of fuel or gasoline.
5. “Fuel-related option” shall mean any option, program, or alternative offered by Respondent in connection with how consumers will pay for fuel or gasoline or the method by which Respondent will calculate fuel-related charges, fees, or costs.
6. “Renter” shall mean any person in any manner obligated under a contract for the lease or hire of a passenger vehicle from Respondent for a period of less than 30 days.
7. “At the time of rental transaction” shall mean the time after which a renter arrives at the location from which the vehicle will be rented but before the renter signs the rental contract.

I.

IT IS ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, marketing, promotion, offering for rent, or renting of any vehicle, shall not misrepresent, in any manner, expressly or by implication:

Decision and Order

- A. that renters who return their vehicle with a full gas tank will not incur any fuel-related charges;
- B. any fuel-related charge, fee, or cost, or related requirement; or
- C. any charge, fee, or cost, or material term or condition, relating to the rental of any vehicle.

II.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, marketing, promotion, offering for rent, or renting of any vehicle, shall disclose clearly and conspicuously, at the time of rental transaction,

- A. any fuel-related charges, fees, or costs, including any fuel-related charges, fees, or costs which a renter who drives the vehicle less than any specified amount may incur;
- B. any requirements related to fuel-related charges, fees, or costs, including any fuel-related requirements which a renter who drives the vehicle less than any specified amount may need to satisfy; and
- C. the manner, if any, in which a renter can avoid such fuel-related charges, fees, or costs, or related requirements.

III.

IT IS FURTHER ORDERED that Respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, marketing, promotion, offering for rent, or renting of any vehicle, shall not make, expressly or by implication, any representation about the benefits, costs, or

Decision and Order

parameters of any fuel-related option, unless it discloses clearly and conspicuously, and in close proximity to the representation, all material terms and conditions relating to that fuel option.

IV.

IT IS FURTHER ORDERED that Respondent Budget Rent-A-Car System, Inc. and its successors and assigns, for five (5) years after the last date of dissemination of any representation covered by this order, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

V.

IT IS FURTHER ORDERED that Respondent Budget Rent-A-Car System, Inc. and its successors and assigns, for a period of three (3) years, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within forty-five (45) days after the date of service of this order, and to future personnel within forty-five (45) days after the person assumes such position or responsibilities.

Decision and Order

VI.

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

VII.

IT IS FURTHER ORDERED that Respondent Budget Rent-A-Car System, Inc. and its successors and assigns shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VIII.

This order will terminate on January 2, 2028, 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

Analysis to Aid Public Comment

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

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any Respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted an agreement to a proposed consent order with Budget Rent-A-Car System, Inc. ("Budget"), one of the nation's largest rental car agencies.

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons.

Analysis to Aid Public Comment

Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

This matter concerns deceptive practices by Budget with respect to an automatic, flat "EZ Fuel" fee it charges to renters who drive fewer than 75 miles, regardless of whether they return their rental with a full gas tank, unless they present a receipt. Budget has failed to adequately disclose the EZ Fuel fee or how renters can have the fee reversed.

The complaint alleges that Budget engaged in deceptive practices relating to its EZ-Fuel program. The complaint alleges that Budget has falsely represented that, if consumers return their rental vehicle with a full gas tank, they will not have to pay any fuel-related charge, fee, or cost. In numerous instances, however, consumers who drive their vehicle fewer than 75 miles will have to pay the EZ Fuel fee, regardless of whether they return the vehicle with a full gas tank, unless they present a gas receipt.

The complaint further alleges that Budget failed to disclose and failed to disclose adequately that consumers who drive their rental vehicle fewer than 75 miles and refuel can have the EZ Fuel fee reversed only if they present a fuel receipt. In addition, Budget failed to disclose that consumers without corporate accounts would have to present their fuel receipt inside at the rental counter after returning their rental vehicle and checking out on the return lot. These facts would be material to consumers in their rental transaction. The failure to disclose these facts, in light of the representations made, was a deceptive practice.

The proposed order contains provisions designed to prevent Budget from engaging in similar acts and practices in the future. Part I prohibits Budget from misrepresenting (A) that renters who

Analysis to Aid Public Comment

return their vehicle with a full tank of gas will not incur any fuel-related charges; (B) any fuel-related charge, fee, cost, or requirement; or, (C) any charge, fee, or cost, or term or condition, relating to the rental of any vehicle.” Part II of the proposed order requires that Budget disclose, clearly and conspicuously, at the time of rental transaction: (A) any fuel related charges, fee, or costs; (B) any material requirements related to the fuel-related charge; and (C) the manner, if any, in which the renter can avoid such fuel-related charges. Finally, Part III of the proposed order prohibits Budget from making any representation about the benefits, costs, or parameters of any fuel-related option unless it discloses clearly and conspicuously, and in close proximity to the representation, any material terms or conditions relating to that fuel option. These conduct provisions prohibit the deceptive practices alleged in the complaint, but do not prohibit Budget from imposing fuel-related charges, so long as such charges are disclosed as required by the proposed order.

Parts IV through VII of the proposed order are reporting and compliance provisions. Part IV requires Budget to retain documents relating to its compliance with the order. 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 Budget submit compliance reports to the FTC. Part VIII is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to modify the terms of the proposed order in any way.

Complaint

IN THE MATTER OF

**THE GREAT ATLANTIC & PACIFIC TEA
COMPANY, INC.**

AND

PATHMARK STORES INC.

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

Docket C-4209; File No. 071 0120

Complaint, November 27, 2007 B Decision, January 2, 2008

This consent order addresses the \$1.3 billion acquisition by The Great Atlantic & Pacific Tea Company (“A&P”) of Pathmark Stores. The Complaint alleges that the acquisition may increase opportunities for all firms in the market for retail sale of grocery products from supermarkets in Staten Island, New York, and Shirley, Long Island, New York to engage in coordinated interaction or for A&P to exercise unilateral market power, leading to higher prices or decreases in services. The order requires that A&P sell four Waldbaum’s supermarket stores and one Pathmark supermarket store in Staten Island and a Waldbaum’s store in Shirley, Long Island, together with their related assets. The one Pathmark store and four Waldbaum’s stores in Staten Island are required to be divested to King Kullen Grocery Co., Inc., and the Waldbaum’s store in Shirley is required to be divested to The Stop & Shop Supermarket Company LLC, a subsidiary of Koninklijke Ahold NV.

Participants

For the Commission: *Joseph Brownman, Benjamin Gris, Grace H. Kwon, Mazor Matzkevich, Susan E. Raitt, Anthony R. Saunders, Jan Tran, and Nancy Turnblacer.*

For the Respondents: *Manfred Gabriel, Hanno Kaiser, and Bruce Prager, Latham & Watkins LLP; Michael L. Keeley, William Rubenstein, Michelle Seagull, and Adam Strayer, Axinn, Veltrop & Harkrider LLP.*

Complaint

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 (“Commission”), having reason to believe that The Great Atlantic and Pacific Tea Company, Inc. (“A&P”), a corporation, and Pathmark Stores Inc. (“Pathmark”), a corporation, have entered into an agreement for A&P to acquire all of the voting securities of Pathmark, all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the terms of such agreement, were they to be satisfied, would result in a violation of Section 5 of the Federal Trade Commission Act, and Section 7 of the Clayton Act, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. Definition

1. For purposes of this complaint, the term “supermarket” means a full-line retail grocery store with annual sales of at least \$2 million that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products, refrigerated and frozen food and beverage products, fresh and prepared meats and poultry, produce, including fresh fruits and vegetables, shelf-stable food and beverage products, including canned and other types of packaged products, staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea, and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

II. Respondent The Great Atlantic & Pacific Tea Company, Inc.

2. Respondent A&P is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 2

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Paragon Drive, Montvale, New Jersey 07645. A&P had revenues from all operations in 2006 of \$6.9 billion.

3. A&P is, and at all times relevant herein has been, engaged in the operation of supermarkets in the states of Connecticut, Delaware, Maryland, New Jersey, New York, and in the District of Columbia. A&P operates supermarkets under the A&P, A&P Super Foodmart, Food Basics, Food Emporium, Super Fresh, and Waldbaum's banners.

4. A&P owns and operates about 316 supermarkets in the United States.

5. A&P 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. Respondent Pathmark Stores, Inc.

6. Respondent Pathmark 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 200 Milik Street, Carteret, New Jersey 07008. Pathmark had revenues in 2006 of about \$4.1 billion.

7. Pathmark is, and at all times relevant herein has been, engaged in the operation of supermarkets in the states of Delaware, New York, New Jersey, and Pennsylvania.

8. Pathmark owns and operates about 141 supermarkets in the United States.

9. Pathmark 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

Complaint

Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

IV. The Proposed Acquisition

10. On or about March 4, 2007, Respondents A&P and Pathmark entered into an agreement for A&P to acquire all of the voting securities of Pathmark. The purchase price is approximately \$1.3 billion in cash and stock, a figure that includes the assumption of Pathmark's debt.

V. Nature of Trade and Commerce

11. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically more than 10,000 different stock-keeping units) as well as a deep inventory of those items. In order to accommodate the large number of food and nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

12. Supermarkets compete primarily with other supermarkets that provide one-stop shopping opportunities for food and grocery products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at other supermarkets. Supermarkets do not regularly price-check food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores.

13. Retail stores other than supermarkets that sell food and grocery products, including neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores, club stores, military commissaries, and mass merchants, do not, individually or collectively, effectively constrain prices at supermarkets. Those retail stores do not offer a supermarket's distinct set of products and services that enable consumers to do their one-stop shopping for

Complaint

food and grocery products. The vast majority of consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

VI. Relevant Product Markets

14. The relevant lines of commerce in which to analyze the proposed acquisition is the retail sale of food and other grocery products in supermarkets.

VII. Relevant Geographic Markets

15. The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition are:

- (a) Staten Island (Richmond County), New York, and
- (b) Shirley, Long Island, New York.

VIII. Concentration

16. The relevant markets are highly concentrated, and the proposed acquisition will substantially increase concentration, whether concentration is measured by the Herfindahl Hirschman Index (“HHI”) or the number of competitively significant firms remaining in the market.

IX. Entry Conditions

17. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects.

Complaint

X. Effects of the Acquisition

18. The acquisition may substantially lessen competition in the relevant markets in the following ways, among others:

(a) by eliminating direct competition between Respondents Great A&P and Pathmark;

(b) by increasing the likelihood of, or facilitating, coordinated interaction among the remaining competitively significant firms; or

(c) by increasing the likelihood that A&P will unilaterally exercise market power;

each of which increases the likelihood of an increase in the price of food and other grocery products, or a decrease in the quality or selection of food, other grocery products, or services.

XI. Violations Charged

19. The agreement described in Paragraph 10 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of November, 2007, issues its complaint against said Respondents.

By the Commission.

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition of 100% of the outstanding voting securities of Respondent Pathmark Stores, Inc. (“Pathmark”) by Respondent The Great Atlantic & Pacific Tea Company, Inc. (“A&P”), hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place the Consent Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent The Great Atlantic & Pacific Tea Company, Inc. is a corporation organized, existing, and doing business under and

Order to Maintain Assets

by virtue of the laws of the State of Maryland, with its office and principal place of business located at 2 Paragon Drive, Montvale, New Jersey 07645.

2. Respondent Pathmark Stores Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 200 Milik Street, Carteret, New Jersey 07008.

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 Order to Maintain Assets, the definitions used in the Consent Agreement and the attached Decision and Order shall apply. In addition, "Supermarket To Be Maintained" means any Supermarket business identified as a part of the Assets To Be Divested.

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall they cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets To Be Divested. Respondents shall comply with the terms of this Paragraph until such time as Respondents have divested the Assets To Be Divested pursuant to the terms of the attached Decision and Order. Respondents shall conduct

Order to Maintain Assets

or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use reasonable best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice.

- B. Respondents shall not terminate the operation of any Supermarket To Be Maintained. Respondents shall continue to maintain the inventory of each Supermarket To Be Maintained at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained by such Respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Respondents shall use best efforts to keep the organization and properties of each Supermarket To Be Maintained intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Supermarket. Included in the above obligations, Respondents shall, without limitation:
1. maintain operations and departments, and not reduce hours, at each Supermarket To Be Maintained;
 2. not transfer inventory from any Supermarket To Be Maintained, other than in the ordinary course of business consistent with past practice;
 3. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with any Supermarket To Be Maintained, in each case in a manner consistent with past practice;

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4. maintain the books and records of each Supermarket To Be Maintained;
5. not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations at a Supermarket To Be Maintained to another location, or that indicates a Supermarket To Be Maintained will close;
6. not conduct any “going out of business,” “close-out,” “liquidation” or similar sales or promotions at or relating to any Supermarket To Be Maintained; and
7. not change or modify in any material respect the existing advertising practices, programs and policies for any Supermarket To Be Maintained, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the Respondents not being closed or relocated.

III.

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

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

Order to Maintain Assets

IV.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representatives of the Commission:

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

V.

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

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. With respect to each Supermarket To Be Maintained, the day after Respondents' completion of the divestiture of Assets to Be Divested related to such Supermarket, as described in and required by the Decision and Order.

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Provided, however, that if the Commission, pursuant to Paragraph II.A. of the Decision and Order, requires the Respondents to rescind any or all of the divestitures contemplated by the Purchaser Agreement, then, upon rescission, the requirements of this Order shall again be in effect with respect to the relevant Assets To Be Divested until the day after Respondents' completion of the divestiture(s) of the relevant Assets To Be Divested, as described in and required by the Decision and Order.

By the Commission.

DECISION AND ORDER

[Public Record Version]

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of 100% of the outstanding voting securities of Respondent Pathmark Stores Inc. by Respondent The Great Atlantic & Pacific Tea Company, Inc., hereinafter referred to as "Respondents," 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 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 Respondents that the law has been violated as alleged in such Complaint, or that the facts 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 Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order ("Order"):

1. Respondent The Great Atlantic & Pacific Tea Company, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 2 Paragon Drive, Montvale, New Jersey 07645.

2. Respondent Pathmark Stores Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 200 Milik Street, Carteret, New Jersey 07008.

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.

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ORDER**I.**

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

- A. “A&P” means The Great Atlantic & Pacific Tea Company, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by A&P and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Pathmark” means Pathmark Stores Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Pathmark and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means A&P and Pathmark, individually and collectively.
- D. “Acquisition” means A&P’s proposed acquisition of 100% of the outstanding voting securities of Pathmark pursuant to an agreement dated March 4, 2007.
- E. “Assets To Be Divested” means the Staten Island, New York Assets and the Shirley, New York Assets.
- F. “Commission-approved Acquirer” means any entity approved by the Commission to acquire any or all of the Assets To Be Divested pursuant to this Order.
- G. “Divestiture Agreement” means any agreement between the Respondents and a Commission- approved Acquirer (or a

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trustee appointed pursuant to Paragraph III. of this Order and a Commission-approved Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested that have been approved by the Commission to accomplish the requirements of this Order. The term “Divestiture Agreement” includes, as appropriate, the Purchaser Agreements.

- H. “Divestiture Trustee(s)” means any person or entity appointed by the Commission pursuant to Paragraph III. of the Decision and Order to act as a trustee in this matter.
- I. “Purchasers” means (1) The Stop & Shop Supermarket Company LLC (“Stop & Shop”), a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its offices and principal place of business located at 1385 Hancock Street, Quincy, MA 02169, and (2) King Kullen Grocery Co., Inc and King Kullen Pharmacies Corp. (“King Kullen”), a corporation organized, existing and doing business under and by virtue of the laws of New York, with its offices and principal place of business located at 185 Central Avenue, Bethpage, NY 11714-3929.
- J. “Purchaser Agreements” means (1) the Asset Purchase Agreement Dated as of October 5, 2007, among Stop & Shop and A&P and Waldbaum, Inc. (“Stop & Shop/A&P Agreement”) and all amendments, exhibits, attachments, related agreements, and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order, and (2) the Asset Purchase Agreement Dated as of November 9, 2007, among King Kullen and A&P and Waldbaum, Inc. (“King Kullen/A&P Agreement”) and all amendments, exhibits, attachments, related agreements, and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order.

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- K. “Staten Island, New York Assets” means the following Supermarkets currently operated by Respondents: (1) Waldbaum’s Super Market 219, 3251 Richmond Avenue South, Staten Island, NY; (2) Waldbaum’s Super Market 672, 778 Manor Road, Staten Island, NY; (3) Waldbaum’s Super Market 238, 4343 Amboy Road, Staten Island, NY; (4) Waldbaum’s Super Market 230, 1441 Richmond Avenue, Staten Island, NY; and (5) Pathmark Super Market 683, 2660 Rylan Boulevard, Staten Island, NY, and all assets, leases, properties, government permits (to the extent transferable), businesses and goodwill, tangible and intangible, related to or used in the Supermarket business operated at these locations, but shall not include those assets consisting of or pertaining to any of the Respondents’ trademarks, trade dress, service marks, or trade names. *Provided, however*, the inventory of consumer goods and merchandise owned by the Respondents for sale in the ordinary course of the Supermarket business may be excluded from the divestiture at the option of the Commission-approved Acquirer.
- L. “Shirley, New York Assets” means A&P’s Waldbaum’s Super Market 604, 999 Montauk Highway, Shirley, NY, and all assets, leases, properties, government permits (to the extent transferable), businesses and goodwill, tangible and intangible, related to or used in the Supermarket business operated at that location, but shall not include those assets consisting of or pertaining to any of the Respondents’ trademarks, trade dress, service marks, or trade names. *Provided, however*, the inventory of consumer goods and merchandise owned by the Respondents for sale in the ordinary course of the Supermarket business may be excluded from the divestiture at the option of the Commission-approved Acquirer.
- M. “Supermarket” means any store that offers a Wide Selection and Deep Inventory of Food and Grocery Products, enabling consumers to purchase substantially all of their weekly food

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and grocery shopping requirements in a single shopping visit.

- N. “Wide Selection and Deep Inventory of Food and Grocery Products” means substantial offerings in each of the following product categories: bread and dairy products; refrigerated and frozen food and beverage products; fresh and prepared meats and poultry; produce including fresh fruits and vegetables; shelf-stable food and beverage products, including canned and other types of packaged products; staple foodstuffs, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.
- O. “Third Party Consents” means all consents from any person other than the Respondents, including all landlords, that are necessary to effect the complete transfer to the Commission- approved Acquirer(s) of the Assets To Be Divested.

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

- A. Respondents shall divest, by January 10, 2008, absolutely and in good faith, the Staten Island, New York Assets and the Shirley, New York Assets, as ongoing businesses to Purchasers pursuant to and in accordance with the Purchaser Agreements (which agreements shall not vary or contradict, or be construed to vary or contradict, the terms of this Order), and such agreements, if approved by the Commission, are incorporated by reference into this Order and made part hereof as non-public Appendix I. Any failure by Respondents to comply with all terms of any Divestiture Agreements related to the Staten Island, New

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York Assets or Shirley, New York Assets shall constitute a failure to comply with this Order.

Provided, however, that if Respondents have divested the Staten Island, New York Assets, or Shirley, New York Assets to Purchasers pursuant to the Purchaser Agreements 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 Purchasers is not an acceptable Purchasers of the Staten Island, New York Assets, or Shirley, New York Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Purchasers and shall divest the Staten Island, New York Assets and Shirley, New York Assets within three (3) months of 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.

- B. Respondents shall obtain all required Third Party Consents prior to the closing of the Divestiture Agreements pursuant to which the Assets To Be Divested are divested to a Commission-approved Acquirer.
- C. Any Divestiture Agreements between Respondents (or a trustee appointed pursuant to Paragraph III. of this Order) and Commission-approved Acquirers of the Assets To Be Divested that has been approved by the Commission shall be deemed incorporated by reference into this Order, and any failure by Respondents to comply with the terms of such Divestiture Agreements shall constitute a failure to comply with this Order.
- D. The purpose of the divestitures is to ensure the continuation of the Staten Island, New York Assets and the Shirley, New York Assets as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of

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competition resulting from the Acquisition alleged in the Commission's Complaint.

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

- A. If Respondents have not divested all of the Assets To Be Divested as required by Paragraph II. of this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest the remaining Assets To Be Divested in a manner that satisfies the requirements of Paragraphs II. and III. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the 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(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.
- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents

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

- C. Within ten (10) days after 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 relevant divestiture or transfer required by the Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, 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 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; *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

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

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to 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 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 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 Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture

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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 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 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)

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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 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 III.
- 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 assist the Divestiture Trustee in accomplishing the divestitures required by this Order.

IV.

IT IS FURTHER ORDERED that, for a period often (10) years commencing on the date this Order becomes final, Respondents shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission:

- A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in Staten Island (Richmond County), NY and in Shirley, New York.
- B. Acquire any stock, share capital, equity, or other interest in

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any entity that owns any interest in or operates any Supermarket, or holds any ownership or leasehold interest in any facility that has operated as a Supermarket within six (6) months prior to the date of such proposed acquisition in Staten Island (Richmond County), NY and in Shirley, New York.

Provided, however, that advance written notification shall not apply to the construction of new facilities by Respondents or the acquisition or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Respondents' offer to purchase or lease such facility.

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, 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 Respondents and not of any other party to the transaction. Respondents shall provide the notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. *Provided, however,* that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton

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Act, 15 U.S.C. § 18a.

V.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final, Respondents shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. § 12(a)) that acquires any Supermarket, any leasehold interest in any Supermarket or any interest in any retail location used as a Supermarket on or after January 1, 2007, in Staten Island (Richmond County), NY and in Shirley, New York, to operate a supermarket at that site, if such Supermarket was formerly owned or operated by Respondents.

VI.

IT IS FURTHER ORDERED that:

- A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until the Respondents have fully complied with the provisions of Paragraphs II. and III. of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II. and III. of this Order. 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 Paragraphs II. and III. of this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their reports copies of all non-privileged written communications to and from such parties, all non-privileged internal memoranda, and all non-privileged reports and recommendations concerning completing the obligations; and

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- 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, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

VII.

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

- A. Any proposed dissolution of such Respondents;
- B. Any proposed acquisition, merger or consolidation of Respondents; or
- C. Any other change in the Respondents, 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.

VIII.

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

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

Analysis to Aid Public Comment

- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on January 2, 2018.

By the Commission.

NONPUBLIC APPENDIX I

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

**ANALYSIS OF THE CONSENT ORDER TO AID PUBLIC
COMMENT**

I. Introduction

The Federal Trade Commission (“Commission”) has accepted for public comment, and subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from The Great Atlantic & Pacific Tea Company, Inc. (“A&P”) and Pathmark Stores, Inc. (“Pathmark”). The purpose of the Consent Agreement is

Analysis to Aid Public Comment

to remedy the anticompetitive effects that likely would result from A&P's proposed \$1.3 billion acquisition (a figure that includes the assumption of debt by A&P) of Pathmark, as alleged in the Complaint the Commission has issued.

The Consent Agreement provides for relief in two markets where the Commission believes the proposed acquisition is anticompetitive. Under the terms of the Consent Agreement, A&P must divest four Waldbaum's supermarkets and one Pathmark supermarket in Staten Island, New York, and one Waldbaum's supermarket in Shirley, Long Island, New York.

The Commission, A&P, and Pathmark have also agreed to an Order to Maintain Assets. This order requires A&P and Pathmark to maintain the assets required by the Consent Agreement to be divested, pending their divestiture.

The investigation and settlement negotiations were conducted in close cooperation with the Office of the New York State Attorney General, which anticipates entering into an agreement with the parties that mirrors the proposed consent order divestitures.

II. The Parties and the Transaction

A&P is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 2 Paragon Drive, Montvale, New Jersey 07645. The company owns and operates about 316 supermarkets in the States of Connecticut, Delaware, Maryland, New York, New Jersey, and in the District of Columbia. A&P operates its supermarkets under the A&P, A&P Super Foodmart, Food Basics, Food Emporium, Super Fresh and Waldbaum's banners. A&P had revenues from all operations in 2006 of about \$6.9 billion.

Pathmark 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 200 Milik

Analysis to Aid Public Comment

Street, Carteret, New Jersey 07008. The company owns and operates about 141 supermarkets in the States of Delaware, New York, New Jersey, and Pennsylvania, all operating under the Pathmark banner. Pathmark had revenues in 2006 of about \$4.1 billion.

Under the terms of their March 4, 2007, agreement, A&P will acquire all of the voting securities of Pathmark for approximately \$1.3 billion, including the assumption of debt.

III. The Complaint

According to the Commission's Complaint, A&P and Pathmark compete in the retail sale of grocery products from supermarkets. Supermarkets are stores that carry a wide selection and deep inventory of food and grocery products in a variety of brands and sizes, enabling consumers to purchase substantially all of their food and other grocery shopping requirements in a single shopping visit.

The Complaint alleges that the acquisition by A&P of Pathmark would be competitively problematic in Staten Island, New York, and Shirley, Long Island, New York, both of which are highly concentrated geographic markets. As alleged in the Complaint, the proposed acquisition may increase opportunities for all firms in these markets to engage in coordinated interaction or for A&P to exercise unilateral market power, leading to higher prices or decreases in services. The Complaint further alleges that entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the geographic markets.

The 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 connection with the retail sale of grocery products from supermarkets.

Analysis to Aid Public Comment

IV. The Proposed Consent Order

Under the terms of the proposed Consent Order, Respondent A&P must sell four Waldbaum's supermarket stores and one Pathmark supermarket store in Staten Island and a Waldbaum's store in Shirley, Long Island, together with their related assets. The addresses of the Waldbaum's stores required to be divested are as follows:

1. 3251 Richmond Ave. South
Staten Island, NY
2. 778 Manor Road
Staten Island, NY
3. 4343 Amboy Road
Staten Island, NY
4. 1441 Richmond Ave.
Staten Island, NY
5. 999 Montauk Hwy.
Shirley, NY

The address of the one Pathmark store required to be divested is:

1. 2660 Hylan Blvd.
Staten Island, NY

The one Pathmark store and four Waldbaum's stores in Staten Island are required to be divested to King Kullen Grocery Co., Inc., headquartered in Bethpage, New York, and the Waldbaum's store in Shirley is required to be divested to The Stop & Shop Supermarket Company LLC ("Stop & Shop"). Stop & Shop is a subsidiary of Koninklijke Ahold NV, a Dutch corporation. The Commission evaluated these prospective acquirers and determined that they are well qualified to operate the divested supermarkets.

Analysis to Aid Public Comment

The proposed Consent Order requires that the divestitures occur no later than January 10, 2008. If Respondents consummate the divestitures to the purchasers during the public comment period, and if, at the time the Commission determines whether to make the proposed Consent Order final, the Commission notifies Respondents that the purchasers are not acceptable acquirers, or that the asset purchase agreements with those acquirers are not acceptable manners of divestiture, then Respondents must immediately rescind those transactions and divest the five Waldbaum's stores and one Pathmark store (and their related assets) to other buyers, within three (3) months of the date the Consent Order becomes final. Under those circumstances, Respondents must divest those stores and related assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission. In the event Respondents have not divested the supermarkets in a manner that satisfies the requirements of the Consent Order, the Commission may appoint a trustee to divest those assets.

The Commission has also issued an Order to Maintain Assets. Under its terms, Respondents are required to maintain the viability of the six supermarkets and their related assets pending their divestiture. More specifically, Respondents must: (1) maintain the viability, competitiveness, and marketability of the assets; (2) not cause the wasting or deterioration of those assets; (3) not sell, transfer, encumber, or otherwise impair the marketability of the assets; (4) maintain the supermarkets consistent with the parties' past practices; (5) use best efforts to preserve the supermarkets' existing relationships with suppliers, customers, and employees; and (6) keep the supermarkets open for business and maintain inventories at levels consistent with past practices.

The proposed Consent Order prohibits Respondents, for a period of ten years, from acquiring, without providing the Commission with prior notice, any ownership or leasehold interest in any facility that has operated as a supermarket within six (6) months prior to the date of such proposed acquisition, in Staten Island, New York, and the

Analysis to Aid Public Comment

Shirley, Long Island, New York area. The proposed Consent Order also prohibits Respondents, for a period of ten (10) years, from entering into or enforcing any agreement that restricts the ability of any person acquiring any interest in any location formerly used by Respondents as a supermarket in Staten Island or the Shirley area to operate that location as a supermarket. The proposed Consent Order does not prohibit Respondents from building new supermarkets, or leasing a facility not operated as a supermarket within the preceding six (6) months.

Under the terms of the proposed Consent Order, A&P is also required to provide the Commission with regular compliance reports demonstrating how it is complying with the terms of the Consent Agreement until it is in full compliance with that Agreement.

V. Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for thirty (30) days for the purpose of soliciting comments from the public. All comments received during this period will become part of the public record. After the thirty (30) day comment period, the Commission will again consider the Consent Agreement, together with all comments received. After that second review, the Commission may either withdraw from the Consent Agreement or make its Order 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 invite public comment on the Consent Order, including the proposed divestitures, to aid the Commission in its determination whether it should make final the Consent Agreement. This analysis is not an official interpretation of the Consent Agreement nor does it modify any of its terms.

Complaint

IN THE MATTER OF

MILLIMAN, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4213; File No. 062 3189**Complaint, February 6, 2008 – Decision, February 6, 2008*

This consent order relates to the failure of Milliman, Inc., to provide the *Notice To Users of Consumer Reports: Obligations of Users Under the FCRA*, as required by the Fair Credit Reporting Act. The respondent markets IntelliScript, a data aggregation service that provides individual medical profiles to health and life insurance companies. The order requires Milliman to provide the *Notice To Users* to any user or prospective user of any medical profile generated by IntelliScript that constitutes a consumer report, or of any other consumer report. The order requires the respondent to maintain reasonable procedures to limit the furnishing of consumer reports to those with a permissible purpose; to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individuals about whom the reports relate; to maintain reasonable procedures to ensure compliance with Section 611 of the Fair Credit Reporting Act; to conduct a reasonable reinvestigation in cases of disputed accuracy; and to comply with the Disposal of Consumer Report Information and Records Rule. The order also requires the respondent to maintain and upon request make available to the Commission documents demonstrating compliance with the requirements of the order. In addition, the respondent is required to distribute copies of the order to various officers, directors, and managers, employees, agents, and representatives having decision-making responsibilities with respect to IntelliScript or any other consumer report; to notify the Commission of any changes in corporate structure that might affect compliance with the order; and to file reports with the Commission detailing its compliance with the order.

Participants

For the Commission: *Katherine Armstrong, Kathleen Benway, Rebecca E. Kuehn, and Joel Winston.*

For the Respondent: *Roger Longtin, DLA Piper.*

COMPLAINT

Complaint

The Federal Trade Commission, having reason to believe that Milliman, Inc. (“respondent”), has violated provisions of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., and the Federal Trade Commission Act, 15 U.S.C. § 41 et seq., and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Washington corporation with its office or principal place of business located at 1301 Fifth Avenue, Seattle, Washington.

2. Since at least 2005, respondent has marketed IntelliScript, a data aggregation service that provides individual medical profiles, including, but not limited to, prescription drug purchase histories of insurance applicants, to health and life insurance companies.

3. Respondent has contractual relationships with insurance companies that use IntelliScript for underwriting or claims review purposes. These insurance companies require applicants to sign a consent form, which authorizes the insurance company or its agents to access the consumer’s health and medical records, including prescription drug records.

4. Respondent has contractual relationships with Pharmacy Benefit Managers (“PBMs”), which maintain records of individuals’ prescription drug histories. Respondent obtains an insurance applicant’s five-year prescription drug history from the PBMs and creates a medical profile on the applicant for the insurance company. The medical profile generated by IntelliScript includes, but is not limited to: all prescription drugs, including dosage and number of refills filled by the insurance applicant for the previous five years. It also includes, for each drug, the name and address of the dispensing pharmacy, as well as the name and address of the prescribing doctor, including medical specialty. The medical profile generated by IntelliScript analyzes the individual’s prescription drug history and provides a “map” of the risk levels associated with each drug, based on information provided by the insurer.

5. The medical profile generated by IntelliScript is a consumer report as that term is defined in Section 603(d) of the Fair Credit

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Reporting Act, 15 U.S.C. §1681a(d), because it bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing a consumer's eligibility for credit or insurance.

6. In providing medical profiles generated by IntelliScript to insurers, respondent is now and has been a consumer reporting agency, as that term is defined in Section 603(f) of the Fair Credit Reporting Act, 15 U.S.C. §1681a(f), because it regularly engages in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties for monetary fees, dues, or on a cooperative nonprofit basis. Respondent furnishes these consumer reports to third parties through the means or facilities of interstate commerce.

7. Section 607(d) of the Fair Credit Reporting Act, 15 U.S.C. § 1681e(d), requires that any consumer reporting agency provide, to any person to whom it provides a consumer report; a "Notice To Users of Consumer Reports: Obligations of Users Under the FCRA," the required content of which is set forth in 16 CFR 698, Appendix H. Respondent has failed and continues to fail to provide this notice to insurance companies that purchase medical profiles generated by IntelliScript.

8. By and through the practices described above, respondent has violated Section 607(d) of the Fair Credit Reporting Act, 15 U.S.C. § 1681e(d).

9. By its violation of Section 607(d) of the Fair Credit Reporting Act, and pursuant to Section 621(a) thereof, 15 U.S.C. § 1681s, respondent has engaged in unfair and deceptive acts and practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Decision and Order

THEREFORE, the Federal Trade Commission this sixth day of February, 2008, has issued this complaint against respondent.

By the Commission.

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 Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*;

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

Decision and Order

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 Milliman, Inc., is a Washington corporation with its office and principal place of business at 1301 Fifth Avenue, Seattle, Washington.

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

ORDER**DEFINITIONS**

For purposes of this order, the following definitions apply:

“*Respondent*” means Milliman, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees acting in such capacity on its behalf, directly or through any corporation, subsidiary, division or other device.

“*IntelliScript*” means respondent’s data aggregation service that provides individual medical profiles, including prescription drug purchase histories, to health and life insurance companies.

“*FCRA*” means the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, as the same from time to time may be amended or modified by statute or by regulations having the effect of statutory provisions.

The terms “*consumer*,” “*consumer report*,” and “*consumer reporting agency*,” shall be defined as provided in Sections 603(c), 603(d) and 603(f), respectively of the Fair Credit Reporting Act, 15 U.S.C. §§ 1681a(c), 1681a(d) and 1681a(f).

Decision and Order

“*Notice To Users*” is the notice referred to in Section 607(d) of the Fair Credit Reporting Act, 15 U.S.C. §1681e(d), 16 CFR 698, Appendix H.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the sale or dissemination of any medical profile generated by IntelliScript, or any other consumer report to any user or prospective user of such consumer report, shall, as required by Section 607(d) of the Fair Credit Reporting Act, 15 U.S.C. §1681e(d), provide to such users or prospective users a Notice To Users.

II.

IT IS FURTHER ORDERED that respondent, in connection with the compilation, creation, sale, or dissemination of any medical profile generated by IntelliScript, or any other consumer report, shall:

- A. Maintain or continue to maintain reasonable procedures to limit the furnishing of such consumer report to those with a permissible purpose, as required by Section 607(a) of the Fair Credit Reporting Act, 15 U.S.C. § 1681e(a);
- B. Follow or continue to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individuals about whom the report relates, as required by Section 607(b) of the Fair Credit Reporting Act, 15 U.S.C. §1681e(b);
- C. Maintain or continue to maintain reasonable procedures to ensure compliance with Section 611 of the Fair Credit Reporting Act, 15 U.S.C. § 1681i, “Procedures in case of disputed accuracy;”

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- D. Conduct or continue to conduct a reasonable reinvestigation in cases of disputed accuracy, as required by Section 611 of the Fair Credit Reporting Act, 15 U.S.C. § 1681i; and
- E. Comply or continue to comply with the Disposal of Consumer Report Information and Records Rule, 16 C.F.R. Part 682.

III.

IT IS FURTHER ORDERED that respondent shall, for five (5) years, maintain and upon request make available to the Federal Trade Commission for inspection and copying documents demonstrating compliance with the requirements of Parts I and II of this order.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future officers and directors, and to all current and future managers, employees, agents, and representatives having decision-making responsibilities with respect to IntelliScript or any other consumer report, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

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V.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as it is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that respondent shall within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

This order will terminate on February 6, 2028, 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:

Analysis to Aid Public Comment

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Milliman, Inc. ("respondent" or "Milliman").

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

Analysis to Aid Public Comment

should withdraw from the agreement or make final the agreement's proposed order.

Milliman markets IntelliScript, a data aggregation service that provides individual medical profiles, including but not limited to prescription drug purchase histories of insurance applicants, to health and life insurance companies. Insurance companies use IntelliScript for underwriting or claims review purposes. The medical profile generated by IntelliScript analyzes the individual's prescription drug history, and provides a 'map' of the risk levels associated with each drug, based on information provided by the insurer.

The Commission's complaint alleges that the medical profile generated for the IntelliScript service is a consumer report and that respondent is a consumer reporting agency, as those terms are defined in Sections 603(d) and (f) of the Fair Credit Reporting Act, 15 U.S.C. §§1681a(d) and (f). The complaint alleges that the respondent's failure to provide the "Notice To Users of Consumer Reports: Obligations of Users Under the FCRA" ("Notice To Users"), the required content of which is found in 16 CFR 698, Appendix H, is a violation of Section 607(d) of the Fair Credit Reporting Act, 15 U.S.C. § 1681e(d).

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future.

Part I of the proposed order requires respondent to provide the Notice To Users to any user or prospective user of any medical profile generated by IntelliScript that constitutes a consumer report or of any other consumer report.

Part II.A. of the proposed order requires respondent to maintain or continue to maintain reasonable procedures to limit the furnishing of consumer reports to those with a permissible purpose, as required by Section 607(a) of the Fair Credit Reporting Act, 15 U.S.C. § 1681e(a).

Analysis to Aid Public Comment

Part II.B. of the proposed order requires respondent to follow or continue to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individuals about whom the reports relates, as required by Section 607(b) of the Fair Credit Reporting Act, 15 U.S.C. §1681e(b).

Part II.C. of the proposed order requires respondent to maintain or continue to maintain reasonable procedures to ensure compliance with Section 611 of the Fair Credit Reporting Act, 15 U.S.C. § 1681i, “Procedure in case of disputed accuracy.”

Part II.D. of the proposed order requires respondent to conduct or continue to conduct a reasonable reinvestigation in cases of disputed accuracy, as required by Section 611 of the Fair Credit Reporting Act, 15 U.S.C. §1681i.

Part II.E. of the proposed order requires respondent to comply or continue to comply with the Disposal of Consumer Report Information and Records Rule, 16 C.F.R. Part 682.

Part III of the proposed order contains a document retention requirement. It requires respondent to maintain and upon request make available to the Commission for inspection and copying documents demonstrating compliance with the requirements of Parts I and II of the proposed order.

Part IV of the proposed order requires respondent to distribute copies of the order to various officers, directors, and managers, employees, agents, and representatives having decision-making responsibilities with respect to IntelliScript or any other consumer report.

Part V of the proposed order requires respondent to notify the Commission of any changes in corporate structure that might affect compliance with the order.

Analysis to Aid Public Comment

Part VI of the proposed order requires respondent to file with the Commission one or more reports detailing its compliance with the order.

Part VII of the proposed order is a “sunset” provision, dictating the conditions under which the order will terminate twenty years from the date it is issued or twenty years after a complaint is filed in federal court, by either the United States or the FTC, alleging any violation of the order.

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 in any way its terms.

Complaint

IN THE MATTER OF**INGENIX, INC.****CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT***Docket C-4214; File No. 062 3190**Complaint, February 6, 2008 – Decision, February 6, 2008*

This consent order relates to the failure of Ingenix, Inc., to provide the *Notice To Users of Consumer Reports: Obligations of Users Under the FCRA*, as required by the Fair Credit Reporting Act. The respondent markets MedPoint, a data aggregation service that provides individual medical profiles to health and life insurance companies. The order requires Ingenix to provide the *Notice To Users* to any user or prospective user of any medical profile generated by MedPoint that constitutes a consumer report, or of any other consumer report. The order requires the respondent to maintain reasonable procedures to limit the furnishing of consumer reports to those with a permissible purpose; to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individuals about whom the reports relate; to maintain reasonable procedures to ensure compliance with Section 611 of the Fair Credit Reporting Act; to conduct a reasonable reinvestigation in cases of disputed accuracy; and to comply with the Disposal of Consumer Report Information and Records Rule. The order also requires the respondent to maintain and upon request make available to the Commission documents demonstrating compliance with the requirements of the order. In addition, the respondent is required to distribute copies of the order to various principals, officers, directors, and managers, employees, agents, and representatives having decision-making responsibilities with respect to MedPoint or any other consumer report; to notify the Commission of any changes in corporate structure that might affect compliance with the order; and to file reports with the Commission detailing its compliance with the order.

Participants

For the Commission: *Katherine Armstrong, Kathleen Benway, Rebecca E. Kuehn, Karen Leonard, and Joel Winston.*

For the Respondent: *Skip Durocher, Dorsey and Whitney, LLP.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Ingenix, Inc. (“respondent”), has violated provisions of the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., and the Federal Trade Commission Act, 15 U.S.C. § 41 et seq., and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent, a wholly owned subsidiary of UnitedHealth Group Incorporated, is a Delaware corporation with its principal office or place of business located at 12125 Technology Drive, Eden Prairie, Minnesota.

2. Since at least 2003, respondent has marketed MedPoint, a data aggregation service that provides individual medical profiles, including, but not limited to the prescription drug purchase histories of insurance applicants to health and life insurance companies.

3. Respondent has contractual relationships with insurance companies that use MedPoint for underwriting or claims review purposes. These insurance companies require applicants to sign a consent form, which authorizes the insurance company or its agents to access the consumer’s health and medical records, including prescription drug records.

4. Respondent has contractual relationships with Pharmacy Benefit Managers (“PBM”), which maintain records of individuals’ prescription drug histories. Respondent obtains an insurance applicant’s five-year prescription drug history from the PBMs and creates a prescription medical profile on the applicant for the insurance company. The medical profile generated by MedPoint includes, but is not limited to, prescription drugs, including dosage and number of refills filled by the insurance applicant for the previous five years. It also includes for each drug, the name and address of the dispensing pharmacy, as well as the name and address of the prescribing doctor, including specialty medical practice. The medical profile generated by MedPoint analyzes the individual’s prescription drug history, and provides, based on that analysis,

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potential medical conditions that may be present and predictive scores for the individual.

5. The medical profile generated by MedPoint is a consumer report as that term is defined in Section 603(d) of the Fair Credit Reporting Act, 15 U.S.C. § 1681a(d), because it bears on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing a consumer's eligibility for credit or insurance.

6. In providing medical profiles generated by MedPoint to insurers, respondent is now and has been a consumer reporting agency, as that term is defined in Section 603(f) of the Fair Credit Reporting Act, 15 U.S.C. § 1681a(f), because it regularly engages in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties for monetary fees, dues, or on a cooperative nonprofit basis. Respondent furnishes these consumer reports to third parties through the means or facilities of interstate commerce.

7. Section 607(d) of the Fair Credit Reporting Act, 15 U.S.C. § 1681e(d), requires that any consumer reporting agency provide, to any person to whom it provides a consumer report, a "Notice To Users of Consumer Reports: Obligations of Users Under the FCRA," the required content of which is set forth in 16 CFR 698, Appendix H. Respondent has failed and continues to fail to provide this notice to insurance companies that purchase medical profiles generated by MedPoint.

8. By and through the practices described above, respondent has violated Section 607(d) of the Fair Credit Reporting Act, 15 U.S.C. §1681e(d).

Decision and Order

9. By its violation of Section 607(d) of the Fair Credit Reporting Act, and pursuant to Section 621(a) thereof, 15 U.S.C. § 1681s, respondent has engaged in unfair and deceptive acts and practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a).

THEREFORE, the Federal Trade Commission this sixth day of February, 2008, has issued this complaint against respondent.

By the Commission.

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 Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq*;

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

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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 Ingenix, Inc. is a Delaware corporation with its office and principal place of business at 12125 Technology Drive, Eden Prairie, Minnesota.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

For purposes of this order, the following definitions apply:

“Respondent” means Ingenix, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees acting in such capacity on its behalf, directly or through any corporation, subsidiary, division or other device.

“MedPoint” means respondent’s data aggregation service that provides individual medical profiles, including prescription drug purchase histories, to health and life insurance companies.

“FCRA” means the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, as the same from time to time may be amended or modified

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by statute or by regulations having the effect of statutory provisions.

The terms “*consumer*,” “*consumer report*,” and “*consumer reporting agency*,” shall be defined as provided in Section 603(c), 603(d) and 603(f), respectively of the FCRA, 15 U.S.C. §§ 1681a(c), 1681a(d) and 1681a(f).

“*Notice To Users*” is the notice referred to in Section 607(d) of the Fair Credit Reporting Act, 15 U.S.C. §1681e(d), 16 CFR 698, Appendix H.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the dissemination of any medical profile generated by MedPoint that constitutes a consumer report, or any other consumer report to any user or prospective user of such consumer report, shall as provided by Section 607(d) of the Fair Credit Reporting Act, 15 U.S.C. § 1681e(d), provide to such users or prospective users a Notice to Users.

II.

IT IS FURTHER ORDERED that respondent, in connection with the compilation, creation, sale, or dissemination of any medical profile generated by MedPoint that constitutes a consumer report, or any other consumer report, shall:

- A. Maintain or continue to maintain reasonable procedures to limit the furnishing of such consumer report to those only with a permissible purpose, as required by Section 607(a) of the Fair Credit Reporting Act, 15 U.S.C. §1681e(a);
- B. Follow or continue to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individuals about whom the reports relates, as required

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by Section 607(b) of the Fair Credit Reporting Act, 15 U.S.C. § 1681e(b);

- C. Maintain or continue to maintain reasonable procedures to ensure compliance with Section 611 of the Fair Credit Reporting Act, 15 U.S.C. § 1681i, "Procedures in case of disputed accuracy;"
- D. Conduct or continue to conduct a reasonable reinvestigation in cases of disputed accuracy, as required by Section 611 of the Fair Credit Reporting Act, 15 U.S.C. § 1681i; and
- E. Comply or continue to comply with the Disposal of Consumer Report Information and Records Rule, 16 C.F.R. Part 682.

III.

IT IS FURTHER ORDERED that respondent shall, for five (5) years, maintain and upon request make available to the Federal Trade Commission for inspection and copying documents demonstrating compliance with the requirements of Parts I and II of this order.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future principals, officers, and directors, and to all current and future managers, employees, agents, and representatives having decision-making responsibilities with respect to MedPoint or any other consumer report, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within thirty (30) days after the person assumes such position or responsibilities.

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V.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as it is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that respondent shall within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

This order will terminate on February 6, 2028, 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:

Analysis to Aid Public Comment

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

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

By the Commission.

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a consent order from Ingenix, Inc. ("respondent" or "Ingenix").

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

Analysis to Aid Public Comment

should withdraw from the agreement or make final the agreement's proposed order.

Ingenix markets MedPoint, a data aggregation service that provides individual medical profiles to health and life insurance companies. Insurance companies use MedPoint for underwriting or claims review purposes. The medical profile generated by MedPoint analyzes the individual's prescription drug history, and provides, based on that analysis, potential medical conditions that may be present and predictive scores for the individual.

The Commission's complaint alleges that the medical profile generated for the MedPoint service is a consumer report and that respondent is a consumer reporting agency, as those terms are defined in Sections 603(d) and (f) of the Fair Credit Reporting Act, 15 U.S.C. §§1681a(d) and (f). The complaint alleges that the respondent's failure to provide the "Notice To Users of Consumer Reports: Obligations of Users Under the FCRA" ("Notice to Users"), the required content of which is found in 16 CFR 698, Appendix H, is a violation of Section 607(d) of the Fair Credit Reporting Act, 15 U.S.C. §1681e(d).

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future.

Part I of the proposed order requires respondent to provide the Notice To Users to any user or prospective user of any medical profile generated by MedPoint that constitutes a consumer report, or of any other consumer report.

Part II.A. of the proposed order requires respondent to maintain or continue to maintain reasonable procedures to limit the furnishing of consumer reports to those with a permissible purpose, as required by Section 607(a) of the Fair Credit Reporting Act, 15 U.S.C. § 1681e(a).

Analysis to Aid Public Comment

Part II.B. of the proposed order requires respondent to follow or continue to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individuals about whom the reports relates, as required by Section 607(b) of the Fair Credit Reporting Act, 15 U.S.C. §1681e(b).

Part II.C. of the proposed order requires respondent to maintain or continue to maintain reasonable procedures to ensure compliance with Section 611 of the Fair Credit Reporting Act, 15 U.S.C. § 1681i, “Procedure in case of disputed accuracy.”

Part II.D. of the proposed order requires respondent to conduct or continue to conduct a reasonable reinvestigation in cases of disputed accuracy, as required by Section 611 of the Fair Credit Reporting Act, 15 U.S.C. §1681i.

Part II.E. of the proposed order requires respondent to comply or continue to comply with the Disposal of Consumer Report Information and Records Rule, 16 C.F.R. Part 682.

Part III of the proposed order contains a document retention requirement. It requires respondent to maintain and upon request make available to the Commission for inspection and copying documents demonstrating compliance with the requirements of Parts I and II of the proposed order.

Part IV of the proposed order requires respondent to distribute copies of the order to various principals, officers, directors, and managers, employees, agents, and representatives having decision-making responsibilities with respect to MedPoint or any other consumer report.

Part V of the proposed order requires respondent to notify the Commission of any changes in corporate structure that might affect compliance with the order.

Analysis to Aid Public Comment

Part VI of the proposed order requires respondent to file with the Commission one or more reports detailing its compliance with the order.

Part VII of the proposed order is a “sunset” provision, dictating the conditions under which the order will terminate twenty years from the date it is issued or twenty years after a complaint is filed in federal court, by either the United States or the FTC, alleging any violation of the order.

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 in any way its terms.

Complaint

IN THE MATTER OF

HERBS NUTRITION CORPORATION
AND
SYED M. JAFRY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket 9325; File No. 072 3147

Complaint, September 28, 2007 – Decision, February 21, 2008

This consent order addresses the advertising and promotion of Eternal Woman Progesterone Cream and Pro-Gest Body Cream, transdermal creams that respondents claimed were effective in preventing or treating osteoporosis and certain cancers. The Commission's complaint alleged that the respondents failed to have substantiation for these claims. The order requires the respondents to have competent and reliable scientific evidence substantiating claims that any progesterone product or any other dietary supplement, food, drug, device, or health-related service or program is effective in preventing, treating, or curing osteoporosis, in preventing or reducing the risk of estrogen-induced endometrial cancer or breast cancer, or in the mitigation, treatment, prevention, or cure of any disease, illness, or health condition; that it does not increase the user's risk of developing breast cancer, is safe for human use, or has no side effects; or about its health benefits, performance, efficacy, safety, or side effects. The order prevents the respondents from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research. Respondents are not prohibited from making representations for any drug, medical device, or other product that are permitted in labeling by the Food and Drug Administration. The order requires the respondents to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure and changes in employment that might affect compliance obligations under the order; and to file compliance reports with the Commission.

Participants

For the Commission: *Gregory A. Ashe, Laura DeMartino, Janice P. Frankle, James A. Kohm, and Michael Ostheimer.*

For the Respondents: *Not represented by counsel.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Herbs Nutrition Corporation, a corporation, and Syed M. Jafry, individually and as an officer of Herbs Nutrition 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 Herbs Nutrition Corporation is a California corporation with its principal office or place of business at 21712 Hawthorne Blvd #276, Torrance, California 90503.

2. Respondent Syed M. Jafry is an officer of Herbs Nutrition Corporation. Individually, or in concert with others, he formulates, directs, controls, or participates in the policies, acts, or practices of Herbs Nutrition Corporation, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Herbs Nutrition Corporation.

3. The acts and practices of Respondents alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

4. Many women experience symptoms of menopause including hot flashes (also called flushes), night sweats, sleep disturbances, and painful intercourse. To relieve the symptoms of menopause, some doctors prescribe hormone therapy. This typically involves the use of either estrogen alone (for women who have had a hysterectomy) or (for women who have not had a hysterectomy) estrogen with an orally administered progestagen. Progestagen is a general term that includes progesterone (which is the progestagen produced by the human body or which can be synthesized as a drug) and progestins (which are synthetic forms of progestagens). A progestagen is added to estrogen to prevent hyperplasia (cell overgrowth) in the endometrium (lining of the uterus). This overgrowth can lead to endometrial (uterine) cancer. While progestagens decrease a woman’s risk of estrogen-induced

Complaint

endometrial cancer, progestins have been found to increase a woman's risk of developing breast cancer.

5. Respondents have advertised, offered for sale, sold, and distributed products to the public throughout the United States, including Eternal Woman Progesterone Cream and Pro-Gest Body Cream. Respondents advertise and offer the products for sale through the Internet site www.progesterone-cream.net.

6. For the purposes of Section 12 of the FTC Act, 15 U.S.C. § 52, Eternal Woman Progesterone Cream and Pro-Gest Body Cream are "drugs" as defined in Section 15(c) of the FTC Act, 15 U.S.C. § 55(c).

7. Eternal Woman Progesterone Cream is a drug labeled as containing Natural Progesterone USP from soy (500 mg per ounce) and other ingredients. A four ounce jar costs \$18.93 plus shipping and handling, and a two ounce tube costs \$9.50 plus shipping and handling. Pro-Gest Body Cream is a drug labeled as containing USP Progesterone. A 2-ounce tube costs \$18.13 plus shipping and handling. Eternal Woman Progesterone Cream and Pro-Gest Body Cream are applied transdermally.

8. To induce consumers to purchase Eternal Woman Progesterone Cream and Pro-Gest Body Cream, Respondents have disseminated or have caused to be disseminated advertisements, including but not necessarily limited to the attached Exhibit A. These advertisements contain the following statements and depictions, among others, on Respondents' website:

A. Progesterone Cream contains NO synthetic hormones and thus can help you balance your hormones. Progesterone cream eliminates estrogen dominance and relieve your symptoms without dangerous side effects.

(Exhibit A at 1.)

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B. Medical experts believe the out of balance hormones are due to the lack of progesterone in women. Clinical studies show that PMS, menopausal problems, breast cancer and fibrocystic breast have a direct relationship with estrogen dominance. Progesterone is needed for the proper function of the adrenal glands. Stress on the adrenal glands may lead to progesterone deficiency, often causing symptoms of nervous disorders, depression, irritability, fatigue and mood swings. Medical practitioners reports many of these issues are helped through the use of a high quality natural progesterone cream, as Wild Yam & Progesterone+ or Ultra Harmony - a plant estrogen cream. Our creams do not contain estrogen but plant estrogens, which have no side effects.

* * *

Millions of women use natural progesterone to reduce monthly PMS symptoms, ease the transitions of menopausal hot flashes, night sweats, mood swings, while others use it as to maintain healthy bones.

Benefits of Progesterone

* * *

Protects against endometrial cancer
Helps protect against breast cancer

* * *

Natural progesterone is naturally produced in the body.
Synthetic progestins can cause side effects.

(Exhibit A at 4.)

C. Natural Progesterone cream is a safe, natural alternative to HRT because it's produced by a woman's body during the second half of each monthly cycle, from ovulation until menses, and is the dominant hormone during this phase.

* * *

Complaint

Natural Progesterone cream also stimulates bone-building and thus helps protect against osteoporosis.

(Exhibit A at 6.)

D. Your body needs natural progesterone. . .For women, who suffer from hysterectomy symptoms, menstrual conditions, female health conditions, hormone deficiencies, menopause hot flashes, osteoporosis or thinning bones, pms. Reduces breast cancer risk, hair loss, fat gain from estrogen dominance, menopause acne, migraine headaches, and much more. . .

* * *

In the right amount, progesterone can:

* * *

Decrease risk of endometrial cancer

Help protect against breast cancer, fibrocystic breasts, and osteoporosis

(Exhibit A at 12-13.)

9. Through the means described in Paragraphs 7 and 8, Respondents have represented, expressly or by implication, that:

A. Eternal Woman Progesterone Cream and Pro-Gest Body Cream are effective in preventing, treating, or curing osteoporosis;

B. Eternal Woman Progesterone Cream and Pro-Gest Body Cream are effective in preventing or reducing the risk of estrogen-induced endometrial (uterine) cancer; and

C. Eternal Woman Progesterone Cream and Pro-Gest Body Cream do not increase the user's risk of developing breast cancer and/or are effective in preventing or reducing the user's risk of developing breast cancer.

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10. Through the means described in Paragraphs 7 and 8, Respondents have represented, expressly or by implication, that they possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 9, at the time the representations were made.

11. In truth and in fact, Respondents did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 9 at the time the representations were made. Therefore, the representation set forth in Paragraph 10 was, and is, false or misleading.

12. The acts and practices 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.

NOTICE

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

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the twentieth (20th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute

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a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the ALJ shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the ALJ, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 7 days after the last answer is filed by any party named as a respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

Notice is hereby given to each of the respondents named in this complaint that a hearing before the ALJ on the charges set forth in this complaint will begin on January 3, 2008, at 10 a.m., or such other date and time as determined by the ALJ, in Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. At the hearing, you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

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

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

ORDER**DEFINITIONS**

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

1. Unless otherwise specified, "Respondents" shall mean:
 - a. Herbs Nutrition Corporation, a corporation, and its successors and assigns and its officers; and
 - b. Syed M. Jafry, individually and as an officer of Herbs Nutrition Corporation.

2. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified

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to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

3. “Progesterone product” shall mean any product containing or purporting to contain any progestagen (whether natural or synthetic), including but not limited to progesterone (whether produced by the human body or produced outside the human body but having the same chemical structure as the progesterone produced by the human body) or any progestin, including but not limited to Eternal Woman Progesterone Cream and Pro-Gest Body Cream.

4. “Food” shall mean (a) articles used for food or drink for man or other animals, (b) chewing gum, and (c) articles used for components of any such article.

5. “Drug” shall mean (a) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; (b) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; (c) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (d) articles intended for use as a component of any article specified in clause (a), (b), or (c); but does not include devices or their components, parts, or accessories.

6. “Device” shall mean an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is (a) recognized in the official National Formulary, or the United States Pharmacopoeia, or any supplement to them; (b) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or (c) intended to affect the structure or any function of the body of man or other animals, and which does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon

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being metabolized for the achievement of any of its principal intended purposes.

7. “Covered product or service” shall mean any dietary supplement, food, drug, device, or any health-related service or program.

8. “Commerce” shall mean commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

9. “Endorsement” shall mean any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group or institution.

I.

IT IS THEREFORE ORDERED that Respondents, directly or through any person, partnership, corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any Progesterone product or any other covered product or service, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name or endorsement:

- A. That such product or service is effective in preventing, treating, or curing osteoporosis;

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- B. That such product or service is effective in preventing or reducing the risk of estrogen-induced endometrial (uterine) cancer;
- C. That such product or service does not increase the user's risk of developing breast cancer;
- D. That such product or service is effective in preventing or reducing the user's risk of developing breast cancer;
- E. That such product or service is safe for human use or has no side effects;
- F. That such product or service is effective in the mitigation, treatment, prevention, or cure of any disease, illness or health conditions; or
- G. About the health benefits, performance, efficacy, safety, or side effects of such product or service;

unless the representation is true, not misleading, and, at the time it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that Respondents, directly or through any person, partnership, corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any Progesterone product or any other covered product or service in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

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

- A. Nothing in this order shall prohibit Respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration;
- B. Nothing in this order shall prohibit Respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990; and
- C. Nothing in this order shall prohibit Respondents from making any representation for any device that is permitted in labeling for such device under any new medical device application approved by the Food and Drug Administration.

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:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and

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- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

V.

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

VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any change with regard to Herbs Nutrition Corporation or any business entity that any Respondent directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including but not limited to incorporation or other organization; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. *Provided, however,* that, with respect to any proposed change about which Respondents learn less than thirty (30) days prior to the date such action is to take place, Respondents shall notify the Commission as soon as is practicable after obtaining such

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knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that Respondents, for a period of seven (7) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment; or of their affiliation with any new business or employment. The notice shall include Respondent's new business address and telephone number, a description of the nature of the business or employment, and their duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that Respondents shall, within sixty (60) days after service of this order, and, upon reasonable notice, at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IX.

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

Complaint

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any Respondent that is not named as a Respondent in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the 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 this order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by the Secretary and its official seal to be affixed hereto, at Washington, D.C., this twenty-eighth day of September, 2007.

By the Commission.

Complaint

EXHIBIT A

Home | Progesterone Cream at Progesterone Cream Store

Page 1 of 3

Progesterone Cream

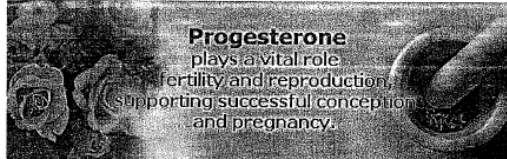
Progesterone Cream - Natural PMS remedy
progesterone Cream - Osteoporosis treatment
progesterone Cream - Control Menopause
progesterone Cream - Hormone Replacement Therapy

[View Cart](#)

[Checkout](#)

Home | [Add to Favourite](#) | [Health Articles](#) | [Member Area](#) | [Health Froum](#)

[Search](#)



Progesterone Cream contains NO synthetic hormones and thus can help you balance your hormones. Progesterone cream eliminates estrogen dominance and relieves your symptoms without dangerous side effects. Progesterone Cream is designed for women to relief symptoms relating to PMS. [<More>](#)

Top Selling Product

Hot Flash
Source Naturals
Size: 45 Tabs
Price: **\$6.63**
[Buy](#)

Full Spectrum Vitex Extract
Planetary Formulas
Size: 60 Tabs
Price: **\$6.73**
[Buy](#)

Soy 1000 Full Spectrum
Planetary Formulas
Size: 240 Tabs
Price: **\$24.68**
[Buy](#)

Shen Min Activator with
Progestoplex
Biotech Corporation
Size: 3 Oz
Price: **\$26.62**
[Buy](#)

MaxCuts
Olymplan Labs
Size: 150 Caps
Price: **\$26.61**
[Buy](#)

NuSoma
Olymplan Labs
Size: 150 Caps
Price: **\$37.28**
[Buy](#)

base review our entire range of Women's Health Products:

Progesterone Cream
Source Naturals
Size: 4 Oz
Price: **\$14.83**
[Buy](#)

Natural Progesterone Cream
Source Naturals
Size: 2 Oz Tube
Price: **\$7.94**
[Buy](#)

Pro-Gest Body Cream
Emerita
Size: 2 Oz
Price: **\$18.13**
[Buy](#)

Phytoestrogen Body Cream
(Menopause Solutions)
Emerita
Size: 2 Oz
Price: **\$13.60**
[Buy](#)

Womens Renew Internal
Cleansing System
Yerba Prima
Size: 1 Kit (3 PC)
Price: **\$18.97**
[Buy](#)

Black Cohosh
Source Naturals
Size: 120 Tabs
Price: **\$9.28**
[Buy](#)

Tribulus
Source Naturals
Size: 60 Tabs
Price: **\$7.16**
[Buy](#)

DIM (Diindolylmethane)
Source Naturals
Size: 60 Tabs
Price: **\$10.59**
[Buy](#)

Bioflavonoid Complex
Source Naturals
Size: 60 Tabs
Price: **\$10.87**

Oxy-Response
Source Naturals
Size: 4 Oz
Price: **\$16.42**

[Laine HCl Pepsin & Gentian](#)

Complaint

Royal & Progestrone Cream at Progestrone Cream Store

Page 2 of 3



Buy



PMS Forte
Futurebiotics
Size: 50 Tabs
Price: **\$7.94**
Buy



PMS
Hylands
Size: 100 Tabs
Price: **\$6.83**
Buy



Female Complex
Nature's Answer
Size: 90 VCaps
Price: **\$5.87**
Buy



Menopause Formula
Natrol
Size: 60 Caps
Price: **\$8.68**
Buy



Cran-Aid (CranAid) Tea
Traditional Medicinals Teas
Size: 16 Bags
Price: **\$4.06**
Buy



Pregnancy Tea
Traditional Medicinals Teas
Size: 16 Bags
Price: **\$4.06**
Buy



PMS Tea
Traditional Medicinals Teas
Size: 16 Bags
Price: **\$4.06**
Buy



Women's Liberty Tea
Traditional Medicinals Teas
Size: 16 Bags
Price: **\$4.06**
Buy



Buy



Menopause Tablets
Hylands
Size: 100 Tabs
Price: **\$6.83**
Buy



Royal Ginseng for Women
Imperial Elixir/Ginseng Company
Size: 45 Caps
Price: **\$9.64**
Buy



Phyto Estrogen Power
Nature's Herbs
Size: 150 Caps
Price: **\$24.77**
Buy



Women's One Multivitamin
Rainbow Light
Size: 90 Tabs
Price: **\$16.97**
Buy



Mother's Milk Tea
Traditional Medicinals Teas
Size: 16 Bags
Price: **\$4.06**
Buy



Organic Raspberry Leaf Tea
Traditional Medicinals Teas
Size: 16 Bags
Price: **\$4.06**
Buy



Female Toner Tea
Traditional Medicinals Teas
Size: 16 Bags
Price: **\$4.06**
Buy



Womens Moon Cycle
Yogi Teas
Size: 16 Bags
Price: **\$3.79**
Buy



Bitters
Doctor's Best
Size: 120 VC
Price: **\$13.89**
Buy



Vagi Gard Moist Again
Women's Health Formulas
Size: 2.5 Oz
Price: **\$5.31**
Buy



MindEase (Mind Ease)
Honso USA
Size: 180 tabs
Price: **\$18.17**
Buy



Woman's Nursing Mom
Yogi Teas
Size: 16 Bags
Price: **\$3.79**
Buy



Woman's Mother To Be
Yogi Teas
Size: 16 Bags
Price: **\$3.79**
Buy



Woman's Raspberry Leaf
Yogi Teas
Size: 16 Bags
Price: **\$3.79**
Buy



Complete Menopause Multivitamin
Rainbow Light
Size: 120 Tabs
Price: **\$21.52**
Buy

Complaint

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Woman's Dong Quai Tonic
Yogi Teas
Size: 16 Bags
Price: \$3.79
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Natural Progesterone Cream at Progesterone Cream 01/16

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Progesterone Cream

Progesterone Cream - Natural PMS remedy
 progesterone Cream - Osteoporosis treatment
 progesterone Cream - Control Menopause
 progesterone Cream - Hormone Replacement Therapy

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Progesterone Cream

Women need natural progesterone to counter-balance the effects of estrogen dominance. Progesterone therapy is successfully used by health care professionals to relieve symptoms of both PMS, help the transitions of menopause, improve moods, or low libido when progesterone levels are low and/or estrogen is dominant. In menopause, both estrogen and progesterone decrease.

Medical experts believe the out of balance hormones are due to the lack of progesterone in women. Clinical studies show that PMS, menopausal problems, breast cancer and fibrocystic breast have a direct relationship with estrogen dominance. Progesterone is needed for the proper function of the adrenal glands. Stress on the adrenal glands may lead to progesterone deficiency, often causing symptoms of nervous disorders, depression, irritability, fatigue and mood swings.

Medical practitioners reports many of these issues are helped through the use of a high quality natural progesterone cream, as Wild Yam & Progesterone+ or Ultra Harmony -a plant estrogen cream. Our creams do not contain estrogen but plant estrogens, which have no side effects. Blood tests do not show an increase of estrogen with progesterone or plant estrogens. We do know that progesterone and estrogen, like many of the hormones in the body, work synergistically. The presence of progesterone sensitizes estrogen receptors in the body, making circulating estrogen levels work better without changing the actual levels of estrogens.

We know that after menopause, many women find that supplementation of progesterone is enough for addressing symptoms. For some women, who are very thin, have had hysterectomies at a younger age, or have high cholesterol or heightened bone loss, some form of estrogen or phytoestrogen may be necessary to completely fulfill and balance the bodies needs.

Millions of women use natural progesterone to reduce monthly PMS symptoms, ease the transitions of menopausal hot flashes, night sweats, mood swings, while others use it as to maintain healthy bones.

Benefits of Progesterone

- Precursor of other sex hormones, i.e., estrogen and testosterone
- Protects against breast fibrocysts
- Natural diuretic
- Helps use fat for energy
- Natural antidepressant
- Helps thyroid hormone action
- Normalizes blood clotting
- Restores libido
- Helps normalize blood sugar levels
- Restores proper cell oxygen levels
- Protects against endometrial cancer
- Helps protect against breast cancer
- Necessary for survival of embryo and fetus throughout gestation

The herbs have been used for medicinal purposes for hundreds of years around the world. Many of these herbs have been clinically documented to have special remedial and therapeutic properties for hormonal balance. Wise Women Essentials creams contain several well-known herbal ingredients. The compound diosgenin from the wild yam or soybean is used to make natural progesterone in a laboratory. Natural progesterone is naturally produced in the body. Synthetic progestins can cause side effects. Often, the cause of distress during changing times is a lack of

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PROGESTERONE Cream at Progesterone Cream Store

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progesterone. Natural progesterone minimizes the discomfort.

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Natural Progesterone Cream-Control Your Hormone Naturally

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Progesterone Cream - Natural PMS remedy
 progesterone Cream - Osteoporosis treatment
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Natural Progesterone Cream
Natural Progesterone Cream-Control Your Hormone Naturally
Natural Progesterone Cream

Progesterone derived from plant sources as an alternative to conventional hormone replacement therapy in menopausal women. Progesterone Cream can help address normal menopausal discomforts, such as hot flashes, night sweats, and irritability. Natural Progesterone cream is a safe, natural alternative to HRT because it's produced by a woman's body during the second half of each monthly cycle, from ovulation until menses, and is the dominant hormone during this phase.

Our leading brands' Natural Progesterone cream has been clinically formulated to help bring balance to a woman's body throughout change-of-life transitions using herbs, vitamins, and other natural ingredients. Natural Progesterone Cream is comprehensive formula addresses the different changes each woman experiences and may be taken along with other women's health supplements. Natural Progesterone cream also stimulates bone-building and thus helps protect against osteoporosis.

<p>Natural Progesterone Cream (4 Oz Tube) Source Naturals Source Naturals ETERNAL WOMAN™ Natural PROGESTERONE CREAM is intended for women of all ages. It features ... Price \$18.93 Buy Now</p>	
---	---

Pre Menopausal Woman Need Natural Progesterone Cream

Why would a pre menopausal woman need Natural Progesterone Cream? In the ten to fifteen years before menopause, many women regularly have anovulatory cycles in which they make enough estrogen to create menstruation, but they don't make any progesterone, thus setting the stage for estrogen dominance. Using Natural progesterone cream during anovulatory months can help prevent the symptoms of PMS.

PMS

We know that PMS can occur despite normal progesterone levels when stress is present. Stress increases cortisol production; cortisol blockades (or competes for) progesterone receptors. Additional progesterone cream is required to overcome this blockade, and stress management is important.

Related Products

- Menopause Tablets (100 Tabs) by Hylands
- Female Toner Tea (16 Bags) by Traditional Medicinals Teas

Related Keyword Searched

- natural progesterone cream
- fatigue
- progesterone effects
- source natural



Hot Flash
 Source Naturals
 Price \$8.45
[Buy Now](#)



Menopause Multiple
 Source Naturals
 Price \$11.48
[Buy Now](#)



Progesterone Cream
 Zand
 Price \$15.20
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Progestex
 Nutricology/Allergy
 Research Group
 Price \$12.42
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Natural Progesterone Cream-Control Your Hormone Naturally

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estrogen dominance
progesterone
menopausal
medroxyprogesterone
hot flashes
hormone imbalance
breast tenderness
post menopausal



Progesterone Cream
NOW Foods
Price **\$12.66**
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Progesterone Cream by Source Naturals

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Progesterone Cream

Progesterone Cream - Natural PMS remedy
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Progesterone Cream
Source Naturals
 Size **4 Oz**
 Retail Price ~~\$27.98~~
 Our Price **\$18.93**

[Add to Cart](#)



Size Choices
 02 Oz

Description of Progesterone Cream

Eternal Woman Progesterone Cream features natural progesterone USP from soy. Our Progesterone Cream is guaranteed to contain 500 mg of progesterone per ounce and 22 mg per 1/4 teaspoon.

Ingredients of Progesterone Cream

Supplement Facts		
Serving Size: 1/4 teaspoon		
	Amount Per Serving	%DV
Delonized Water, Aloe Vera Gel, Cetearyl Glucoside, Caprylic/Capric Triglyceride, Cetyl Alcohol, Glycerin, Natural Progesterone USP from soy (500 mg per ounce), Wild Yam Extract, Tocopheryl Acetate (Natural Vitamin E), Lecithin Phospholipid, Glyceryl Stearate & Peg-100 Stearate, Jojoba Oil, Squalene, Benzyl Alcohol, Stearic Acid, Grapefruit Seed Extract, Ginseng Root Extract, Methylparaben, Propylparaben, Sorbic Acid, Potassium Benzoate, Xanthan Gum, and Rosemary Oil.		

Suggested Use for Progesterone Cream

Massage 1/4 to 1/2 teaspoon of cream twice daily into smooth skin areas, such as wrists, face, throat, abdomen or chest. Pre-menopausal women use for 14 days prior to the first day of menstruation, discontinue and repeat. Menopausal and postmenopausal women use for 21 days, discontinue for 7 days and repeat. These are general recommendations only and may need to be modified for individual needs.

Warning for Progesterone Cream

If you are pregnant, nursing, or intending to become pregnant, consult with a health care professional before using this product. If irritation occurs, discontinue use. For external use only. Do not use around eye area.

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ETERNAL WOMAN™ PROGESTERONE CREAM BY SOURCE NATURALS

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 [Search](#)**Natural Progesterone Cream**

Source Naturals

Size **2 Oz Tube**Retail Price ~~\$14.98~~Our Price **\$9.50**[Add to Cart](#)**Size Choices**
0.4 Oz Tube**Description of Natural Progesterone Cream**

Source Naturals ETERNAL WOMAN™ Natural PROGESTERONE CREAM is intended for women of all ages. It features natural progesterone USP from soy. Our Progesterone Cream is guaranteed to contain 500 mg of progesterone per ounce and 22 mg per 1/4 teaspoon.

Ingredients of Natural Progesterone Cream**Supplement Facts**

Serving Size: 1/4 teaspoon

Amount Per Serving %DV

Deionized Water, Aloe Vera Gel, Cetearyl Glucoside, Caprylic/Capric Triglyceride, Cetyl Alcohol, Glycerin, Natural Progesterone USP from soy (500 mg per ounce), Tocopheryl Acetate (Natural Vitamin E), Wild Yam Extract, Lecithin Phospholipid, Glyceryl Stearate & PEG-100 Stearate, Jojoba Oil, Squalene, Benzyl Alcohol, Stearic Acid, Grapefruit Seed Extract, Ginseng Root Extract, Methylparaben, Propylparaben, Sorbic Acid, Xanthan Gum, and Rosemary Oil.

Suggested Use for Natural Progesterone Cream

Massage 1/4 to 1/2 teaspoon of cream twice daily into smooth skin areas such as the wrists, inner arms or thighs, throat, abdomen or chest. Premenopausal women use for 14 days prior to the first day of menstruation, discontinue and repeat. Menopausal and postmenopausal women use for 21 days, discontinue for 7 days and repeat. These are general recommendations only and may need to be modified for individual needs.

Warning for Natural Progesterone Cream

If you are pregnant, nursing, or intending to become pregnant, consult with a health care professional before using this product. If irritation occurs, discontinue use. For external use only. Do not use around eye area.

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Herbs Nutrition Corporation Cream by SOURCE NATURALS

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Pro-Gest Body Cream by Emerita

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Pro-Gest Body Cream

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Pro-Gest Body Cream

Emerita

Size 2 Oz

Retail Price ~~\$26.99~~Our Price **\$18.13**
 Add to Cart

Size Choices
 1/4 Oz
Description of Pro-Gest Body Cream

Who knew a little tube of cream could change the world? In 1978 we had a revolutionary idea: that there was not enough choice when it came to support for perimenopause and menopause. So we created Pro-Gest to give women a much-deserved alternative. It's the only natural progesterone cream that's been clinically tested. It's the best-selling progesterone cream available anywhere (and has been for many years).

USP Progesterone: Pro-Gest cream is manufactured to contain 450 milligrams (mg) of USP Progesterone per ounce (900 mg per two-ounce tube). Each 1/4 tsp contains approximately 20 mg of USP Progesterone. Careful clinical research has shown this to be an effective amount to achieve a natural balance. United States Pharmacopoeia (USP) denotes a government recognized standard of purity and strength. It is sometimes referred to as "human-identical" or "bio-identical" progesterone, which differentiates it from synthetic progestins or progestogens. USP classifies the progesterone as the highest quality available.

Ingredients of Pro-Gest Body Cream

Water (Aqua), Aloe Barbadensis Gel, Tocopheryl Acetate, Cetyl Alcohol, Ethylhexyl Palmitate, Sweet Almond (Prunus amygdalus dulcis) Oil, Panthenol, PEG-8 Stearate, Stearic Acid, Glycerin, USP Progesterone, Glycerol Stearate, Propylene Glycol, Lemon (Citrus medica limonum) Oil, Carbomer, Methylparaben, Ethylparaben, Triethanolamine, Diazolidinyl Urea This information is intended for educational purposes only. These statements have not been evaluated by the Food and Drug Administration. These products are not intended to diagnose, treat, cure or prevent disease.

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rogesta care-progestaCare for women

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Progesterone Cream

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rogesta care
rogesta care-ProgestaCare for Women

rogestaCare:
Your body needs natural progesterone. ProgestaCare helps women reduce the
severity of PMS symptoms lessen the effects of menopause and counter-balance
the effects of estrogen dominance, Infertility, Migraines, Fibrocystic Breast, Skin
Acne, and Acne. For women, who suffer from hysterectomy symptoms, menstrual
irregularities, female health conditions, hormone deficiencies, menopause hot
flashes, osteoporosis or thinning bones, pms. Reduces breast cancer risk, hair loss,
weight gain from estrogen dominance, menopause acne, migraine headaches, and
much more ProgestaCare is the #1 selling natural progesterone cream trusted by
millions of women worldwide. Our superior formula represents the purest
ingredients you can buy With all its benefits, purity and quality, ProgestaCare is
commended by physicians and women more than any other natural
progesterone cream.

rogestaCare for Women

progesterone Cream Just Got Better,
Now 4 oz. size for the price of the old 3
oz.

rogestaCare is the #1 selling natural
progesterone cream trusted by millions
of women worldwide.

Our superior formula represents the
finest ingredients you can buy.

rogestaCare helps women reduce the
severity of PMS symptoms, lessen the
effects of menopause and counter-
balance the effects of estrogen
dominance.

rogestaCare utilizes USP grade
micronized natural progesterone derived
from wild yam. The formula contains an
average of 480mg of natural
progesterone per ounce.

ProgestaCare is made entirely from natural ingredients (no fragrances). It is
non-oily, does not leave a residue on the skin, and it absorbs quickly.

Why is natural progesterone so important?The fact is, that in industrialized
countries, most men and women have out-of-balance hormones. The reason,
according to Dr. John Lee, is there is an over-abundance of estrogen and
xeno-genic substances in the food we eat and in our modern environment.
"Estrogen dominance," as it is sometimes referred to, is a problem in the U.S. and
other industrialized countries. Your body needs natural progesterone to counter-
balance the toxic effects of estrogen dominance.

rogestaCare - Hormone Balance

The balance of progesterone and estrogen in a woman's body is very important.
Progesterone acts to balance excess estrogen thus preventing estrogen from
becoming harmful to health, a condition known as estrogen dominance. At
different times in the life of a woman, hormonal imbalance can result in symptoms
of PMS, perimenopause, or menopause. Symptoms of progesterone imbalance

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Progesterone Cream

Source Naturals

Price \$14.83

Buy Now



Natural Progesterone Cream

Kal

Price \$17.13

Buy Now



Progesterone Cream

Kal

Price \$21.97

Buy Now



Progesterone Cream

NOW Foods

Price \$12.66

Buy Now



Natural Progesterone Cream

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Progesterone Cream - Progesterone Cream for Women

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clude moodiness, hot flashes, night sweats, depression, weight gain, bloating,
and breast tenderness.

Source Naturals

Price \$14.83

[Buy Now!!!](#)

When the right amount, progesterone can:

- have a calming effect
- enhance moods
- regulate fluid balance
- normalize sleep
- increase sex drive
- help use fat for energy
- stabilize blood sugar, thyroid function, and mineral balance
- decrease risk of endometrial cancer
- help protect against breast cancer, fibrocystic breasts, and osteoporosis

Related Products

- Progesterone 1000 Full Spectrum (1000 mg, 60 Tabs) by Planetary Formulas
- Progesterone PM (4 Fl Oz) by Kal

Related Keyword Searched

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- progesterone

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Decision and Order

DECISION AND ORDER

The Commission having heretofore issued its Complaint charging the Respondents, Herbs Nutrition Corporation and Syed M. Jafry named in the caption hereof, with violations of Sections 5(a) and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45(a) and 52 as amended, and Respondents having been served with a copy of that Complaint, together with a notice of contemplated relief; and

The Respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondents of all the jurisdictional facts set forth in the aforesaid complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondents that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; 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, 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 Herbs Nutrition Corporation is a California corporation with its principal office or place of business at 21712 Hawthorne Blvd #276, Torrance, California 90503.
2. Respondent Syed M. Jafry is an officer of Herbs Nutrition Corporation. Individually, or in concert with others, he formulates,

Decision and Order

directs, controls, or participates in the policies, acts, or practices of Herbs Nutrition Corporation. His principal office or place of business is the same as Herbs Nutrition Corporation.

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

ORDER**DEFINITIONS**

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

1. Unless otherwise specified, "Respondents" shall mean:

(a) Herbs Nutrition Corporation, a corporation, and its successors and assigns and its officers; and

(b) Syed M. Jafry, individually and as an officer of Herbs Nutrition Corporation.

2. "Competent and reliable scientific evidence" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

3. "Progesterone product" shall mean any product containing or purporting to contain any progestagen (whether natural or synthetic), including but not limited to progesterone (whether produced by the human body or produced outside the human body but having the same chemical structure as the progesterone produced by the human body) or any progestin, including but not limited to Eternal Woman Progesterone Cream and Pro-Gest Body Cream.

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4. “Food” shall mean (a) articles used for food or drink for man or other animals, (b) chewing gum, and (c) articles used for components of any such article.

5. “Drug” shall mean (a) articles recognized in the official United States Pharmacopoeia, official Homoeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; (b) articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals; (c) articles (other than food) intended to affect the structure or any function of the body of man or other animals; and (d) articles intended for use as a component of any article specified in clause (a), (b), or (c); but does not include devices or their components, parts, or accessories.

6. “Device” shall mean an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, which is (a) recognized in the official National Formulary, or the United States Pharmacopoeia, or any supplement to them; (b) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease, in man or other animals, or (c) intended to affect the structure or any function of the body of man or other animals, and which does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and which is not dependent upon being metabolized for the achievement of any of its principal intended purposes.

7. “Covered product or service” shall mean any dietary supplement, food, drug, device, or any health-related service or program.

8. “Commerce” shall mean commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or

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between the District of Columbia and any State or Territory or foreign nation.

9. “Endorsement” shall mean any advertising message (including verbal statements, demonstrations, or depictions of the name, signature, likeness or other identifying personal characteristics of an individual or the name or seal of an organization) which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser. The party whose opinions, beliefs, findings, or experience the message appears to reflect will be called the endorser and may be an individual, group or institution.

I.

IT IS THEREFORE ORDERED that Respondents, directly or through any person, partnership, corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any Progesterone product or any other covered product or service, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name or endorsement:

- A. That such product or service is effective in preventing, treating, or curing osteoporosis;
- B. That such product or service is effective in preventing or reducing the risk of estrogen-induced endometrial (uterine) cancer;
- C. That such product or service does not increase the user’s risk of developing breast cancer;
- D. That such product or service is effective in preventing or reducing the user’s risk of developing breast cancer;

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- E. That such product or service is safe for human use or has no side effects;
- F. That such product or service is effective in the mitigation, treatment, prevention, or cure of any disease, illness or health conditions; or
- G. About the health benefits, performance, efficacy, safety, or side effects of such product or service;

unless the representation is true, not misleading, and, at the time it is made, Respondents possess and rely upon competent and reliable scientific evidence that substantiates the representation.

II.

IT IS FURTHER ORDERED that Respondents, directly or through any person, partnership, corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any Progesterone product or any other covered product or service in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

III.

IT IS FURTHER ORDERED that:

- A. Nothing in this order shall prohibit Respondents from making any representation for any drug that is permitted in labeling for such drug under any tentative final or final standard promulgated by the Food and Drug Administration, or under any new drug application approved by the Food and Drug Administration;

Decision and Order

- B. Nothing in this order shall prohibit Respondents from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990; and
- C. Nothing in this order shall prohibit Respondents from making any representation for any device that is permitted in labeling for such device under any new medical device application approved by the Food and Drug Administration.

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:

- A. All advertisements and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation; and
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

V.

IT IS FURTHER ORDERED that Respondents shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees,

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agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of the order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any change with regard to Herbs Nutrition Corporation or any business entity that any Respondent directly or indirectly controls, or has an ownership interest in, that may affect compliance obligations arising under this order, including but not limited to incorporation or other organization; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. *Provided, however,* that, with respect to any proposed change about which Respondents learn less than thirty (30) days prior to the date such action is to take place, Respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that Respondents, for a period of seven (7) years after the date of issuance of this order, shall notify the Commission of the discontinuance of their current business or employment; or of their affiliation with any new business or employment. The notice shall include Respondents' new business

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address and telephone number, a description of the nature of the business or employment, and their duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that Respondents shall, within sixty (60) days after service of this order, and, upon reasonable notice, at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with this order.

IX.

This order will terminate on February 21, 2028, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any Respondent that is not named as a Respondent in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the 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 this order will not

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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 Herbs Nutrition Corporation, a corporation, and Syed Jafry, individually and as an officer of Herbs Nutrition (together, “respondents”). The proposed order resolves the allegations of the complaint issued against the respondents on September 28, 2007.

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

This matter involves the advertising and promotion of Eternal Woman Progesterone Cream and Pro-Gest Body Cream, transdermal creams that, according to their respective labels, contain, among other ingredients, natural progesterone. According to the Commission’s complaint, the respondents represented that Eternal Woman Progesterone Cream and Pro-Gest Body Cream: (1) were effective in preventing, treating, or curing osteoporosis; (2) were

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effective in preventing or reducing the risk of estrogen-induced endometrial (uterine) cancer; and (3) did not increase the user's risk of developing breast cancer and/or were effective in preventing or reducing the user's risk of developing breast cancer. The complaint alleged that the respondents failed to have substantiation for these claims. The proposed consent order contains provisions designed to prevent the respondents from engaging in similar acts and practices in the future.

Part I of the proposed order requires the respondents to have competent and reliable scientific evidence substantiating claims that any progesterone product or any other dietary supplement, food, drug, device or health-related service or program is effective in preventing, treating, or curing osteoporosis, in preventing or reducing the risk of estrogen-induced endometrial cancer or breast cancer, or in the mitigation, treatment, prevention, or cure of any disease, illness, or health condition; that it does not increase the user's risk of developing breast cancer, is safe for human use, or has no side effects; or about its health benefits, performance, efficacy, safety, or side effects.

Part II of the proposed order prevents the respondents from misrepresenting the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

Part III of the proposed order provides that the order does not prohibit the respondents from making representations for any drug that are permitted in labeling for the drug under any tentative final or final Food and Drug Administration ("FDA") standard or under any new drug application approved by the FDA; representations for any medical device that are permitted in labeling under any new medical device application approved by the FDA; and representations for any product that are specifically permitted in labeling for that product by regulations issued by the FDA under the Nutrition Labeling and Education Act of 1990.

Parts IV through VIII require the respondents to keep copies of relevant advertisements and materials substantiating claims made in

Analysis to Aid Public Comment

the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure and changes in employment that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part IX provides that the order will terminate after twenty (20) years under certain circumstances.

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

Complaint

IN THE MATTER OF

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

*Docket C-4215; File No. 061 0090
Complaint, March 13, 2008 – Decision, March 13, 2008*

This consent order addresses charges that Multiple Listing Service, Inc., a private real estate association in the Southwest Wisconsin area, adopted a rule that limited the publication of certain listing agreements on popular real estate multiple listing service websites, in a manner that limited the ability of real estate brokers to use Exclusive Agency Listings to offer unbundled brokerage services at a lower price than the full-service package. Specifically, information about properties would not be made available on the websites unless the listing contracts were Exclusive Right to Sell Listings. The order prohibits the respondent from adopting or enforcing any rules or policies that deny or limit the ability of its participants to enter into Exclusive Agency Listings, or any other lawful listing agreements, with sellers of properties. In addition, the order requires the respondent to conform its rules to the substantive provisions of the order within 30 days and to notify its participants of the order through its usual business communications and its website. The respondent is also required to notify the Commission of changes in its structure and to file periodic written reports concerning compliance with the terms of the order.

Participants

For the Commission: *Joel Christie, Mark Frankena, Stephanie Langley, David Meyer, Patrick J. Roach, and Louis Silvia.*

For the Respondent: *Alan Deutch, sole practitioner, and David Evans, Arent Fox 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 the Multiple Listing Service, Inc. (“Respondent” or “MLS, Inc.”), a corporation, has violated Section 5 of the Federal Trade Commission Act, 15

Complaint

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 allegations as follows:

NATURE OF THE CASE

This case involves a local, private real estate association that operates a Multiple Listing Service, which is a joint venture among its participants designed to foster real estate brokerage services. MLS, Inc. adopted a rule that limits the publication of certain listing agreements on popular internet real estate websites, in a manner that limits the ability of real estate brokers to use Exclusive Agency Listings to offer unbundled brokerage services at a lower price compared to the full service package. This rule deprives such brokers and the home sellers they represent of a significant benefit afforded by the MLS. The rule discriminates on the basis of lawful contractual terms between the listing real estate broker and the seller of the property, and lacks any justification that such a rule improves competitive efficiency. Consumers are harmed by this rule because it inhibits a lower cost option to sellers and increases search costs to buyers. As such, this rule constitutes a concerted refusal to deal except on specified terms with respect to a key input for the provision of real estate brokerage services.

RESPONDENT AND ITS PARTICIPANTS

1. Respondent Multiple Listing Service, Inc., (“MLS, Inc.”) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin. Respondent’s principal place of business is 11430 West North Avenue, Wauwatosa, Wisconsin 53226. MLS, Inc. operates for the benefit of its participants.

2. MLS, Inc. has more than 6500 real estate professionals as participants, and is affiliated with the National Association of Realtors (“NAR”). The majority of MLS, Inc.’s participants hold an active real estate license and are active in the real estate profession.

Complaint

3. The large majority of residential real estate brokerage professionals in the Southeast Wisconsin Area are participants of MLS, Inc. These professionals compete with one another to provide residential real estate brokerage services to consumers.

4. A Multiple Listing Service (“MLS”) is a clearinghouse through which participating real estate brokerage firms regularly and systematically exchange information on listings of real estate properties and share commissions with other participants who locate purchasers. MLS, Inc. is now and has been providing since 1985 a MLS for the use of its participants doing business in the Southeast Wisconsin Area, and this service is known as the Metro MLS.

5. When a property is listed on the Metro MLS, it is made available to all participants of the MLS for the purpose of trying to match a buyer with a seller. Information about the property, including the asking price, address and property details, is made available to participants of the MLS so that a suitable buyer can be found.

6. Metro MLS services the Southeast Wisconsin Area, which includes the cities of Milwaukee, Racine, Kenosha and Sheboygan, Wisconsin, and the surrounding counties.

7. Metro MLS is the only MLS that services the Southeast Wisconsin Area.

JURISDICTION

8. MLS, Inc. is and has been at all times relevant to this Complaint a corporation organized for its own profit or for the profit of its participants within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

9. The acts and practices of MLS, Inc., including the acts and practices alleged herein, have been or are in or affecting commerce

Complaint

within the meaning of Section 4 of the Federal Trade Commission Act.

MLS, INC. CONDUCT

10. In 2001, MLS, Inc. adopted and approved a rule that stated: “All active listings of all Participants are eligible for Internet publication unless . . . the listing is subject to an ‘exclusive agency’ contract as indicated on the MLS property profile sheet.” (the “Web Site Policy”). The Web Site Policy was rescinded by the MLS, Inc. Board of Directors in October 2006. MLS, Inc. participants were notified of the change on November 1, 2006.

11. The Web Site Policy prevented certain lawful residential property listings provided to Metro MLS, specifically “Exclusive Agency Listings,” from being transmitted to real estate web sites, based on the contractual relationship between the home seller and the real estate agent the seller employs to promote the property.

12. An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without assistance of a broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

13. Exclusive Agency Listings provide a means for MLS, Inc. participants to offer lower-cost, Unbundled Real Estate Brokerage Services to consumers. “Unbundled Real Estate Brokerage Services” are lawful arrangements pursuant to which a real estate broker or agent provides that a property offered for sale shall be listed on the MLS, but the listing broker or agent will not provide some or all of the services offered by other real estate brokers or will only offer such additional services on an à la carte basis.

14. Brokers offering Unbundled Real Estate Brokerage Services are able to provide home sellers with exposure of their listings

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through the MLS for a flat fee or reduced commission that is very small compared to the full commission prices traditionally charged. Exclusive Agency Listings can reserve to the home seller the right to sell the property without owing more than an agreed-to amount to the listing broker.

15. The Web Site Policy did not permit the publication of Exclusive Agency Listings on web sites approved by MLS, Inc., including (1) the NAR-operated “Realtor.com” web site; (2) the MLS-owned “wihomes.com” web site; and (3) Metro MLS participant web sites (collectively, “Approved Web Sites”).

16. The Web Site Policy had the effect of discouraging MLS, Inc. participants from accepting Exclusive Agency Listings.

MLS, INC. MARKET POWER

17. The provision of residential real estate brokerage services to sellers and buyers of real property in the Southeast Wisconsin Area is a relevant product market.

18. The publication and sharing of information relating to residential real estate listings for the purpose of brokering residential real estate transactions is a key input to the provision of real estate brokerage services, and represents a relevant input market. Publication of listings through Metro MLS is generally considered by sellers, buyers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for property in the Southeast Wisconsin Area.

19. By virtue of industry-wide participation and control over a key input, MLS, Inc. has market power in the Southeast Wisconsin Area.

20. Participation in MLS, Inc. is necessary to a broker providing effective residential real estate brokerage services to sellers and buyers of real property in the Southeast Wisconsin Area. Participation significantly increases the opportunities of brokerage

Complaint

firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales. The realization of these opportunities and efficiencies is important for brokers to compete effectively in the provision of residential real estate brokerage services in the Southeast Wisconsin Area.

APPROVED WEB SITES ARE KEY INPUTS

21. Access to the Approved Web Sites is a key input in the brokerage of residential real estate sales in the Southeast Wisconsin Area. Home buyers regularly use the Approved Web Sites to assist in their search for homes. The Approved Web Sites are the web sites most commonly used by home buyers in their home search. Many home buyers find the home that they ultimately purchase by searching on Approved Web Sites.

22. The most efficient, and at least in some cases the only, means for MLS, Inc. participants to have their properties listed on the Approved Web Sites is by having Metro MLS transmit those listings.

23. Property owners and their brokers in the Southeast Wisconsin Area generally consider publication of listings on Approved Web Sites, in conjunction with publication of listings on the Metro MLS, to be the most effective means of obtaining the broadest market exposure for residential property in the Southeast Wisconsin Area.

EFFECTS OF WEB SITE POLICY

24. The Web Site Policy restricted competition by inhibiting the use of Exclusive Agency Listings in the Southeast Wisconsin Area.

25. The Web Site Policy reduced consumer choices regarding both the purchase and sale of homes and induced consumers to pay

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for real estate brokerage services that they would not otherwise have purchased.

**THE WEB SITE POLICY OFFERS NO EFFICIENCY
BENEFIT**

26. There is no cognizable and plausible efficiency justification for the Web Site Policy. The Web Site Policy is not reasonably ancillary to the legitimate and beneficial objectives of the MLS.

VIOLATION

27. In adopting the policies and engaging in the Acts and Practices described herein, MLS, Inc. has acted as a combination of its participants to restrain trade in the provision of residential real estate brokerage services within the Southeast Wisconsin Area.

28. The purposes, capacities, tendencies, or effects of the policies, acts, or practices of MLS, Inc. and its participants as described herein have been unreasonably to restrain competition among brokers, and to injure consumers.

29. The policies, acts, practices, and combinations or conspiracies described herein constitute unfair methods of competition in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of March, 2008, issues its Complaint against Respondent Multiple Listing Service, Inc.

By the Commission.

Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the Multiple Listing Service, Inc., hereinafter sometimes referred to as “Respondent” or “MLS, Inc.,” and Respondent having been furnished thereafter with a copy of the draft Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered a public comment filed by an interested party, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34 (2008), the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent Multiple Listing Service, Inc. is a corporation organized, existing and doing business under and by virtue of the

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laws of the State of Wisconsin, with its office and principal place of business at 11430 West North Avenue, Wauwatosa, Wisconsin 53226.

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

- A. “Respondent” or “MLS, Inc.” means Multiple Listing Service, Inc., the MLS, Inc. Board of Directors, the predecessors, successors and assigns of MLS, Inc., its divisions and wholly- or partially-owned subsidiaries, affiliates, licensees of affiliates, partnerships, and joint ventures; and all the directors, officers, committees, employees, consultants, agents, and representatives of the foregoing, when acting in such capacity. The terms “subsidiary,” “affiliate” and “joint venture” refer to any person in which there is partial or total ownership or control by MLS, Inc., and is specifically meant to include Metro MLS and/or each of the MLS, Inc. Websites.
- B. “Multiple Listing Service” or “MLS” means a cooperative venture by which real estate brokers serving a common market area submit their listings to a central service which, in turn, distributes the information for the purpose of fostering cooperation in and facilitating real estate transactions.
- C. The term “Metro MLS” means any MLS owned, operated or controlled, in whole or in part, directly or indirectly, by MLS, Inc.

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- D. “Participant” means any person authorized by MLS, Inc. to access, use or enjoy the benefits of the Metro MLS in accordance with MLS, Inc.’s bylaws, policies, rules and regulations.
- E. “IDX” means the internet data exchange process that provides a means or mechanism for MLS listings to be integrated within a Website, including but not limited to IDX and/or Broker Reciprocity as defined by MLS, Inc.
- F. “IDX Website” means a Website that is capable of integrating the IDX listing information within the Website.
- G. “MLS, Inc. Websites” means any public Website operated by MLS, Inc., including but not limited to wihomes.com.
- H. “Realtor.com” means the Website operated by the National Association of Realtors that allows the general public to search information concerning real estate listings downloaded from a variety of MLSs representing different geographic areas of the country, including but not limited to real estate listings from MLS, Inc.
- I. “Approved Website” means a Website to which MLS, Inc. or Metro MLS provides information concerning listings for publication, including but not limited to Participant IDX Websites, MLS, Inc. Websites, and Realtor.com.
- J. “Exclusive Right to Sell Listing” means a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner’s stated terms, and agrees to pay the listing broker a commission when the property is sold, regardless of whether the buyer is found by the listing broker, the owner or another broker.

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- K. “Exclusive Agency Listing” means a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner’s stated terms, but also reserves to the property owner or principal a general right to sell the property without assistance from a broker, in which case the listing broker is paid a reduced commission or no commission when the property is sold.
- L. “Other Lawful Listing” means a listing agreement, other than an Exclusive Right to Sell Listing or an Exclusive Agency Listing, which is subject to the rules and regulations of MLS, Inc., and in compliance with applicable state laws and regulations.
- M. “Services of the MLS” means the benefits and services provided by the MLS to assist Participants in selling, leasing and valuing property and/or brokering real estate transactions. With respect to real estate brokers or agents representing home sellers, Services of the MLS shall include, but are not limited to:
1. having the property included among the listings in the MLS in a manner so that information concerning the listing is easily accessible by cooperating brokers; and
 2. having the property publicized through means available to the MLS, including, but not limited to, information concerning the listing being made available on wihomes.com, Realtor.com and IDX Websites.

II.

IT IS FURTHER ORDERED that Respondent directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a Multiple Listing Service or Approved Websites in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade

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Commission Act, 15 U.S.C. § 44, shall forthwith cease and desist from adopting or enforcing any policy, rule, practice or agreement of MLS, Inc. to deny, restrict or interfere with the ability of Participants to enter into Exclusive Agency Listings or other lawful listing agreements with the sellers of properties, including but not limited to any policy, rule, practice or agreement to:

1. prevent Participants from offering or accepting Exclusive Agency Listings;
2. prevent Participants from cooperating with listing brokers or agents that offer or accept Exclusive Agency Listings;
3. prevent Participants from publishing information concerning listings offered pursuant to Exclusive Agency Listings on Approved Websites;
4. deny or restrict the Services of the MLS to Exclusive Agency Listings or Other Lawful Listings in any way that such Services of the MLS are not denied or restricted to Exclusive Right to Sell Listings; and
5. treat Exclusive Agency Listings, or any Other Lawful Listings, in a less advantageous manner than Exclusive Right to Sell Listings, including but not limited to, any policy, rule or practice pertaining to the transmission, downloading, or displaying of information pertaining to such listings.

Provided, however, that nothing herein shall prohibit the Respondent from adopting or enforcing any policy, rule, practice or agreement that it can show is reasonably ancillary to the legitimate and beneficial objectives of the MLS. Such policies, rules, practices or agreements may include those regarding subscription or participation requirements, payment of dues, and administrative matters, and may also include, but are not limited to, rules allowing

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a Participant to make an independent decision regarding the selection of IDX listing information to be transmitted to the Participant or the display of listing information on that Participant's IDX Web Site, so long as Respondent can show that the policy, rule, practice or agreement is reasonably ancillary to the legitimate and beneficial objectives of the MLS.

III.

IT IS FURTHER ORDERED that, no later than thirty (30) days after the date this Order becomes final, Respondent shall have amended its rules and regulations to conform to the provisions of this Order.

IV.

IT IS FURTHER ORDERED that, within ninety (90) days after the date this Order becomes final, Respondent shall (1) have informed each Participant of the amendments to its rules and regulations to conform to the provisions of this Order; and (2) provide each Participant with a copy of this Order. Respondent shall transmit the rule change and Order by the means it uses to communicate with its members in the ordinary course of MLS, Inc.'s business, which shall include, but not be limited to: (A) sending one or more emails with one or more statements that there has been a change to the rule and an Order, along with a link to the amended rule and the Order, to each Participant; and (B) placing on the publicly accessible MLS, Inc. Website (www.metromls.com) a statement that there has been a change to the rule and an Order, along with a link to the amended rule and the Order. Respondent shall modify its Website as described above no later than five (5) business days after the date the Order becomes final, and shall display such modifications for no less than ninety (90) days from the date this Order becomes final. The Order shall remain accessible through common search terms and archives on the Website for five (5) years from the date it becomes final.

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 such 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 might affect compliance obligations arising out of the Order.

VI.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months of the date this Order becomes final, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

VII.

IT IS FURTHER ORDERED that this Order shall terminate on March 13, 2018.

By the Commission.

Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted for public comment an agreement containing consent order with Multiple Listing Service, Inc. (“MLS, Inc.” or “Respondent”). Respondent operates a multiple listing service (“MLS”) that is designed to facilitate real estate transactions by sharing and publicizing information on properties for sale by customers of real estate brokers. The agreement settles charges that MLS, Inc. violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, through particular acts and practices of the MLS. The proposed consent order has been placed on the public record for thirty (30) days to receive 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 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 consent order. This analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify its terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by proposed Respondent that it violated the law or that the facts alleged in the complaint against the Respondent (other than jurisdictional facts) are true.

I. The Respondent

MLS, Inc. is a Wisconsin corporation that provides multiple listing services to each of the local associations of real estate professionals based in the Milwaukee metropolitan area and surrounding counties. It is owned by several realtor boards and associations, and has more than 6500 members. Respondent serves the great majority of the residential real estate brokers in its service area, and is the sole MLS serving that area. MLS, Inc. also owns and

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operates a web site, wihomes.com, that provides listing information directly to consumers over the internet.

II. The Conduct Addressed by the Proposed Consent Order

In general, the conduct at issue in this matter is largely the same as the conduct addressed by the Commission in six other consent orders involving MLS restrictions in the past year.¹ A general discussion of industry background and the Commission's reasoning is contained in the Analysis to Aid Public Comment issued in connection with five of those consent orders in the "real estate sweep" announced in October 2006.²

A. The Respondent Has Market Power

MLS, Inc. serves residential real estate brokers in the Milwaukee metropolitan area and surrounding counties in Wisconsin. These professionals compete with one another to provide residential real estate brokerage services to consumers. Membership in MLS, Inc. is necessary for a broker to provide effective residential real estate brokerage services to sellers and buyers of real property in this area.³ By virtue of broad industry participation and control over a key input, MLS, Inc. has market power in the provision of residential real estate brokerage services to sellers and buyers of real property in southeast Wisconsin.

¹ *Information and Real Estate Services, LLC*, FTC File No. 061-0087; *Northern New England Real Estate Network, Inc.*, FTC File No. 051-0065; *Williamsburg Area Ass'n of Realtors, Inc.*, FTC File No. 061-0268; *Realtors Ass'n of Northeast Wisconsin, Inc.*, FTC File No. 061-0267; *Monmouth County Ass'n of Realtors, Inc.*, FTC File No. 051-0217; *Austin Bd. of Realtors*, FTC File No. 051-0219. See generally <http://www.ftc.gov/opa/2006/10/realestatesweep.shtm>.

² See <http://www.ftc.gov/os/caselist/0610268/0610268consentanalysis.pdf>.

³ As noted, the MLS provides valuable services for a broker assisting a seller as a listing broker, by offering a means of publicizing the property to other brokers and the public. For a broker assisting a buyer, it also offers unique and valuable services, including detailed information that is not shown on public web sites, which can help with house showings and otherwise facilitate home selections.

Analysis to Aid Public Comment

B. Respondent's Conduct

The complaint accompanying the proposed consent order alleges that Respondent has violated the FTC Act by adopting rules and policies that limit the publication and marketing of certain sellers' properties, but not others, based solely on the terms of their respective listing contracts. Listing contracts are the agreements by which property sellers obtain services from their chosen real estate brokers. The restrictions challenged in the complaint accompanying the proposed order state that information about properties will not be made available on popular real estate web sites unless the listing contracts follow the traditional format approved by the MLS. When implemented, these restrictions prevent properties with non-traditional listing contracts from being displayed on a broad range of public web sites, including the "Realtor.com" web site operated by the National Association of Realtors, the local web site "wihomes.com" operated by MLS, Inc., and web sites operated by brokers or brokerage firms that are MLS members. The complaint alleges that the conduct was collusive and exclusionary, because in agreeing to keep non-traditional listings off the MLS and from public web sites, the brokers enacting the rules were, in effect, agreeing among themselves to limit the manner in which they compete with one another, and withholding valuable benefits of the MLS from real estate brokers who did not go along.

As was the case with the other MLSs that agreed to consent orders with the Commission, the contract favored by Respondent here is known as an "Exclusive Right to Sell Listing," and is the kind of listing agreement traditionally used by listing brokers to provide the full range of residential real estate brokerage services. Among the contracts disfavored by the Respondent is the kind known as an "Exclusive Agency Listing," which brokers can use to offer limited brokerage services to home sellers in exchange for set fees or reduced commissions.

Respondent adopted the challenged rules and policies in May 2001. In October 2006, prior to agreeing to the proposed consent order and prior to the Commission's acceptance of the consent order

Analysis to Aid Public Comment

and proposed complaint for public comment, the Board of Directors of MLS, Inc. voted to rescind the restriction. The members of the MLS affected by these rules were notified in November 2006 of the Board's intention to change its rules.

C. Competitive Effects of the Respondent's Rules and Policies

MLS, Inc.'s rules and policies have discouraged its members from offering or accepting Exclusive Agency Listings. Thus, the restrictions impede the provision of unbundled brokerage services, and may make it more difficult and costly for home sellers to market their homes. Furthermore, the rules and policies have caused home sellers to switch away from Exclusive Agency Listings to other forms of listing agreements. By prohibiting Exclusive Agency Listings from being transmitted to popular real estate web sites, the MLS, Inc. restrictions have adverse effects on home sellers and home buyers. When home sellers switch to full-service listing agreements from Exclusive Agency Listings that often offer lower-cost real estate services to consumers, the sellers may purchase services that they would not otherwise buy. This, in turn, may increase the commission costs to consumers of real estate brokerage services. In particular, the rules deny home sellers choices for marketing their homes and deny home buyers the chance to use the internet easily to see all of the houses listed by real estate brokers in the area, making their search less efficient.

D. There is No Competitive Efficiency Associated with the Web Site Policy

The Respondent's rules at issue here advance no legitimate procompetitive purpose. As a theoretical matter, if buyers and sellers could avail themselves of an MLS system and carry out real estate transactions without compensating any of its broker members, an MLS might be concerned that those buyers and sellers were free-riding on the investment that brokers have made in the MLS and adopt rules to address that free-riding. But this theoretical concern

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does not justify the restrictions adopted by the Respondent here. Exclusive Agency Listings are not a credible means for home buyers or sellers to bypass the use of the brokerage services that the MLS was created to promote, because a listing broker is always involved in an Exclusive Agency Listing, and other provisions in MLS, Inc.'s rules ensure that a cooperating broker – a broker who finds a buyer for the property – is compensated for the brokerage service he or she provides.

Under existing MLS rules that apply to any form of listing agreement, the listing broker must ensure that the home seller pays compensation to the cooperating selling broker (if there is one), and the listing broker may be liable himself for a lost commission if the home seller fails to pay a selling broker who was the procuring cause of a completed property sale. The possibility of sellers or buyers using the MLS but bypassing brokerage services is already addressed effectively by the Respondent's existing rules that do not distinguish between forms of listing contracts, and does not justify the series of exclusionary rules and policies adopted by MLS, Inc. It is possible, of course, that a buyer of an Exclusive Agency Listing may make the purchase without using a selling broker, but this is true for traditional Exclusive Right to Sell Listings as well.

III. The Proposed Consent Order

Despite the recent decision by Respondent's Board of Directors to remove the challenged restrictions, it is appropriate for the Commission to require the prospective relief in the proposed consent order. Such relief ensures that MLS, Inc. cannot revert to the old rules or policies, or engage in future variations of the challenged conduct. The conduct at issue in the current case is itself a variation of practices that have been the subject of past Commission orders; in the 1980s and 1990s, the Commission condemned the practices of several local MLS boards that had banned Exclusive Agency Listings entirely, and several consent orders were imposed.⁴

⁴ See, e.g., *In the Matter of Port Washington Real Estate Bd., Inc.*, 120 F.T.C. 882 (1995); *In the Matter of United Real Estate Brokers of Rockland, Ltd.*, 116 F.T.C. 972 (1993); *In the Matter of Am. Indus. Real Estate Assoc.*, Docket No. C-

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The proposed order is designed to ensure that Respondent does not misuse its market power, while preserving the procompetitive incentives of members to contribute to the joint venture operated by MLS, Inc. The proposed order prohibits Respondent from adopting or enforcing any rules or policies that deny or limit the ability of MLS participants to enter into Exclusive Agency Listings, or any other lawful listing agreements, with sellers of properties. The proposed order includes examples of such practices, but the conduct it enjoins is not limited to those five enumerated examples. In addition, the proposed order states that, within thirty days after it becomes final, Respondent shall have conformed its rules to the substantive provisions of the order. MLS, Inc. is further required to notify its participants of the order through its usual business communications and its web site. The proposed order requires notification to the Commission of changes in the Respondent's structure, and periodic filings of written reports concerning compliance.

The proposed order applies to Respondent and entities it owns or controls, including MetroMLS and any affiliated web site it operates. The order does not prohibit participants in the MLS, or other independent persons or entities that receive listing information from Respondent, from making independent decisions concerning the use or display of such listing information on participant or third-party web sites, consistent with any contractual obligations to Respondent.

The proposed order will expire in 10 years.

3449, 1993 WL 11373 (30)09648 (F.T.C. Jul. 6, 1993); *In the Matter of Puget Sound Multiple Listing Serv.*, Docket No. C-3390 (F.T.C. Aug. 2, 1990); *In the Matter of Bellingham-Whatcom County Multiple Listing Bureau*, Docket No. C-3299 (F.T.C. Aug. 2, 1990); *In the Matter of Metro MLS, Inc.*, Docket No. C-3286, 1990 WL 10012611 (F.T.C. Apr. 18, 1990); *In the Matter of Multiple Listing Serv. of the Greater Michigan City Area, Inc.*, 106 F.T.C. 95 (1985); *In the Matter of Orange County Bd. of Realtors, Inc.*, 106 F.T.C. 88 (1985).

Complaint

IN THE MATTER OF

GOAL FINANCIAL, LLCCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF THE GRAMM-LEACH-BLILEY SAFEGUARDS RULE AND PRIVACY
RULE AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4216; File No. 072 3013
Complaint, April 9, 2008 – Decision, April 9, 2008*

This consent order applies to practices of Goal Financial, LLC, in regard to personal information it collects from or about consumers in connection with its student loan and related services. The respondent's practices in storing the information failed to provide reasonable and appropriate security for consumers' sensitive personal information, leading to the transfer of consumer files to third parties and the potential exposure of personal information through sale of the company's hard drives. The order requires that Goal Financial not misrepresent the extent to which it maintains and protects the privacy, confidentiality, or integrity of any personal information collected from or about consumers. The order requires Goal Financial to establish and maintain a comprehensive information security program in writing that is reasonably designed to protect the security, confidentiality, and integrity of personal information it collects from or about consumers. In addition, Goal Financial must obtain, on a biennial basis for 10 years, an assessment and report from a qualified, objective, independent third-party professional, certifying that Goal Financial has in place a security program that provides protections that meet or exceed the protections required by the order; and that its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of nonpublic personal information has been protected. The respondent is required to retain documents relating to its compliance and to disseminate the order now and in the future to persons with responsibilities relating to the subject matter. Additional provisions of the order relate to notifying the Commission of changes in corporate status and submitting compliance reports to the Commission.

Participants

For the Commission: *Loretta Garrison, Marc Groman, Jamie Hine, Jessica Rich, Alain Sheer, and Joel Winston.*

For the Respondent: *Alysa Z. Hutnik and Lewis Rose, Kelley Drye Collier Shannon.*

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COMPLAINT

The Federal Trade Commission (“Commission”), having reason to believe that Goal Financial, LLC has violated the provisions of the Commission’s Standards for Safeguarding Customer Information Rule (“Safeguards Rule”), 16 C.F.R. Part 314, issued pursuant to Title V, Subtitle A of the Gramm-Leach-Bliley Act (“GLB Act”), 15 U.S.C. § 6801-6809; the Commission’s Privacy of Customer Financial Information Rule (“Privacy Rule”), 16 C.F.R. Part 313, issued pursuant to the GLB Act; and 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 Goal Financial, LLC, (“Goal Financial”) is a California limited liability company with its principal office or place of business at 9477 Waples Street, Suite 100, San Diego, California 92121.
2. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the FTC Act.
3. Respondent markets and originates a variety of student loans, and provides loan related services.
4. In the course of its business, respondent collects personal information from consumer loan applications and other sources. The information includes name; address; telephone number; driver’s license number; Social Security number; date of birth; and income, debt, and employment information. Respondent retains the personal information in paper documents and also stores and maintains the information in an electronic database.
5. Since at least September 1, 2004, respondent has engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for consumers’ sensitive personal information, including Social Security numbers, dates of

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birth, and income and employment information. In particular, respondent has:

A. failed to assess adequately risks to the information it collected and stored in its paper files and on its computer network;

B. failed to restrict adequately access to personal information stored in its paper files and on its computer network to authorized employees;

C. failed to implement a comprehensive information security program, including reasonable policies and procedures in key areas such as the collection, handling, and disposal of personal information;

D. failed to provide adequate training to employees about handling and protecting personal information and responding to security incidents; and

E. failed in a number of instances to require third-party service providers by contract to protect the security and confidentiality of personal information.

6. In 2005 and 2006, respondent's employees exploited the failures enumerated in paragraph 5 and were able to remove without authorization more than 7000 consumer files containing sensitive information and transfer them to third parties. Further, in 2006, an employee sold to the public hard drives that had not been processed to remove the data on the drives, thus exposing in clear text the sensitive personal information of approximately 34,000 consumers.

VIOLATIONS OF THE SAFEGUARDS RULE

7. The Safeguards Rule, which implements Section 501(b) of the GLB Act, 15 U.S.C. § 6801(b), was promulgated by the Commission on May 23, 2002, and became effective on May 23, 2003. The Rule requires financial institutions to protect the security,

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confidentiality, and integrity of customer information by developing a comprehensive written information security program that contains reasonable administrative, technical, and physical safeguards, including: (1) designating one or more employees to coordinate the information security program; (2) identifying reasonably foreseeable internal and external risks to the security, confidentiality, and integrity of customer information, and assessing the sufficiency of any safeguards in place to control those risks; (3) designing and implementing information safeguards to control the risks identified through the risk assessment, and regularly testing or otherwise monitoring the effectiveness of the safeguards' key controls, systems, and procedures; (4) overseeing service providers, and requiring them by contract to protect the security and confidentiality of customer information; and (5) evaluating and adjusting the information security program in light of the results of testing and monitoring, changes to the business operation, and other relevant circumstances.

8. Respondent is a "financial institution," as that term is defined in Section 509(3)(A) of the GLB Act, 15 U.S.C. § 6809(3)(A).

9. As set forth in Paragraph 5, respondent has failed to implement reasonable security policies and procedures, and has thereby engaged in violations of the Safeguards Rule, by, among other things:

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

B. Failing to design and implement information safeguards to control the risks to customer information or to regularly test or monitor their effectiveness;

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

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D. Failing to require service providers by contract to implement safeguards to protect the security and confidentiality of customer information.

VIOLATIONS OF THE FTC ACT

10. Since at least November 9, 2005, respondent has disseminated or caused to be disseminated to consumers privacy policies and statements, including, but not limited to the following:

Our Security Policies and Practices

Access to nonpublic personal information about you is limited to those employees who need to know such information to provide products or services to you. We maintain physical, electronic, and procedural safeguards that comply with federal regulations to guard your nonpublic personal information.

(Goal Financial, LLC Privacy Policy, attached as Exhibit A.)

11. Through the means set forth in Paragraph 10, respondent represented, expressly or by implication, that it implements reasonable and appropriate measures to protect personal information from unauthorized access.

12. In truth and in fact, as set forth in Paragraph 5, respondent did not implement reasonable and appropriate measures to protect personal information from unauthorized access. Therefore, the representation set forth in Paragraph 11 was, and is, false or misleading.

VIOLATION OF THE PRIVACY RULE

13. The Privacy Rule, which implements Sections 501-509 of the GLB Act, 15 U.S.C. § 6801(b), was promulgated by the Commission on May 24, 2000, and became effective on July 1, 2001. The Rule

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requires financial institutions to provide customers, no later than when a customer relationship arises and annually for the duration of that relationship, “a clear and conspicuous notice that accurately reflects [the financial institution’s] privacy policies and practices” including its security policies and practices. 16 C.F.R. §§ 313.4(a); 313.5(a)(1); § 313.6(a)(8).

14. As set forth in Paragraphs 10 through 12, respondent disseminated a privacy policy that contained false or misleading statements regarding the measures implemented to protect consumers’ personal information. Therefore, respondent disseminated a privacy policy that does not accurately reflect its privacy policy, including its security policies and practices, in violation of the Privacy Rule.

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

THEREFORE, the Federal Trade Commission this ninth day of April, 2008, has issued this complaint against respondent.

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 145

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EXHIBIT A

PRIVACY NOTICE

We, Goal Financial, LLC*, are sending this Privacy Notice to individuals who apply for or obtain products or receive services from us ("you") to provide you with information concerning each of our privacy policies and to help you understand how we handle personal information about you which we may collect and disclose. This Privacy Notice applies to our current customers, former customers and applicants.

Our Privacy Policies and Practices

This notice uses the term "nonpublic personal information." This means personal information about you which identifies you, and that is not available from public sources. We may collect nonpublic personal information about you from various sources, including:

- information provided by you such as, for example, information provided on loan applications or other forms;
- information about your transactions with us, our affiliate or others;
- information we receive from third parties, such as a consumer reporting agency or a list vendor; and
- information we receive when you visit our website, such as cookies.

We do not disclose any nonpublic personal information about our applicants, customers or former customers to anyone, except as permitted or required by law. For example, nonpublic personal information about you may be shared with nonaffiliated third parties as necessary to certify, process, make, guarantee, administer or service your loan. We may also provide nonpublic personal information about you to our affiliated companies for any of these purposes. We also share nonpublic personal information about you whenever you consent (or "opt in") to our sharing of your information.

Our Security Policies and Practices

Access to nonpublic personal information about you is limited to those employees who need to know such information to provide products or services to you. We maintain physical, electronic, and procedural safeguards that comply with federal regulations to guard your nonpublic personal information.

Important Information About Credit Reporting

We may report information about your account to credit bureaus. Late payments, missed payments or other defaults on your account may be reflected in your credit report.

If you have any questions regarding our privacy and security policies and practices, please email us at privacy@goalfinancial.net or write us at:

THE FEDERAL TRADE COMMISSION
315 L STREET, N.W.
WASHINGTON, D.C. 20542

3-1-2014

Complaint

Goal Financial, LLC
9477 Waples Street, Suite 100
San Diego, CA 92121

Date last revised: November 9, 2005.

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*The companies issuing the Private Notice are Goal Financial, LLC (formerly known as Student Loan Consolidation Center, LLC), doing business as Student Loan Consolidation Center, and Education Loan Center, and its affiliates, subsidiaries, and eligible broker-dealer and trustee (ELT), including, but not limited to Student Loan Consolidation Center Student Loan Trust I, The State of New York (hereinafter as ELT) for Student Loan Consolidation Center Student Loan Trust I, CEF Management Corp., Education Loan Asset-Broker, Trust I, The Bank of New York (hereinafter as ELT) for Education Loan Asset-Broker Trust I, Consolidation Loan Funding, LLC, The Bank of New York Trust Company, N.A. as ELT for Consolidation Loan Funding, LLC, Consolidation Loan Trusting II, LLC, The Bank of New York Trust Company, N.A. as ELT for Consolidation Loan Trusting II, LLC, CEF Management Corp., Higher Education Funding I, The Bank of New York Trust Company, N.A. as ELT for Higher Education Funding I, Higher Education Funding II, LLC, CEF Management Corp., Higher Education Funding II, The Bank of New York Trust Company, N.A. as ELT for Higher Education Funding II, Higher Education Funding III, LLC, The Bank of New York Trust Company, N.A. as ELT for Higher Education Funding III, Higher Education Funding III, LLC, The Bank of New York Trust Company, N.A. as ELT for Higher Education Funding III, LLC, Goal Capital Funding, LLC, Princeton Chase Bank, N.A. as ELT for Goal Capital Funding, LLC, Goal Capital Funding Trust, Princeton Chase Bank, N.A. as ELT for Goal Capital Funding Trust.

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 violations of the Commission's Standards for Safeguarding Customer Information Rule, 16 C.F.R. Part 314, and Privacy of Consumer Financial Information Rule, 16 C.F.R. Part 313, both issued pursuant to Title V, Subtitle A of the Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 -6809, and the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq*;

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondent has violated the said Acts, 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:

Decision and Order

1. Respondent Goal Financial, LLC, (“Goal Financial”) is a California limited liability company with its principal office or place of business at 9477 Waples Street, Suite 100, San Diego, California, 92121.

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

ORDER**DEFINITIONS**

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

1. “Personal information” shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual’s email address; (d) a telephone number; (e) a Social Security number; (f) a bank, loan, or credit card account number; (g) a persistent identifier, such as a customer number held in a “cookie” or processor serial number, that is combined with other available data that identifies an individual consumer; or (h) any information that is combined with any of (a) through (g) above.
2. Unless otherwise specified, “respondent” shall mean Goal Financial and its successors and assigns, officers, agents, representatives, and employees.
3. All other terms are synonymous in meaning and equal in scope to the usage of such terms in the Gramm-Leach-Bliley

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Act, 15 U.S.C. § 6801 *et seq.*, attached hereto as Appendix A or as may hereafter be amended.

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

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the collection of personal information from or about consumers, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondent maintains and protects the privacy, confidentiality, or integrity of any personal information collected from or about consumers.

II.

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

- A. the designation of an employee or employees to coordinate and be accountable for the information security program.
- B. the identification of material internal and external risks to the security, confidentiality, and integrity of personal

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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 retain service providers capable of appropriately safeguarding personal information they receive from respondent, requiring service providers by contract to implement and maintain appropriate safeguards, and monitoring their safeguarding of personal information.
- E. the evaluation and adjustment of respondent's information security program in light of the results of the testing and monitoring required by sub-Part C, any material changes to respondent's operations or business arrangements, or any other circumstances that respondent knows or has reason to know may have a material impact on the effectiveness of its information security program.

III.

IT IS FURTHER ORDERED that respondent shall not, directly or through any corporation, subsidiary, division, website, or other device, violate any provision of:

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- A. the Standards for Safeguarding Customer Information Rule, 16 C.F.R. Part 314, as attached or as may be amended; or
- B. the Privacy of Customer Financial Information Rule, 16 C.F.R. Part 313, as attached or as may be amended.

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

IV.

IT IS FURTHER ORDERED that, in connection with its compliance with Parts II, and III.A. of this order, respondent shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment, and (2) each two (2) year period thereafter for ten (10) years after service of the order for the biennial Assessments. Each Assessment shall:

- A. set forth the specific administrative, technical, and physical safeguards that respondent has implemented and maintained during the reporting period;
- 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 Parts II and III A. of this order; and
- D. certify that respondent's security program is operating with sufficient effectiveness to provide reasonable assurance that

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the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies by a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

Respondent shall provide the initial Assessment to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, within ten (10) days after the Assessment has been prepared. All subsequent biennial Assessments shall be retained by respondent until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.

V.

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

- A. for a period of five (5) years: any documents, whether prepared by or on behalf of respondent, that contradict, qualify, or call into question respondent's compliance with this order; and
- B. for a period of three (3) years after the date of preparation of each Assessment required under Part IV of this order, all

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materials relied upon to prepare the Assessment, whether prepared by or on behalf of the respondent, including but not limited to all plans, reports, studies, reviews, audits, audit trails, policies, training materials, and assessments, and any other materials relating to respondent's compliance with Parts II and III.A. of this order, for the compliance period covered by such Assessment. Respondent shall provide such documents to the Associate Director of Enforcement within ten (10) days of request.

VI.

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

VII.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the limited liability company 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, 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 company name or address. *Provided, however*, that, with respect to any proposed change in the company 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,

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Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondent and its successors and assigns shall, within sixty (60) days after service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IX.

This order will terminate on April 9, 2028, 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

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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 has accepted, subject to final approval, a consent agreement from Goal Financial, LLC (“Goal Financial”).

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.

Goal Financial markets and originates a variety of student loans and provides loan-related services. In conducting its business, Goal Financial routinely obtains personal information from loan applications and other sources, including name, address, telephone number, driver’s license number, Social Security number, date of birth, and income, debt, and employment information. Goal Financial, therefore, is a “financial institution” subject to the requirements of the Gramm-Leach-Bliley (“GLB”) Safeguards Rule and Privacy Rule. This matter concerns Goal Financial’s alleged violations of the GLB Safeguards Rule, the GLB Privacy Rule, and Section 5 of the Federal Trade Commission (“FTC”) Act.

Analysis to Aid Public Comment

The Commission's proposed complaint alleges that Goal Financial engaged in a number of practices that, taken together, failed to employ reasonable and appropriate security measures to protect personal information. In particular, Goal Financial failed: (1) to assess adequately risks to the information it collected and stored in its paper files and on its computer network; (2) to restrict adequately access to personal information stored in its paper files and on its computer network to authorized employees; (3) to implement a comprehensive information security program, including reasonable policies and procedures in key areas such as the collection, handling, and disposal of personal information; (4) to provide adequate training to employees about handling and protecting personal information and responding to security incidents; and (5) in a number of instances to require third-party service providers by contract to protect the security and confidentiality of personal information. As a result of these alleged failures, Goal Financial put at risk the sensitive information of more than 41,000 consumers.

The complaint alleges that these security failures violated the GLB Safeguards Rule. In addition, the complaint alleges that Goal Financial misrepresented that it implemented reasonable and appropriate security measures to protect personal information from unauthorized access, in violation of Section 5 of the FTC Act. Further, the proposed complaint alleges that Goal Financial disseminated a privacy policy that does not accurately reflect its privacy practices, including its security policies and practices, in violation of the GLB Privacy Rule.

The proposed order applies to personal information Goal Financial collects from or about consumers in connection with its student loan and related services and contains provisions designed to prevent Goal Financial from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order requires that Goal Financial not misrepresent the extent to which it maintains and protects the

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privacy, confidentiality, or integrity of any personal information collected from or about consumers.

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

- Designate an employee or employees to coordinate and be accountable for the information security program.
- Identify material internal and external risks to the security, confidentiality, and integrity of consumer information that could result in unauthorized disclosure, misuse, loss, alteration, destruction, or other compromise of such information, and assess the sufficiency of any safeguards in place to control these risks.
- 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 retain service providers capable of appropriately safeguarding personal information they receive from Goal Financial, require service providers by contract to implement and maintain appropriate safeguards, and monitor their safeguarding of personal information.
- Evaluate and adjust its information security program in light of the results of testing and monitoring, any material changes to its operations or business arrangements, or any other

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circumstances that it knows or has reason to know may have a material impact on the effectiveness of its information security program.

Part III of the proposed order requires that Goal Financial not violate any provision of the GLB Safeguards Rule and Privacy Rule.

Part IV of the proposed order requires that Goal Financial obtain, within 180 days after being served with the final order approved by the Commission, and on a biennial basis thereafter for ten (10) years, an assessment and report from a qualified, objective, independent third-party professional, certifying that: (1) Goal Financial has in place a security program that provides protections that meet or exceed the protections required by Parts II and IIIA 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 nonpublic personal information has been protected. This provision is substantially similar to comparable provisions obtained in prior Commission orders under the Safeguards Rule and Section 5 of the FTC Act.

Parts V through IX of the proposed order are reporting and compliance provisions. Part V requires Goal Financial 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, Goal Financial must retain the documents for a period of three years after the date that each assessment is prepared. Part VI requires dissemination of the order now and in the future to persons with responsibilities relating to the subject matter of the order. Part VII ensures notification to the FTC of changes in company status. Part VIII mandates that Goal Financial submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part IX is a provision “sunsetting” the order 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. 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

**THE CONNECTICUT CHIROPRACTIC
ASSOCIATION,
THE CONNECTICUT CHIROPRACTIC
COUNCIL,
AND
ROBERT L. HIRTLE, ESQ.**

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

*Docket C-4217; File No. 071 0074
Complaint, April 14, 2008 – Decision, April 14, 2008*

This consent order concerns a series of agreements among competing chiropractors to boycott American Specialty Health (ASH), to preclude ASH from administering a chiropractic cost-savings benefits administration program on behalf of payors offering coverage for health care services in the State of Connecticut. The chiropractors engaged in this conduct with and through their respective trade associations, the Connecticut Chiropractic Association and the Connecticut Chiropractic Council. Respondent Robert L. Hirtle was legal counsel for the former association. The conduct in question had the purpose and effect of unreasonably restraining prices and other forms of competition among hundreds of otherwise independent chiropractors in Connecticut. The order prohibits the respondents from entering into or facilitating any agreement between or among any chiropractors to negotiate with payors on any chiropractor's behalf; to deal, not to deal, or threaten not to deal with payors; or on what terms to deal with any payor. More specifically, the order prohibits the respondents from engaging in, attempting to engage in, or inducing anyone to engage in the following actions: persuading a chiropractor to deal or not deal with a payor, or to accept or not accept the terms or conditions on which the chiropractor is willing to deal with a payor; facilitating exchanges of information between chiropractors concerning whether, or on what terms, to contract with a payor; or continuing a meeting of chiropractors after any person makes any statements regarding any chiropractor's intentions that if agreed to would violate the order, unless that person is ejected from the meeting. Certain kinds of agreements are excluded from the general bar on joint negotiations, and the associations are not prevented from exercising rights permitted under the First Amendment to the United States Constitution to petition the government. Other provisions relate to distributing the complaint and order to current and future members of the two associations and to certain payors, and impose various obligations on the respondents to report or provide access to

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information to the Commission to facilitate monitoring their compliance with the order.

Participants

For the Commission: *Gloria Armstead, Robert S. Canterman, Daniel P. Ducore, Mark Frankena, Melea Greenfeld, Markus H. Meier, Martha Oppenheim, Ronise Parker, and Louis Silvia.*

For the Respondents: *Michael Shea, Day Pitney; Eric Wiechmann, McCarter & English; and Robert Langer, Wiggin & Dana.*

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 the Connecticut Chiropractic Association (“CCA”), the Connecticut Chiropractic Council (“CCC”), and Robert L. Hirtle, Esq., hereinafter sometimes collectively referred to as “Respondents,” have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

NATURE OF THE CASE

1. This matter concerns a series of agreements among competing chiropractors to boycott American Specialty Health (“ASH”) to preclude ASH from administering a chiropractic cost-savings benefits administration program on behalf of payors offering coverage for health care services in the State of Connecticut. The chiropractors engaged in this conduct with and through their respective trade associations, CCA and CCC, CCA’s legal counsel, Robert L. Hirtle, Esq., and through activities undertaken collectively among CCA, CCC, Mr. Hirtle, and other licensed chiropractors in the State of Connecticut.

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2. The Respondents' illegal conduct had the purpose and effect of unreasonably restraining prices and other forms of competition among hundreds of otherwise independent chiropractors in the State of Connecticut.

RESPONDENTS

3. CCA is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal address at 2257 Silas Deane Highway, Rocky Hill, Connecticut 06067. CCA is a voluntary trade association whose membership consists of approximately 375 chiropractors licensed to practice chiropractic in the State of Connecticut.

4. CCC is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal address located at 8 Tyler Avenue, Branford, Connecticut 06405. CCC is a voluntary trade association whose membership consists of approximately 150 chiropractors licensed to practice chiropractic in the State of Connecticut.

5. Mr. Hirtle was legal counsel for CCA at all times relevant herein. His principal address is 185 Asylum Street, Hartford, Connecticut 06103.

JURISDICTION

6. CCA is organized for the purpose, among others, of serving the interests of its members. CCA exists and operates, and at all times relevant to this Complaint has existed and operated, in substantial part for the pecuniary benefit of its members.

7. CCC is organized for the purpose, among others, of serving the interests of its members. CCC exists and operates, and at all

Complaint

times relevant to this Complaint has existed and operated, in substantial part for the pecuniary benefit of its members.

8. At all times relevant to this Complaint CCA chiropractors and CCC chiropractors have been engaged in the business of providing chiropractic services for a fee. Except to the extent competition has been restrained as alleged herein:

a. CCA chiropractors have been and are in competition with other CCA chiropractors for the provision of chiropractic services in areas throughout the State of Connecticut;

b. CCC chiropractors have been and are in competition with other CCC chiropractors for the provision of chiropractic services in areas throughout the State of Connecticut; and

c. CCA chiropractors and CCC chiropractors have been and are in competition with each other, and with other chiropractors, for the provision of chiropractic services in areas throughout the State of Connecticut.

9. All Respondents are “persons” or “corporations” within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

10. The general business practices of Respondents, 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 the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

OVERVIEW OF CHIROPRACTOR CONTRACTING WITH PAYORS

11. Individual chiropractors and chiropractic group practices contract with payors of health care services and benefits, including insurance companies, managed care organizations, health care benefits organizations, and others, to establish the terms and

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conditions, including price terms, under which the chiropractors will render their professional chiropractic services to the payors' enrollees. Chiropractors and chiropractic group practices entering into such contracts often agree to accept lower compensation from payors in order to obtain access to additional patients made available by the payors' relationship with the covered individuals. These contracts may reduce payors' costs and enable them to lower the price of insurance or of providing health benefits, thereby resulting in lower health care costs for covered individuals.

12. Absent anticompetitive agreements among them, otherwise competing chiropractors and chiropractic group practices unilaterally decide whether to enter into contracts with payors to provide services to individuals covered by a payor's programs, and what prices and other terms they will accept as payment for their services pursuant to such contracts.

ASH CHIROPRACTIC COST-SAVINGS PROGRAM

13. ASH is a health care benefits organization that offers a chiropractic cost-savings benefits administration program to payors nationwide, including payors in the State of Connecticut. The purpose of the program is to improve the efficiency, increase the quality, and reduce the cost of providing chiropractic care to the payors' enrollees.

14. Under the program, payors delegate the management of chiropractic services and benefits for their enrollees to ASH. ASH contracts with chiropractors to provide chiropractic services to the payors' enrollees under the cost-savings program. In addition to its chiropractor network, ASH administers chiropractic benefits, including utilization management, credentialing, claims processing, and other management services, for payors under the program.

ANTICOMPETITIVE CONDUCT

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15. CCA acted in conspiracy with its members, CCC acted in conspiracy with its members, and CCA, CCC, and their members acted in conspiracy with each other. Through their joint agreements, CCA, CCC, and their respective members, restrained competition by, among other things, collectively agreeing to boycott ASH. The purpose and effect of the boycott was to prevent ASH from providing its cost-savings chiropractic benefits administration program to Anthem Blue Cross and Blue Shield of Connecticut (“Anthem”), CIGNA HealthCare (“CIGNA”), Empire Blue Cross Blue Shield (“Empire”), and other payors.

16. Mr. Hirtle acted to restrain competition by, among other things, encouraging, facilitating, and implementing agreements, among competing CCA and CCC chiropractors, and other chiropractors licensed in the State of Connecticut, to boycott ASH to prevent ASH from providing its chiropractic cost-savings program to Anthem, CIGNA, Empire, and other payors.

17. In furtherance of the combinations and agreements, CCA, CCC, and Mr. Hirtle engaged in a campaign through meetings and other communications to encourage and assist chiropractors in the State of Connecticut to boycott ASH. CCA and CCC urged their respective members and other chiropractors licensed in the State of Connecticut to “take a stand and resign” from ASH. The communications conveyed the message, “united we stand, divided we fall.”

18. During these meetings and through other communications, CCA and CCC chiropractors discussed with each other their dissatisfaction with ASH’s price terms and utilization management requirements for chiropractic services. The chiropractors repeatedly incited each other to unite in their fight to defeat the ASH program through communications that included the following:

- a. “We all need to unite on this issue.”
- b. “We must band together.”

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c. “Get [ASH] out of this state!”

**CCA AND CCC CHIROPRACTORS COLLECTIVELY
AGREE TO OPT OUT OF ASH’S CHIROPRACTIC
NETWORK FOR ANTHEM**

19. Anthem entered into an arrangement with ASH in early 2006 under which ASH agreed to provide a chiropractic provider network and administer chiropractic benefits for Anthem enrollees.

20. The arrangement required ASH to contract with a minimum of 80 percent of the chiropractors who were members of Anthem’s existing chiropractic provider network to ensure adequate coverage of chiropractic services for Anthem enrollees in the State of Connecticut. ASH’s existing chiropractic network included approximately 40 percent of the chiropractors in Anthem’s chiropractic network. Therefore, ASH needed to contract with an additional 40 percent of the chiropractors in Anthem’s network.

21. On July 28, 2006, ASH notified chiropractors that the arrangement with Anthem was effective November 1, 2006. ASH also provided applications and contracting materials to the chiropractors. The chiropractors who already were members of ASH’s network had the opportunity to “opt out” of the ASH network for Anthem.

22. In response, CCA, CCC, and Mr. Hirtle organized monthly meetings starting in August, 2006, for all licensed chiropractors in the State of Connecticut to discuss their concerns regarding the ASH program and provide instructions on how to opt out of the ASH program.

23. CCA and CCC distributed a model opt-out letter to the chiropractors to notify ASH that the chiropractors elected not to participate in the ASH chiropractic network for Anthem. CCA and CCC also instructed the chiropractors to send copies of the signed

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opt-out letters to Mr. Hirtle. The chiropractors sent opt-out letters to ASH using the model CCA and CCC had provided to them.

24. Mr. Hirtle regularly circulated written updates to the chiropractors informing them of how many chiropractors had opted out of the ASH network. He also advised them on how many more chiropractors needed to opt out to ensure that ASH would not meet the minimum number of chiropractors required to have a sufficient network under the ASH/Anthem arrangement.

25. Mr. Hirtle also encouraged the chiropractors to refuse to participate in the ASH/Anthem program. Throughout the fall of 2006, he told them:

- a. “There need to be 60 more resignations to cripple the ASH provider list.”
- b. “We need 50 more to destroy the panel.”
- c. “A little more effort and we will be there.”
- d. “The list is now 18 [chiropractors]. 5 Counties out 100%. A great victory for Chiropractic!”
- e. “It would be nice to get 100% out in Hartford and New Haven Counties tomorrow.”

26. During this time, CCA and CCC conveyed the concerns of their members regarding the ASH fee schedule and utilization management requirements to ASH. In September 2006, CCA and CCC informed ASH that the chiropractors were “grateful that everyone at ASH [was] critically re-thinking things such as the fee schedule.” Faced with numerous opt-outs and concerns about the program, ASH sent a revised offer to the chiropractors with an increase in the fee schedule on September 19, 2006.

27. Dissatisfied with ASH’s revised offer, CCA, CCC, and Mr. Hirtle continued their efforts to persuade the chiropractors not to

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contract with ASH or, if they were currently members of ASH's existing network, to opt out of ASH's network for Anthem. In response, the chiropractors continued sending their opt-out letters to ASH to reject the revised offer.

28. As a consequence of the boycott, all but four chiropractors opted out of ASH's chiropractic network for Anthem, and the network had no chiropractors in seven out of the eight counties in the State of Connecticut. The boycott succeeded in defeating the ASH network and forcing Anthem and ASH to cancel their arrangement as of December 1, 2006.

**CCA AND CCC CHIROPRACTORS COLLECTIVELY
TERMINATE THEIR PARTICIPATION FROM ASH'S
PROGRAM FOR CIGNA ENROLLEES**

29. ASH entered into an agreement with CIGNA in 2000 to provide a chiropractic provider network and administer chiropractic benefits for CIGNA enrollees in the State of Connecticut.

30. During the time CCA chiropractors and CCC chiropractors were opting out of the ASH chiropractic program for Anthem, they also collectively decided to terminate their existing relationship with the ASH chiropractic program for CIGNA.

31. Communications among the chiropractors included the warning that "[o]pting out of ASH/Anthem but staying with ASH/CIGNA sends a message of weakness and furthermore strengthens their position in our state. By not resigning completely we have to continue opting out of every new plan they try to pass Just Resign!!"

32. CCA and CCC echoed this rallying cry for action through their communications with the chiropractors. CCC told the chiropractors, "There is no option except for ASH to get out of Connecticut. No more negotiations. No more new contracts."

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33. Following these communications, the chiropractors sent letters to ASH terminating their participation in the ASH program for CIGNA.

34. In November 2006, Mr. Hirtle announced that the chiropractors had “voted overwhelmingly” to terminate their participation in the ASH program for CIGNA.

35. The terminations forced CIGNA to develop its own chiropractic network to continue to provide adequate chiropractic coverage to its enrollees.

**CCA AND CCC CHIROPRACTORS CONSPIRE TO
BOYCOTT EMPIRE**

36. ASH manages chiropractic benefits for Empire enrollees in the State of New York. Empire also has enrollees who reside in Connecticut, but obtain health coverage from their employers in New York. ASH attempted to contract with chiropractors in Connecticut to provide chiropractic services to Empire enrollees residing in Connecticut.

37. At a meeting in December 2006, CCA and CCC chiropractors discussed ASH’s offer to provide services to Empire enrollees. CCA and CCC advised their members that if they did not want to participate in the ASH program for Empire, they should send a letter to ASH declining the offer and provide a copy of the letter to Mr. Hirtle. Following the meeting, many CCA and CCC members sent opt-out letters to Empire.

38. In January 2007, CCA informed all chiropractors in Connecticut that an insufficient number of chiropractors agreed to join ASH’s chiropractic network for Empire enrollees residing in Connecticut. The collective conduct of the chiropractors forced ASH to abandon its efforts to contract with chiropractors in Connecticut.

Complaint

**RESPONDENTS' CONDUCT IS NOT LEGALLY
JUSTIFIED**

39. Respondents have not identified any reason for the agreement among CCA and CCC chiropractors to boycott ASH, and Mr. Hirtle's activities to encourage, facilitate, and help implement the boycott, other than to prevent ASH from managing chiropractic benefits on behalf of payors and their enrollees in Connecticut.

40. Neither CCA nor CCC has undertaken any programs or activities that create any integration among their members in the delivery of chiropractic services. Members do not share any financial risk in providing chiropractic services, do not collaborate in a program to monitor and modify clinical practice patterns of their members to control costs and ensure quality, or otherwise integrate their delivery of care to patients.

41. Respondents' conduct described above has not been, and is not, reasonably related to any efficiency-enhancing integration among the chiropractor members of CCA and CCC, or between CCA and CCC and their respective members.

ANTICOMPETITIVE EFFECTS

42. Respondents' actions described in paragraphs 15 through 41 of this Complaint have had the effect of restraining trade unreasonably and hindering competition in the provision of chiropractic services in areas throughout the State of Connecticut in the following ways, among others:

- a. unreasonably restraining price and other forms of competition among chiropractors;
- b. increasing costs for chiropractic care;
- c. depriving payors and individual consumers access to chiropractic services cost-savings programs; and

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d. depriving payors and individual consumers of the benefits of competition among chiropractors.

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

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourteenth day of April, 2008, issues its Complaint against Respondents Connecticut Chiropractic Association, Connecticut Chiropractic Council, and Robert L. Hirtle, Esq.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the Connecticut Chiropractic Association (“CCA”), the Connecticut Chiropractic Council (“CCC”), and Robert L. Hirtle, Esq. (hereinafter collectively referred to as “Respondents”), and Respondents having been furnished thereafter with a copy of the draft of Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order

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

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

1. Respondent CCA is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 2257 Silas Deane Highway, Rocky Hill, Connecticut 06067.
2. Respondent CCC is a not-for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 8 Tyler Avenue, Branford, Connecticut 06405.
3. Respondent Robert L. Hirtle, Esq., an individual, and a member of the Connecticut bar, was CCA’s legal counsel at all times relevant to the facts alleged in the Complaint. His principal address is 185 Asylum Street, Hartford, Connecticut 06103.

Decision and Order

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

ORDER**I.**

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

- A. “Respondent CCA” means the Connecticut Chiropractic Association, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Respondent CCC” means the Connecticut Chiropractic Council, its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- C. “Respondent Hirtle” means Robert L. Hirtle, Esq.
- D. “Respondent Corporations” means Respondent CCA and Respondent CCC, each of which is a “Respondent Corporation.”
- E. “Respondents” means Respondent CCA, Respondent CCC, and Respondent Hirtle.
- F. “Chiropractic group practice” means a bona fide, integrated firm in which chiropractors practice chiropractic together as partners, shareholders, owners, members, or employees, or in which only one chiropractor practices chiropractic.

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- G. “Chiropractor” means a doctor of chiropractic (“D.C.”) or any other person licensed to engage in the practice of chiropractic.
- H. “Participate” in an entity means (1) to be a partner, shareholder, owner, member, or employee of such entity, or (2) to provide services, agree to provide services, or offer to provide services to a payor through such entity. This definition applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”
- I. “Payor” means any person that pays, or arranges for payment, for all or any part of any health care services, including, but not limited to, chiropractic services, for itself or for any other person, as well as any person that develops, leases, or sells access to networks of chiropractors.
- J. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.
- K. “Principal address” means either (1) primary business address, if there is a business, or (2) primary residential address, if there is not a business address.
- L. “Qualified clinically-integrated joint arrangement” means an arrangement to provide chiropractic services in which:
 - 1. all chiropractors who participate in the arrangement participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the chiropractors who participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and

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

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2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies that result from such integration through the arrangement.

II.

IT IS FURTHER ORDERED that Respondents, directly or indirectly, or through any corporate or other device, in connection with the provision of chiropractic 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 chiropractors with respect to the provision of chiropractic services:
 1. to negotiate on behalf of any chiropractor with any payor;
 2. to deal, refuse to deal, or threaten to refuse to deal with any payor; or
 3. regarding any term, condition, or requirement upon which any chiropractor deals, or is willing to deal, with any payor, including, but not limited to, price terms;
- B. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any chiropractor to deal or not deal with a payor, or accept or not accept the terms or conditions, including, but not limited to, price terms, on which the chiropractor is willing to deal with a payor;

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- C. Exchanging or facilitating in any manner the exchange or transfer of information among chiropractors concerning any chiropractor's willingness to deal with a payor, or the terms or conditions, including price terms, on which the chiropractor is willing to deal with a payor;
- D. Continuing a formal or informal meeting of chiropractors after any person makes any statement concerning one or more chiropractors' intentions or decisions, that if agreed to would violate Paragraphs II.A through II.C above, unless Respondents immediately eject such person from the meeting;
- E. Attempting to engage in any action prohibited by Paragraphs II.A through II.D above; and
- F. 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.E above.

Provided, however, that nothing in this Paragraph II. shall prohibit any agreement or conduct involving Respondent Hirtle: (a) that is reasonably necessary to form, participate in, or take any action in furtherance of, a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement; or (b) where such agreement or conduct solely involves chiropractors in the same chiropractic group practice.

III.

IT IS FURTHER ORDERED that nothing in this Order shall be construed to prevent Respondent Corporations from exercising rights permitted under the First Amendment to the United States Constitution to petition any federal, state, commonwealth, or local government including any executive or legislative body, or to participate in any federal, state, commonwealth, or local administrative or judicial proceeding, or to engage in communications reasonably necessary to develop a position or

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communicate with chiropractors about positions presented to any federal, state, commonwealth, or local government including any executive or legislative body.

IV.

IT IS FURTHER ORDERED that for a period of five (5) years from the date that this Order becomes final, Respondent Corporations shall maintain a copy of any written communication distributed to any chiropractor relating to any subject that is covered by any provision of this Order.

V.

IT IS FURTHER ORDERED that each Respondent Corporation shall:

- A. Within thirty (30) days after the date on which this Order becomes final:
 1. send by first-class mail with delivery confirmation or electronic mail with return confirmation, a copy of this Order and the Complaint to:
 - a. every chiropractor who is or has been a member of Respondent Corporation at any time since January 1, 2005;
 - b. each current officer, director, manager, and employee of Respondent Corporation;
 2. send by first-class mail, return receipt requested, a copy of this Order and the Complaint to the chief executive officer of each payor set forth in Appendix A of this Order;
- B. For five (5) years from the date this Order becomes final:

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1. distribute by first-class mail, return receipt requested, a copy of this Order and the Complaint to:
 - a. each chiropractor who becomes a member of Respondent Corporation, and who did not previously receive a copy of this Order and the Complaint from such Respondent Corporation, within thirty (30) days of the time such membership begins;
 - b. each person who becomes an officer, director, manager, or employee of Respondent Corporation, and who did not previously receive a copy of this Order and the Complaint from such Respondent Corporation, within thirty (30) days of the time that he or she assumes such position with such Respondent Corporation; and
 2. publish on the official website of Respondent Corporation, and, if Respondent Corporation sends an annual report or newsletter to all chiropractors who are members of Respondent Corporation, publish annually in such report or newsletter, a copy of this Order and the Complaint with such prominence as is given to regularly featured information.
- C. Notify the Commission at least thirty (30) days prior to any proposed:
1. dissolution of Respondent Corporation;
 2. acquisition, merger or consolidation of Respondent Corporation; or
 3. other change in Respondent Corporation 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 Corporation.

Decision and Order

- D. File verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for five (5) 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:
1. a detailed description of the manner and form in which Respondent Corporation has complied and is complying with this Order;
 2. the name, address, and telephone number of each payor with which such Respondent Corporation has had any contact; and
 3. copies of the delivery confirmations or electronic mail with return confirmations required by Paragraph V.A.1, and copies of the signed return receipts required by Paragraphs V.A.2 and V.B.1.

VI.

IT IS FURTHER ORDERED that Respondent Hirtle shall file a verified written report within ninety (90) days from the date this Order becomes final, annually thereafter for five (5) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include a detailed description of the manner and form in which Respondent Hirtle has complied and is complying with this Order.

VII.

IT IS FURTHER ORDERED that, for five (5) years from the date this Order becomes final, each Respondent shall notify the Commission of any change in his or its respective principal address within twenty (20) days of such change in address.

Decision and Order

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:

- A. Each Respondent shall permit any duly authorized representative of the Commission access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession, or under the control, of such Respondent relating to any matter contained in this Order; and
- B. Upon five (5) days' notice:
 - 1. each Respondent Corporation shall, in the presence of counsel and without restraint or interference, permit any duly authorized representative of the Commission to interview its officers, directors, or employees;
 - 2. Respondent Hirtle shall, in the presence of counsel and without restraint or interference, permit any duly authorized representative of the Commission to interview him.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on April 14, 2028.

By the Commission.

Decision and Order

APPENDIX A

Aetna, Inc.
151 Farmington Avenue
Hartford, CT 06156

American Specialty Health
777 Front Street
San Diego, CA 92101

Anthem Blue Cross and Blue Shield
Operations Center and East Headquarters
370 Bassett Road
North Haven, CT 06473

CIGNA Corporate Headquarters
Two Liberty Place
1601 Chestnut Street
Philadelphia, PA 19192

ConnectiCare
175 Scott Swamp Road
P.O. Box 4050
Farmington, CT 06034-4050

Empire BlueCross BlueShield
One Liberty Plaza
New York, NY 10006

Health Net, Inc.
P.O. Box 10198
Van Nuys, CA 91410-0198

Oxford Health Plans, LLC
United Healthcare
450 Columbus Boulevard
Hartford, CT 06103

Unicare/WellPoint, Inc.
120 Monument Circle
Indianapolis, IN 46204

United Healthcare
450 Columbus Boulevard
Hartford, CT 06103

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 Connecticut Chiropractic Association (“CCA”), the Connecticut Chiropractic Council (“CCC”), and CCA’s former legal counsel, Robert L. Hirtle, Esq. The agreement settles charges by the Federal Trade Commission that CCA, CCC, and Mr. Hirtle violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by orchestrating and implementing agreements among competing chiropractors in Connecticut to boycott American Specialty Health (“ASH”) to preclude ASH from administering chiropractic services in Connecticut. This conduct is a naked boycott among competitors and a clear *per se* violation of the antitrust laws.

The Commission explored the possibility of seeking disgorgement in this case, given the egregious nature of the conduct. It ultimately concluded that disgorgement was inappropriate under the specific factual circumstances of this case. However, the Commission reserves the right to seek disgorgement in similar cases in the future.

The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

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

Analysis to Aid Public Comment

The Complaint

The allegations of the complaint are summarized below.

CCA is a voluntary trade association whose membership consists of approximately 375 chiropractors licensed to practice chiropractic in Connecticut. Mr. Hirtle was legal counsel for CCA at all times relevant to the conduct alleged in the complaint. CCC is a voluntary trade association whose membership consists of approximately 150 chiropractors licensed to practice chiropractic in Connecticut. Both CCA and CCC are organized for the purpose, among others, of serving the interests of their respective members, and operate in substantial part for the pecuniary benefit of their respective members.

ASH is a health care benefits organization that offers a chiropractic cost-savings benefits administration program to payors nationwide to improve the efficiency, increase the quality, and reduce the cost of providing chiropractic care. Under the program, ASH provides a network of chiropractors and administers chiropractic benefits, including utilization management, credentialing, and claims processing.

CCA acted in conspiracy with its members, CCC acted in conspiracy with its members, and CCA, CCC, and their members acted in conspiracy with each other. Through their joint agreements, CCA, CCC, and their respective members, restrained competition by, among other things, collectively agreeing to boycott ASH. Mr. Hirtle acted to restrain competition by, among other things, encouraging and facilitating the boycotts. The purpose and effect of the boycotts were to prevent ASH from providing its cost-savings chiropractic benefits administration program to Anthem Blue Cross and Blue Shield of Connecticut (“Anthem”), CIGNA HealthCare (“CIGNA”), Empire Blue Cross Blue Shield (“Empire”), and other payors.

Analysis to Aid Public Comment

ASH entered into an arrangement with Anthem in early 2006 to provide a chiropractic provider network and administer chiropractic benefits for Anthem enrollees. In July 2006, ASH notified CCA and CCC chiropractors that the arrangement was effective November 1, 2006. The chiropractors who already were members of ASH's network in Connecticut had the opportunity to "opt out" of the ASH network for Anthem.

CCA, CCC, and Mr. Hirtle organized monthly meetings starting in August 2006 for all licensed chiropractors in Connecticut to discuss their concerns with the ASH/Anthem arrangement. During these meetings and through other communications, CCA and CCC chiropractors discussed with each other their dissatisfaction with ASH's price terms and utilization management requirements for chiropractic services. The chiropractors incited each other to unite in their fight to defeat the ASH/Anthem program. They agreed to "band together" to defeat the ASH/Anthem arrangement.

CCA and CCC also distributed a model opt-out letter to the chiropractors to notify ASH that the chiropractors elected not to participate in the ASH/Anthem program. The chiropractors sent opt-out letters to ASH using the model letter and provided copies of the letters to Mr. Hirtle. Mr. Hirtle regularly circulated written updates to the chiropractors informing them of how many chiropractors had opted out of the network. Mr. Hirtle encouraged the chiropractors to refuse to participate in the ASH/Anthem program through communications telling the chiropractors how many more chiropractors needed to opt out to "destroy" the ASH chiropractor network.

During this time, CCA, CCC, and Mr. Hirtle also encouraged and assisted the chiropractors to terminate their existing relationship with the ASH chiropractic program for CIGNA and to refuse to participate in the ASH program for Empire. The boycotts succeeded in their efforts to preclude ASH from administering chiropractic services in Connecticut. ASH and Anthem were forced to cancel their arrangement, CIGNA had to abandon its program with ASH,

Analysis to Aid Public Comment

and ASH was unable to contract with chiropractors in Connecticut for the Empire network.

The proposed respondents have not identified any reason for the agreement among CCA and CCC chiropractors to boycott ASH, and Mr. Hirtle's activities to encourage, facilitate, and help implement the boycott, other than to prevent ASH from managing chiropractic benefits on behalf of payors and their enrollees in Connecticut. Neither CCA nor CCC has undertaken any programs or activities that create any integration among their members in the delivery of chiropractic services. Members do not share any financial risk in providing chiropractic services, do not collaborate in a program to monitor and modify clinical practice patterns of their members to control costs and ensure quality, or otherwise integrate their delivery of care to patients. By the acts set forth in the complaint, CCA, CCC, and Mr. Hirtle have violated Section 5 of the FTC Act.

The Proposed Consent Order

The proposed order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence. It is similar to other consent orders that the Commission has issued to settle charges that health care providers engaged in unlawful refusals to deal with health plans. Unlike prior consent orders, however, this order also settles charges that an attorney participated in the unlawful refusals to deal with the providers.

The proposed order's specific provisions are as follows:

Paragraph II.A prohibits CCA, CCC, and Mr. Hirtle from entering into or facilitating any agreement between or among any chiropractors: (1) to negotiate with payors on any chiropractor's behalf; (2) to deal, not to deal, or threaten not to deal with payors; or (3) on what terms to deal with any payor.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the proposed respondents from persuading

Analysis to Aid Public Comment

in any way a chiropractor to deal or not deal with a payor, or accept or not accept the terms or conditions on which the chiropractor is willing to deal with a payor. Paragraph II.C forbids the proposed respondents from facilitating exchanges of information between chiropractors concerning whether, or on what terms, to contract with a payor. Paragraph II.D prohibits proposed respondents from continuing a meeting of chiropractors after any person makes any statements regarding any chiropractor's intentions that if agreed to would violate Paragraphs II.A through II.C unless that person is ejected from the meeting. Paragraph E bars attempts to engage in any action prohibited by Paragraphs II.A through II.D, and Paragraph F proscribes inducing anyone to engage in any action prohibited by Paragraphs II.A through II.E.

As in other Commission orders addressing health care providers' concerted action against health care purchasers, certain kinds of agreements are excluded from the general bar on joint negotiations. Mr. Hirtle would not be precluded from engaging in conduct that is reasonably necessary to form legitimate joint contracting arrangements among competing chiropractors, whether a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement," or conduct that only involves chiropractors who are part of the same chiropractic group practice (defined in Paragraph I.F).

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

A "qualified clinically-integrated joint arrangement," on the other hand, need not involve any sharing of financial risk. Instead, as defined in the proposed order, participants must participate in active

Analysis to Aid Public Comment

and ongoing programs to evaluate and modify their clinical practice patterns in order to control costs and ensure the quality of services provided, and the arrangement must create a high degree of interdependence and cooperation among chiropractors. As with qualified risk-sharing arrangements, any agreement concerning price or other terms of dealing must be reasonably necessary to achieve the efficiency goals of the joint arrangement.

Paragraph III provides that the order does not prevent CCA or CCC from exercising rights permitted under the First Amendment to the United States Constitution to petition the government.

Paragraph IV requires that CCA and CCC maintain copies of written communications distributed to any chiropractor relating to the order.

Paragraph V.A requires CCA and CCC to distribute the complaint and order to all chiropractors who have participated in CCA or CCC, and to payors identified in Appendix A. For five years, Paragraph V.B requires both CCA and CCC, respectively, to distribute the complaint and order to all chiropractors who become a member of CCA or CCC.

Paragraphs V.C, V.D, VI, VII, and VIII of the proposed order impose various obligations on proposed respondents to report or provide access to information to the Commission to facilitate monitoring their compliance with the order.

Paragraph IX provides that the proposed order will expire in 20 years.

Complaint

IN THE MATTER OF

**LIFE IS GOOD, INC.,
AND
LIFE IS GOOD RETAIL, INC.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket C-4218; File No. 072 3046
Complaint, April 16, 2008 – Decision, April 16, 2008*

This consent order addresses false or misleading representations Life is good made about the security it provided for personal information collected from consumers in connection with the sale of apparel and accessories through a retail website. Life is good engaged in a number of practices that failed to provide reasonable and appropriate security for the sensitive consumer information stored on its computer network. In fact, a hacker was able to export consumer information for thousands of customers. The order prohibits Life is good from misrepresenting the extent to which it maintains and protects the privacy, confidentiality, or integrity of personally identifiable information collected from or about consumers. The order requires Life is good to establish and maintain a comprehensive information security program in writing that is reasonably designed to protect the security, confidentiality, and integrity of personal information collected from or about consumers. In addition, Life is good must obtain, on a biennial basis for 20 years, an assessment and report from a qualified, objective, independent third-party professional, certifying, among other things, that it has in place a security program that provides protections that meet or exceed the protections required by the order; and its security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of consumers' personal information is protected. Additional provisions of the order relate to notifying the Commission of changes in corporate status and submitting compliance reports to the Commission.

Participants

For the Commission: *Laura Berger, Kristin Krause Cohen,
Marc Groman, Michael Ostheimer, Jessica Rich, and Joel Winston.*

For the Respondents: *John Banse, in-house counsel.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Life is good, Inc., and Life is good Retail, Inc. (“respondents”), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Life is good, Inc., is a Massachusetts corporation with its principal office or place of business at 283-285 Newbury Street, Boston, Massachusetts 02115.

2. Respondent Life is good Retail, Inc., is a Delaware corporation with its principal office or place of business at 283-285 Newbury Street, Boston, Massachusetts 02115. Life is good Retail, Inc., is a wholly-owned subsidiary of Life is good, Inc.

3. The acts and practices of respondents as alleged in this complaint are in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

4. Respondents design and distribute retail apparel and accessories and operate a retail website at *www.lifeisgood.com*.

5. Respondents operate a computer network that consumers use, in conjunction with respondents’ website (*www.lifeisgood.com*) and web application, to obtain information and to buy respondents’ products.

6. In selling their products, respondents routinely have collected sensitive information from consumers, including name, address, e-mail address, phone number, credit card number, credit card expiration date, and credit card security code (hereinafter “consumer information”). Respondents have collected this consumer information through their website and telephone orders and stored it on a network computer accessible through the website.

Complaint

7. Since at least October 2005, respondents have disseminated or caused to be disseminated privacy policies and statements on their website, including, but not necessarily limited to, the following statements regarding the privacy and confidentiality of the consumer information they collect:

We are committed to maintaining our customers' privacy. We collect and store information you share with us – name, address, credit card and phone numbers – along with information about products and services you request. All information is kept in a secure file and is used to tailor our communications with you.

(Emphasis added).

8. Since at least October 2005, respondents have engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for the consumer information stored on their network, including credit card numbers, expiration dates, and security codes. In particular, respondents: (1) stored the consumer information in clear, readable text; (2) created unnecessary risks to consumer information by storing it indefinitely on their network, without a business need, and by storing credit card security codes; (3) did not adequately assess the vulnerability of their web application and network to commonly known or reasonably foreseeable attacks, such as “Structured Query Language” (“SQL”) injection attacks; (4) did not implement simple, free or low-cost, and readily available defenses to such attacks; (5) did not use readily available security measures to monitor and control connections from the network to the internet; and (6) failed to employ reasonable measures to detect unauthorized access to consumer information.

9. Between June and August 2006, a hacker exploited the failures set forth in Paragraph 8 by using SQL injection attacks on respondents' website and web application and exporting to the hacker's browser consumer information for thousands of customers, including credit card numbers, expiration dates, and security codes.

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After learning of the breach from their customers, respondents took steps to prevent further unauthorized access, notified law enforcement, and sent breach notification letters to affected customers.

10. Through the means described in Paragraph 7, respondents represented, expressly or by implication, that they implemented reasonable and appropriate measures to protect consumer information against unauthorized access.

11. In truth and in fact, respondents did not implement reasonable and appropriate measures to protect consumer information against unauthorized access. Therefore, the representation set forth in Paragraph 7 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission this sixteenth day of April, 2008, has issued this complaint against respondents.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the Respondents named in the caption hereof, and the Respondents having been furnished thereafter with a copy of a draft complaint, which the Bureau of Consumer Protection

Decision and Order

proposed to present to the Commission, and which would charge the Respondents with violation of the Federal Trade Commission Act; and

The Respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the Respondents of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of the agreement is for settlement purposes only and does not constitute an admission by the Respondents that the law has been violated as alleged in such complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comment filed thereafter by an interested party 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 Life is good, Inc., is a Massachusetts corporation with its principal office or place of business at 283-285 Newbury Street, Boston, Massachusetts 02115.

2. Respondent Life is good Retail, Inc., is a Delaware corporation with its principal office or place of business at 283-285 Newbury Street, Boston, Massachusetts 02115. Life is good Retail, Inc., is a wholly-owned subsidiary of Life is good, Inc.

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

Decision and Order

ORDER

DEFINITIONS

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

1. “Personally identifiable information” or “personal information” shall mean individually identifiable information from or about an individual consumer including, but not limited to: (a) a first and last name; (b) a home or other physical address, including street name and name of city or town; (c) an email address or other online contact information, such as an instant messaging user identifier or a screen name that reveals an individual’s email address; (d) a telephone number; (e) a Social Security number; (f) credit or debit card information, including card number, expiration date, and security code; (g) a persistent identifier, such as a customer number held in a “cookie” or processor serial number, that is combined with other available data that identifies an individual consumer; or (h) any information that is combined with any of (a) through (g) above.
2. Unless otherwise specified, “respondents” shall mean Life is good, Inc., Life is good Retail, Inc., and their successors and assigns, officers, agents, representatives, subsidiaries, affiliates, and employees.
3. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that respondents, directly or through any corporation, subsidiary, division, or other device, in connection with the collection of personally identifiable information from or about consumers, in or affecting commerce, shall not misrepresent in any manner, expressly or by implication, the extent to which respondents

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maintain and protect the privacy, confidentiality, or integrity of any personal information collected from or about consumers.

II.

IT IS FURTHER ORDERED that respondents, directly or through any corporation, subsidiary, 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 administrative, technical, and physical safeguards appropriate to respondents' size and complexity, the nature and scope of respondents' 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 failure;

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- C. the design and implementation of reasonable safeguards to control the risks identified through risk assessment, and regular testing or monitoring of the effectiveness of the safeguards' key controls, systems, and procedures;
- D. the development and use of reasonable steps to retain service providers capable of appropriately safeguarding personal information they receive from respondents, requiring service providers by contract to implement and maintain appropriate safeguards, and monitoring their safeguarding of personal information; and
- E. the evaluation and adjustment of respondents' information security program in light of the results of the testing and monitoring required by subpart C, any material changes to respondents' operations or business arrangements, or any other circumstances that respondents know or have reason to know may have a material impact on the effectiveness of their information security program.

III.

IT IS FURTHER ORDERED that, in connection with their compliance with Part II of this order, respondents shall obtain initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party professional, who uses procedures and standards generally accepted in the profession. The reporting period for the Assessments shall cover: (1) the first one hundred and eighty (180) days after service of the order for the initial Assessment; and (2) each two (2) year period thereafter for 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 respondents have implemented and maintained during the reporting period;

Decision and Order

- B. explain how such safeguards are appropriate to respondents' size and complexity, the nature and scope of respondents' 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 Part II of this order; and
- D. certify that respondents' security program is operating with sufficient effectiveness to provide reasonable assurance that the security, confidentiality, and integrity of personal information is protected and has so operated throughout the reporting period.

Each Assessment shall be prepared and completed within sixty (60) days after the end of the reporting period to which the Assessment applies by: a person qualified as a Certified Information System Security Professional (CISSP) or as a Certified Information Systems Auditor (CISA); a person holding Global Information Assurance Certification (GIAC) from the SysAdmin, Audit, Network, Security (SANS) Institute; or a similarly qualified person or organization approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

Respondents 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 respondents until the order is terminated and provided to the Associate Director of Enforcement within ten (10) days of request.

IV.

IT IS FURTHER ORDERED that respondents shall maintain, and upon request make available to the Federal Trade Commission

Decision and Order

for inspection and copying, a print or electronic copy of each document relating to compliance, including but not limited to:

- A. for a period of five (5) years, any documents, whether prepared by or on behalf of either respondent, that contradict, qualify, or call into question respondents' 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 either 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 respondents' compliance with Part II of this order, for the compliance period covered by such Assessment. Respondent shall provide such documents to the Associate Director of Enforcement within ten (10) days of request.

V.

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

VI.

IT IS FURTHER ORDERED that respondents and their successors and assigns shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including, but not

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limited to: a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however*, that, with respect to any proposed change in the corporation(s) about which respondents learn fewer than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

VII.

IT IS FURTHER ORDERED that respondents and their successors and assigns shall, within one hundred and eighty (180) days after service of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VIII.

This order will terminate on April 16, 2028, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

Analysis to Aid Public Comment

- 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(s) did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order as to such respondent(s) 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 has accepted, subject to final approval, a consent agreement from Life is good, Inc. and Life is good Retail, Inc. (collectively, “Life is good”).

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.

Life is good designs and distributes retail apparel and accessories and operates a retail website at www.lifeisgood.com. In

Analysis to Aid Public Comment

selling its products, Life is good routinely has collected sensitive information from consumers, including name, address, e-mail address, phone number, credit card number, credit card expiration date, and credit card security code (hereinafter “consumer information”). Life is good has collected this consumer information through its website and telephone orders and stored it on a network computer accessible through the website. This matter concerns alleged false or misleading representations Life is good made about the security it provided for this information.

The Commission’s proposed complaint alleges that Life is good represented that it implemented reasonable and appropriate security measures to protect the privacy and confidentiality of sensitive consumer information. The complaint alleges this representation was false because Life is good engaged in a number of practices that, taken together, failed to provide reasonable and appropriate security for the sensitive consumer information stored on its computer network. In particular, Life is good: (1) created unnecessary risks to credit card information by storing it indefinitely in clear, readable text on its network without a business need, and by storing credit card security codes; (2) failed to assess adequately the vulnerability of its web application and corporate computer network to certain commonly known or reasonably foreseeable attacks, such as SQL injection attacks; (3) failed to implement simple, free or low-cost, and readily available defenses to SQL and related types of attacks; (4) failed to use readily available security measures to monitor and control connections from the network to the internet; and (5) failed to employ sufficient measures to detect unauthorized access to credit card information.

The complaint further alleges that between June and August 2006, a hacker exploited Life is good’s failures by using SQL injection attacks on Life is good’s website and web application and exporting to the hacker’s browser consumer information for thousands of customers, including credit card numbers, expiration dates, and security codes.

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The proposed order applies to personal information Life is good collects from or about consumers. It contains provisions designed to prevent Life is good from engaging in the future in practices similar to those alleged in the complaint.

Part I of the proposed order prohibits Life is good, in connection with the collection of personally identifiable information from or about consumers, in or affecting commerce, from misrepresenting the extent to which it maintains and protects the privacy, confidentiality, or integrity of such information.

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

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

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- Develop and use reasonable steps to retain service providers capable of appropriately safeguarding personal information they receive from respondents, require service providers by contract to implement and maintain appropriate safeguards, and monitor their safeguarding of personal information.

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

Part III of the proposed order requires that Life is good obtain, covering the first 180 days after the order is served, and on a biennial basis thereafter for 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 consumers' personal information is protected.

Parts IV through VII of the proposed order are reporting and compliance provisions. Part IV requires Life is good to retain documents relating to their compliance with the order. For most records, the order required that the documents be retained for a five-year period. For the third-party assessments and supporting documents, Life is good 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 Life is good submit an initial compliance report to the FTC, and make available to the FTC subsequent reports. Part VIII is a provision "sunsetting" the order after twenty (20) years, with certain exceptions.

Analysis to Aid Public Comment

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

Complaint

IN THE MATTER OF

CASHPRO d/b/a/ MAKEPAYDAYTODAY.COMCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 144 OF THE TRUTH IN LENDING ACT*Docket C-4220; File No. 072 3203**Complaint, June 3, 2008 – Decision, June 3, 2008*

This consent order addresses payday loan advertisements disseminated by CashPro, d/b/a *MakePaydayToday.com*, that failed to disclose the annual percentage rate for these loans, undermining consumers' ability to compare them to loans offered by other payday lenders or to alternative forms of credit. The order prohibits the respondent, in connection with any advertisement of consumer credit, from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by the Truth in Lending Act and its implementing Regulation Z, including the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate. The order prohibits the respondent from stating a rate of finance charge without stating the rate as an annual percentage rate, and from failing to comply in any other respect with the Truth in Lending Act or Regulation Z. It requires that the respondent maintain all records that will demonstrate compliance with the order. The respondent must distribute copies of the order to various principals, officers, directors, and managers, and all current and future employees, agents and representatives having responsibilities with respect to the subject matter of the order. In addition, CashPro is required to notify the Commission of any changes in its corporate structure that might affect compliance with the order and to file with the Commission one or more reports detailing compliance with the order.

Participants

For the Commission: *Beverly Childs, Thomas Pahl, Cara Petersen, Patti Poss, Peggy L. Twohig, and Quisaira Whitney.*

For the Respondent: *Not represented by counsel.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that CashPro d/b/a MakePaydayToday.com (“respondent”), a sole proprietorship owned by Mark and Roxanne Behrendsen has violated the provisions of the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent CashPro d/b/a MakePaydayToday.com is a sole proprietorship with its principal office or place of business at 4306 S. Carson St., Carson City, NV 89701.

2. Respondent has disseminated advertisements to the public that promote extensions of closed-end credit in consumer credit transactions, as the terms “advertisement,” “credit,” “closed-end credit,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

3. Respondent offers credit to consumers in the form of payday loans. Credit is defined as “the right to defer payment of debt or to incur debt and defer its payment.” Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended. Credit includes “a transaction in which a cash advance is made to a consumer in exchange for the consumer’s personal check, or in exchange for the consumer’s authorization to debit the consumer’s deposit account, and where the parties agree either that the check will not be cashed or deposited, or that the consumer’s deposit account will not be debited, until a designated future date. This type of transaction is often referred to as a ‘payday loan’ or ‘payday advance’ or ‘deferred-presentment loan.’” Comment 2 to Section 226.2(a)(14) of the Official Staff Commentary to Regulation Z; 12 C.F.R. Section 226.2(a)(14)-2, Supp.1, as amended. Payday loans have high rates and short repayment periods; they are often due on the borrower’s next payday, usually about every two weeks.

Complaint

4. Respondent has disseminated or has caused to be disseminated payday loan advertisements on the Internet, including but not necessarily limited to the attached Exhibit 1.

A. The advertisement states that MakePaydayToday.com's rates vary depending on the number of days for which the loan is made.

B. The advertisement provides that the maximum number of days for a loan is 14 days, but extensions may be done for up to 60 days.

C. The advertisement provides a fee schedule showing various "loan amounts and fees for our short term loans." According to the fee schedule, a \$100 loan repaid in 14 days costs \$19.95.

5. On a \$100 loan with a \$19.95 fee repayable in 14 days, the APR would be 520%.

Failure to Disclose Information Required by TILA

6. In credit advertisements, including but not necessarily limited to Exhibit 1, respondent has stated the number of payments or period of repayment and/or the amount of any finance charge, as terms for obtaining consumer credit in the form of a payday loan.

7. These advertisements have failed to disclose the "annual percentage rate" or "APR" using that term as required by Regulation Z.

8. Respondent's practices have violated Section 144 of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

THEREFORE, the Federal Trade Commission this third day of June, 2008, has issued this complaint against respondent.

Complaint

By the Commission.

EXHIBIT 1

Fast & Convenient Payday Loans

[Home](#) | [Log In](#) | [Apply Now!](#) | [FAQs](#) | [How It Works](#) | [Our Low Rates](#) | [Privacy](#) | [About Us](#) | [Contact](#)

Need some extra cash till your next payday?

If you have a regular monthly income and need a short term loan you've come to the right place.

Members Login Username: _____

 Password: _____

[Forgot your username or password?](#)

New Customers

<p>We can help! Why Us?</p> <ul style="list-style-type: none"> <input checked="" type="checkbox"/> Quick approval for loans of up to \$500 <input checked="" type="checkbox"/> Very low fees! <input checked="" type="checkbox"/> No credit checks <input checked="" type="checkbox"/> Bad credit or no credit okay <input checked="" type="checkbox"/> No faxing for qualified applicants <input checked="" type="checkbox"/> Cash in your account within 24 hours <input checked="" type="checkbox"/> Complete and submit an application <input checked="" type="checkbox"/> Receive quick approval of your application <input checked="" type="checkbox"/> Cash is deposited directly into your checking account 	<p>First Name: _____ Last Name: _____</p> <p>Email: _____ Confirm Email: _____</p> <p><input type="radio"/> Yes <input type="radio"/> No I am currently employed or I receive recurring income regularly.</p> <p><input type="radio"/> Yes <input type="radio"/> No I make at least \$1,200 per month.</p> <p>Select How long have you held your checking account.</p> <p style="text-align: center;"><input type="button" value="Apply Now!"/></p>
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Complaint

Make Payday Today

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Frequently Asked Questions

- [Is my personal information safe and secure?](#)
- [What are the requirements for a loan?](#)
- [When does the loan come due?](#)
- [What is the maximum number of days I can do a loan for?](#)
- [How long does it take to be approved?](#)
- [How fast can I get a loan?](#)
- [How much can I borrow?](#)
- [What are your fees?](#)
- [How do I repay my loan?](#)
- [Can I do an Extension or Rollover?](#)
- [Do you do credit checks?](#)
- [I have a question not listed here](#)

Is my personal information safe and secure?

MakePaydayToday.com takes your security extremely seriously. We have been making loans since 2000, we are licensed in the State of Nevada, and have two stores in Carson City and Lake Tahoe. Furthermore, All your personal information is sent encrypted to our Secure Server using SSL, the standard for Internet-based commerce. Please review our privacy statement [here](#) for further information.

What are the requirements for a loan?

It's extremely easy to get a loan from MakePaydayToday.com! Our simple requirements are:

1. Be at least 18 years old
2. Make at least \$1,200/monthly gross income
3. Have a checking account open at least two months
4. Fax, Scan/Email, or send a Cell Phone picture of your current pay stub

For new customers, we may request that a current bank statement be sent.

When does the loan come due?

The loan comes due on the day you choose, up to 14 days from when the money will be deposited into your account. If you need the loan longer than 14 days, just do an extension. On the due date, if an extension has not been done, then the money will be withdrawn from your account as per our agreement.

What is the maximum number of days I can do a loan?

14 days. If you need longer than 14 days, you can do an Extension.

How long does it take to be approved?

FAST! You can be approved within two hours.

How fast can I get a loan?

You will typically have your money the next business day, assuming you make your request before 3:30pm PST or 6:30pm EST Monday-Friday. We cannot make deposits on weekends or bank holidays.

How much can I borrow?

25% of your total monthly gross income to a maximum of \$500.00.

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Make Payday Today

Page 2 of 2

What are your fees?

Unlike many loan companies, we charge by the day, making our rates some of the lowest on the Internet. Click here to see our current fee schedule.

How do I repay my loan?

On the day your loan comes due, we automatically withdraw the money from your checking account. This is done using the same system we used to deposit money into your account.

Can I do an Extension?

Yes! Extensions may be done for a maximum of 60 days from the date of your original payment date. If it is not convenient to have us withdraw the loan from your checking account on the due date, just log in to our secure server, click on the extension request form and fill it out. Our customer service staff will review your request immediately, and if approved the extension fee will be automatically withdrawn from your checking account the next business day.

Do you do credit checks?

No. We do not use the normal credit reporting agencies. However, we do use verification services.

I have a question not listed here.

Send an email to info@makepaydaytoday.com, or click here to use our contact form. Our customer service staff will be happy to assist you.

Complaint

MakePaydayToday.com - Fast and Convenient Payday Loans

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Fast & Convenient Payday Loans[Home](#) | [Log In](#) | [Apply Now!](#) | [FAQs](#) | [How It Works](#) | [Our Low Rates](#) | [Privacy](#) | [About Us](#) | [Contact](#)**Our payday loan application is the easiest you'll find anywhere**

First fill out our quick and easy loan application. Typically you'll hear from us within a couple of hours via email after we receive your information.

If approved, your loan will be deposited into your bank account in as little as 24-hours, assuming your application is received by 3:30pm Monday-Friday PST (west coast time), or 6:30pm EST (east coast time).

When your loan is due, we will notify you via email approximately two days prior. If you are not ready to pay your loan off, you may extend the loan by paying an additional fee at the same rate as your original loan.

All loans are deposited directly to your bank account, and all payments are collected directly as well, requiring no action on your part.

Once you have successfully completed a loan with us, you can sign in to your account at any time and request a new loan in less than 60 seconds. No new documents, no new application, just make your request and the money will be sent to you.

We make it easy to get the money you need, *FAST!*

Need money quickly? Simply fill out our short loan application, which should take you less than five minutes, send us the requested documentation so we can verify your income, and then the money will be transferred into your checking account. The best part is you only have to do it once. It's that simple!

After submitting your application, you can sign in to the member section and check the current approval status of your loan at any time. When approved, you'll automatically be notified via email of your approval.

If you ever have a problem, you can always contact our friendly customer service staff by calling (775) 588-3333 to help you. It's never been so easy to get the money you need.

[Click here to apply for a loan now!](#)

Complaint

Fast & Convenient Payday Loans

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Our Low Rates!

The following table shows the loan amounts and fees for our short term loans. Unlike many payday loan companies, we give YOU control of when the loan is repaid, and only charge based on the number of days.

Loan Amount	Length of Loan							
	7 Days	8 Days	9 Days	10 Days	11 Days	12 Days	13 Days	14 Days
\$100.00	\$9.95	\$10.95	\$12.95	\$13.95	\$15.95	\$16.95	\$18.95	\$19.95
\$150.00	\$14.95	\$16.95	\$18.95	\$20.95	\$23.95	\$25.95	\$27.95	\$29.95
\$200.00	\$19.95	\$22.95	\$25.95	\$28.95	\$30.95	\$33.95	\$36.95	\$39.95
\$250.00	\$24.95	\$28.95	\$31.95	\$35.95	\$38.95	\$42.95	\$45.95	\$49.95
\$300.00	\$29.95	\$33.95	\$38.95	\$42.95	\$46.95	\$50.95	\$55.95	\$59.95
\$350.00	\$34.95	\$39.95	\$44.95	\$49.95	\$54.95	\$59.95	\$64.95	\$69.95
\$400.00	\$39.95	\$45.95	\$50.95	\$56.95	\$62.95	\$68.95	\$73.95	\$79.95
\$450.00	\$44.95	\$50.95	\$57.95	\$63.95	\$70.95	\$76.95	\$83.95	\$89.95
\$500.00	\$49.95	\$56.95	\$63.95	\$70.95	\$78.95	\$85.95	\$92.95	\$99.95

[Click here to apply for a loan now!](#)

Complaint

Make Payday Today

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Fast & Convenient Payday Loans

[Home](#) | [Log In](#) | [Apply Now!](#) | [FAQs](#) | [How It Works](#) | [Our Low Rates](#) | [Privacy](#) | [About Us](#) | [Contact](#)**Need some extra cash till your next payday?**

If you have a regular monthly income and need a short term loan you've come to the right place.

We can help! Why Us?

- Quick approval for loans of up to \$500
- Very low fees!
- No credit checks
- Bad credit or no credit okay
- No faxing for qualified applicants
- Cash in your account within 24 hours
-  Complete and submit an application
-  Receive quick approval of your application
-  Cash is deposited directly into your checking account

Privacy Policy Statement

Your privacy is extremely important to us, and we appreciate your trust. Be assured that we'll use the latest technology to protect it.

Definitions:

You, your - means the borrower, applicant and customer.
We, us, our - means lender or MakePaydayToday.com.

Our Goal:

We understand the importance of building a trusting relationship with our customers. We also recognize that you expect your personal financial information to remain private and secure. While some of your personal financial information is critical to the operation of our business, we will not collect any more than is necessary.

Your Financial Privacy Rights:

We respect the privacy of our customers and are committed to treating customer information responsibly. We collect "non-public personal information" about you from the following sources:

1. Information we receive from you on applications or other forms.
2. Information about your past transactions with us.

We do not disclose any non-public personal information about our customers or former customers to anyone, except as permitted by law. We restrict access to non-public personal information about you to those employees who need to know that information to provide products or services to you. We maintain physical, electronic, and procedural safeguards that comply with federal standards to guard your non-public personal information.

Safety of Your Information

All critical information is transmitted in an encrypted state using Secure Sockets Layer (SSL).

It is important for you to protect your information by guarding your account password and your computer. Be sure to sign off when finished using a shared computer.

Cookies

"Cookies" are small identifiers that we transfer to your computer through your web browser to allow our system to manage your session when you are signed in to our site. Make Payday Today requires cookies to be turned on in your browser for proper operation. We do not use cookies for any sort of tracking activity beyond the scope of our normal web site operation.

Sources of Information:

Information about you is received from a variety of sources. Some of the information is provided by you after completion of the application. Other forms of information is obtained for us from outside sources. We only use this information as necessary to conduct the operation of

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Make Payday Today

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our business. This information is safeguarded and used only by MakePaydayToday.com.

USA Patriot Act:

As per Federal Regulations to prevent the United States payment system from being used to launder money or to finance world wide terrorist acts, we are required to verify information establishing your identity.

The information we are required to ask for is: Your full name, current address, social security number and your date of birth, plus any additional information deemed necessary to verify your identity.

Correcting Information About You

If you believe that we have incorrect information pertaining to you, please contact us and we will correct it as quickly as possible.

Secure Environment:

All our operational data processing is held in a secure and safe environment that can not be accessed by third parties.

Disclosure of Account Information:

Our policy is to not reveal specific information about you to unaffiliated third parties for their independent use unless:

1. The information is used to complete a customer transaction.
2. You authorize it.
3. Information is provided to a reputable credit bureau or reporting agency.
4. The disclosure is required by law.
5. You have been informed about the disclosure for marketing purposes to a third party and are given the opportunity to "opt out" whenever required by law.

Customer Questions:

Please direct your questions using our contact information.

Use of Personal Information: We do not provide your email address to third parties sources. We will from time to time use your email address to provide you with information about our services, to provide you information about your loan, etc.

Special Notice:

MakePaydayToday.com's service does not constitute an offer or solicitation for loans in all states. Some states do not allow payday loans. This service may not be available in your particular state. The states this site services may change from time to time without notice.

All aspects and transactions on this site will be deemed to have taken place in the State of Nevada, regardless of where you may be viewing or accessing this site. All contracts and agreements are subject to the Law of the State of Nevada.

If you do not want to have this transaction take place in the State of Nevada, do not complete an application and request a loan.

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<http://www.makepaydaytoday.com/>

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We understand that sometimes people need a little help

Our goal is to help people get the money they need in a fast and convenient way. Nobody beats our speed and service! When you need an affordable short-term payday loan, we want to make sure we're the ones you visit.

We're a small, family-owned business. Unlike many payday loan companies, we've been around since 2000, with stores in Lake Tahoe and Carson City, Nevada. There's only one way we've managed to be around so long, and that's by treating customers with respect and dignity.

Let us show you how fast and easy a loan can be. Click here to read about our quick and simple loan process.

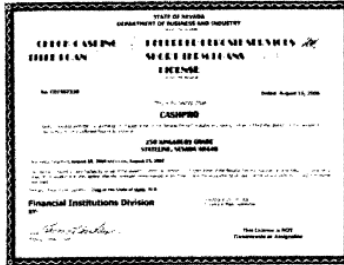
We care about your safety

We realize that you are trusting us with the security of your financial information. We take this trust very seriously and employ only the best security technologies. You can read more about our privacy policies by clicking [here](#).

But don't take our word for it. We are licensed and regularly audited by the State of Nevada Department of Business and Industry. We are required to have high standards of data security and integrity.

Thank you very much for your business!

Our State License



[Click here for larger version](#)

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We can help!

If you have additional questions that are not answered on our FAQ page or would like an answer to a question not listed, please do not hesitate to contact our friendly customer service staff using the following email address:

info@makepaydaytoday.com

If you have questions regarding your application, or the application process, or would like to talk to someone about your concerns you may contact us by the following methods:

Phone: (775) 588-3333
Fax: (775) 580-8511

Mailing Address:

MakePaydayToday.com
4306 S. Carson St.
Carson City, NV 89701

Easy Contact Form

Use this form and our customer service staff will contact you promptly.

Your Name:

Reply Email Address:

Message:

Decision and Order

DECISION AND ORDER

The Federal Trade Commission has conducted an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Truth in Lending Act and its implementing Regulation Z; and

The respondent and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in 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 had reason to believe that the respondent has violated the Truth in Lending Act and its implementing Regulation Z, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comment filed by an interested person, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent CashPro d/b/a MakePaydayToday.com is a sole proprietorship with its principal office or place of business at 4306 S. Carson St., Carson City, NV 89701.

Decision and Order

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

ORDER

DEFINITIONS

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

1. “Advertisement” shall mean a commercial message in any medium that promotes, directly or indirectly, a credit transaction.
2. “Consumer” means a cardholder or a natural person to whom consumer credit is offered or extended. The term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person’s ownership interest in the dwelling is or will be subject to a security interest.
3. “Consumer Credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes.
4. “Clearly and conspicuously” shall mean as follows:
 - A. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read and comprehend it.
 - B. In an electronic medium, the disclosure shall be:
 - (a) unavoidable;

Decision and Order

- (b) of a size and shade, and appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it;
 - (c) understandable language and syntax; and
 - (d) prior to the consumer incurring any financial obligation.
- C. In a television or video advertisement, the audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it, and shall be in understandable language and syntax.
- D. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

Nothing contrary to, inconsistent with, or in mitigation of the material terms shall be used in any advertisement or promotion.

5. “Respondent” unless otherwise specified, shall mean CashPro d/b/a/ MakePaydayToday.com, its successors and assigns and its officers, agents, representatives, and employees.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit in or affecting commerce, shall not, in any manner, expressly or by implication:

Decision and Order

- A. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. §1664, as amended, and Section 226.24(c) of Regulation Z, 12 C.F.R. §226.24(c), as amended, as more fully set out in Section 226.24(c) of the Federal Reserve Board’s Official Staff Commentary to Regulation Z, 12 C.F.R. § 226.24(c), as amended, including, but not limited to:
1. The amount or percentage of the downpayment;
 2. The terms of repayment;
 3. The annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after the consummation of the credit transaction, that fact must also be disclosed.
- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term, as required by Section 144 of the TILA, 15 U.S.C. § 1664, as amended, and Section 226.24(b) of Regulation Z, 12 C.F.R. § 226.24(b), as amended, as more fully set out in Section 226.24(b) of the Federal Reserve Board’s Official Staff Commentary to Regulation Z, 12 C.F.R. § 226.24(b), as amended.
- C. Fail to comply in any other respect with the TILA, 15 U.S.C. §§1601-1667, as amended, and Regulation Z, 12 C.F.R. §226, as amended.

Decision and Order

II.

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 Federal Trade Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

III.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, for a period of five (5) years from the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, for a period of five (5) years from the date of issuance of this order, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place,

Decision and Order

respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VI.

This order will terminate on June 3, 2028, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though

Analysis to Aid Public Comment

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 has accepted, subject to final approval, an agreement containing a consent order from CashPro d/b/a MakePaydayToday.com (“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.

Respondent engaged in practices that violate Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, and Section 226.24(c) of its implementing Regulation Z, 12 C.F.R. § 226.24(c). Respondent disseminated payday loan advertisements on the Internet stating the number of payments or period of repayment, or the amount of a finance charge, as terms for obtaining a payday loan. These advertisements failed, however, to disclose the “annual percentage rate” or “APR” for these loans as required by TILA and its implementing Regulation Z.

Analysis to Aid Public Comment

TILA and Regulation Z require that advertisers, including payday loan advertisers, disclose APRs on their loans to assist consumers in comparison shopping. The respondent's failure to disclose the APR for its advertised payday loans undermined consumers' ability to compare these loans to those offered by other payday lenders. The respondent's failure to disclose the APR for its advertised payday loans also frustrated consumers' ability to compare these loans to alternative forms of credit. Through its law enforcement actions the Commission intends to promote compliance with the APR disclosure requirements of TILA and Regulation Z, thereby promoting comparison shopping relating to payday loans.

The proposed consent order contains provisions designed to prevent respondent from failing to make disclosures required by TILA and Regulation Z in the future.

Part I.A. of the proposed order prohibits respondent, in connection with any advertisement of consumer credit, from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by TILA and Regulation Z, including the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate, using that term or the abbreviation "APR."

Part I.B. of the proposed order prohibits respondent from stating a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR."

Part I.C. of the proposed order prohibits respondent from failing to comply in any other respect with TILA or Regulation Z.

Part II of the proposed order contains a document retention requirement, the purpose of which is to ensure compliance with the proposed order. It requires that respondent maintain all records that will demonstrate compliance with the proposed order.

Analysis to Aid Public Comment

Part III of the proposed order requires respondent to distribute copies of the order to various principals, officers, directors, and managers, and all current and future employees, agents and representatives having responsibilities with respect to the subject matter of the order.

Part IV of the proposed order requires respondent to notify the Commission of any changes in its corporate structure that might affect compliance with the order.

Part V of the proposed order requires respondent to file with the Commission one or more reports detailing compliance with the order.

Part VI of the proposed order is a “sunset” provision, dictating the conditions under which the order will terminate twenty years from the date it is issued or twenty years after a complaint is filed in federal court, by either the United States or the FTC, alleging any violation of the order.

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

AMERICAN CASH MARKET, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 144 OF THE TRUTH IN LENDING ACT

*Docket C-4221; File No. 072 3210
Complaint, June 3, 2008 – Decision, June 3, 2008*

This consent order addresses payday loan advertisements disseminated by American Cash Market, Inc., that failed to disclose the annual percentage rate for these loans, undermining consumers' ability to compare them to loans offered by other payday lenders or to alternative forms of credit. The order prohibits the respondent, in connection with any advertisement of consumer credit, from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by the Truth in Lending Act and its implementing Regulation Z, including the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate. The order prohibits the respondent from stating a rate of finance charge without stating the rate as an annual percentage rate, and from failing to comply in any other respect with the Truth in Lending Act or Regulation Z. It requires that the respondent maintain all records that will demonstrate compliance with the order. The respondent must distribute copies of the order to various principals, officers, directors, and managers, and all current and future employees, agents and representatives having responsibilities with respect to the subject matter of the order. In addition, American Cash Market, Inc., is required to notify the Commission of any changes in its corporate structure that might affect compliance with the order and to file with the Commission one or more reports detailing compliance with the order.

Participants

For the Commission: *Beverly Childs, Thomas Pahl, Cara Petersen, Patti Poss, Peggy L. Twohig, and Quisaira Whitney.*

For the Respondent: *Not represented by counsel.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that American Cash Market, Inc., a corporation (“respondent”) has violated the provisions of the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent American Cash Market, Inc., is a corporation with its principal office or place of business at 2207 S. Sepulveda Blvd., Los Angeles, CA 90064.

2. Respondent has disseminated advertisements to the public that promote extensions of closed-end credit in consumer credit transactions, as the terms “advertisement,” “credit,” “closed-end credit,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.

3. Respondent offers credit to consumers in the form of payday loans. Credit is defined as “the right to defer payment of debt or to incur debt and defer its payment.” Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended. Credit includes “a transaction in which a cash advance is made to a consumer in exchange for the consumer’s personal check, or in exchange for the consumer’s authorization to debit the consumer’s deposit account, and where the parties agree either that the check will not be cashed or deposited, or that the consumer’s deposit account will not be debited, until a designated future date. This type of transaction is often referred to as a ‘payday loan’ or ‘payday advance’ or ‘deferred-presentment loan.’” Comment 2 to Section 226.2(a)(14) of the Official Staff Commentary to Regulation Z; 12 C.F.R. Section 226.2(a)(14)-2, Supp.1, as amended. Payday loans have high rates and short repayment periods; they are often due on the borrower’s next payday, usually about every two weeks.

Complaint

4. Respondent has disseminated or has caused to be disseminated payday loan advertisements on the Internet, including but not necessarily limited to the attached Exhibit 1.

A. The advertisement states that “Americancashmarket.com can provide you with payday loan and cash advance between \$50 and \$255. . . repayable including financial charges on your next payday.”

B. The advertisement states that the fee for a \$50 loan is \$8.82, the fee for a \$100 loan is \$17.65, the fee for a \$150 loan is \$26.47, the fee for a \$200 loan is \$35.29, and the fee for a \$255 loan is \$45.

5. For any of the loans and corresponding fees described above, repayable in a typical pay period of 14 days, the APR would be 460%.

Failure to Disclose Information Required by TILA

6. In credit advertisements, including but not necessarily limited to Exhibit 1, respondent has stated the number of payments or period of repayment and/or the amount of any finance charge, as terms for obtaining consumer credit in the form of a payday loan.

7. These advertisements have failed to disclose the “annual percentage rate” or “APR” using that term as required by Regulation Z.

8. Respondent’s practices have violated Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

THEREFORE, the Federal Trade Commission this third day of June, 2008, has issued this complaint against respondent.

By the Commission.

Complaint

EXHIBIT 1

California Payday Loan & California Cash Advance Online - fast fax...

http://americancashmarket.com



PAYDAY LOAN & CASH ADVANCE

"Smart Financial Solutions"
Licensed. Bonded. Insured. Since 1998.

California Payday Loan • Cash Advance Los Angeles • Payday Loan Online • Payday Advance • Los Angeles Payday Loan
California Cash Advance •



- Home
- How Payday Loan Works?
- Apply Online
- Cash Advance FAQ
- Low Fees
- Payday Loan Legal Disclosure
- Requirements
- Payday Loan News
- Payday Loans and Cash Advance Articles
- Payday Loan Related Links and Websites
- Contact Us

American Cash Market, Inc.

Do you need quick cash to pay a bill or cover an unexpected expense?

YOU CAME TO THE RIGHT PLACE! We offer guaranteed low rates and personal service. AMERICAN CASH MARKET, Inc. offers fast way to obtain fastest online cash advance and payday loans in California. Once you're approved for the cash advance, we'll electronically deposit the payday loan amount directly into your checking account.

Keep this in mind: Cash advance can be used for any sort of financial dilemma, whether you're suffering from credit card or utility bills, medical expenses or bank fees, extra cash will always come in handy. Just fill out fast payday loan application. You literally can not afford to let payday loan to pass you by! Apply for payday loan now and receive the cash advance that will carry you through until the next payday comes. There will be no fee associated with the application process, no paperwork and no private information lost in the mail.

Whatever you need money for, you can go ahead and apply for it right now online or call 310-235-2635, 310-676-9901 to get instant approval! Money will be deposited into your checking account or pick up cash at our Los Angeles branches. Payday loans and cash advances in California the way they should be. Make this the day you take control of your finances and if you plan ahead applying for payday advance this loan could be the smartest financial decision you ever made. Get money deposited directly into your checking account. And it gets better. So what are you waiting for?

All you have to do is click. **APPLY NOW** -

Bad Credit, No Credit OK!
Confidential!

SECURITY PROTECTED

New Customers

APPLY NOW!

Returning Customers

ONLINE SPECIALS

Customers Testimonials

You may be familiar with **payday loans and cash advance**

Get approved in minutes and money will be deposited into your checking account or pick up cash at our Los Angeles branches. Open 7 days a week!

Contact us info@americancashmarket.com

Franchise & Invest

FREE Credit Report

Credit protection

Auto loan

Insurance

Credit cards

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California Licensed

CHECKS CASHED 1% (ask for details)

Complaint

payday loan & cash advance online - fast payday money - FAQ

Page 1 of 1

AMERICAN CASH MARKET
PAYDAY LOAN & CASH ADVANCE
 "Smart Financial Solutions"
 Loans • Advances • Cash Advances

Apply Online

What is a Cash Advance, Payday Loan?
 A payday loan is a short term financial solution to cover an unexpected cash flow need. 21st Century consumers use a range of financial products to assist with their monetary needs and many budget well to do so. However, we understand that there are times when small amounts of additional cash are needed whether to cover unexpected bills or to take advantage of an exciting offer for a holiday. Payday loans are designed to cover these short term needs without incurring an assortment of bank charges or bouncing checks and direct debit.

A payday loan enables you to avoid all these hidden charges and pay back the loan without being caught in an unnecessarily long term credit cycle. You borrow, you pay back on payday, the loan is finished with. It is as simple as that.

Taking out a payday loan is like a friend from a friend, providing help to your financial situation and payday. Dealing with us means that this loan is discreet, quick and that it will not affect your creditworthiness.

So what is a Payday Loan not?
 A payday loan is not a long term solution to ongoing financial problems. We strongly recommend against using this product to help pay for regular credit commitments. In the case where you feel you have debt problems which you feel can not be solved by you individually, we recommend you contact the Consumer Credit Counselling Service. Debt settlement can be a good option to avoid harassment from your creditors. Your debts will be reviewed by taking this service. You can make debt consolidation care to know more about the services.

What if I have poor credit?
 No problem! Unlike many other financial institutions, American Cash Market will work with you.

How soon can I receive my cash advance?
 Within 5 minutes in our Los Angeles branches or next day cash will be deposited to your checking account.

How do I know if I am approved?
 We will contact you by phone or via e-mail. For applications submitted after hours we will contact you next morning. If you wait, you may also find out the status of your application in person at one of our California branches conveniently located in Los Angeles.

How do I determine my due date?
 All loans are due on your next payday. The maximum advance term is 30 days.

How do you protect my personal information?
 We use industry-standard data encryption. If you are using a security-enabled browser (such as Microsoft Internet Explorer version 2.1 or greater, or Netscape Navigator version 2.0 or greater), the information you send us regarding your application is encrypted, making it extremely difficult to read even if it is wrongly intercepted. The American Cash Market online service utilizes industry-standard Secure Sockets Layer (SSL) technology to allow for the encryption of potentially sensitive information such as your name, address and critically sensitive information like your bank account number. If concerned only about the privacy of your bank account information, we encourage you to submit your application electronically without a bank account number and a customer service representative will contact you to obtain this information. If you are still uncomfortable with submitting your personal information via the Internet for any reason, please feel free to fill the application, print and fax it to (310) 235-2650 to complete your request.

Have a question about cash advance? We have the answer!
 Use the following list of topics to find information you require.

- What is a Cash Advance, Payday Loan?
- So what is a Payday Loan not?
- What if I have poor credit?
- How soon can I receive my cash advance?
- How do I know if I am approved?
- How do I determine my due date?
- How do you protect my personal information?

We made it simple, so you can get cash advance fast...

If you can't find an answer on this page, call us (310) 235-2650 (310) 676-9901 and our friendly staff who work in the information center are happy to help with any question.

AMERICAN CASH MARKET

Contact us info.com@americancashmarket.com **CHECKS CASHED 1%** (on 1st check) (California)

Complaint

payday loan & cash advance online - fast payday money - Requirements

Page 1 of 1

AMERICAN CASH MARKET
PAYDAY LOAN & CASH ADVANCE
"Smart Financial Solutions"

What Are The Minimum Requirements For Approval?

- Have a full time job (or receive retirement income)
- Have an active checking account
- Legal US resident
- Be at least 18 years of age

How Long Does It Take ?

Just apply online using our quick and easy form before 4 PM PST and the money will be on your checking account the next business day or you can pick up cash in our California branches located in Los Angeles.

How Much Can I Borrow ?

Americashmarket.com can provide you with payday loan and cash advance between \$50 and \$255.

What Is Payday Loan ?

The Americashmarket.com provides short term payday loans and cash advances that are repayable including financial charges on your next payday.

Get CASH Now!


Get approved in minutes and money will be deposited into your checking account or pick up cash at our Los Angeles branches. Open 7 days a week!

Contact us info@americashmarket.com **CHECKS CASHED 1%** (ask for details) California

<http://www.americashmarket.com/Payday/>

Complaint


California payday Loan & Cash Advance Online - How faxless Payd... http://americancashmarket.com/PaydayLoans/how-online-pay-day-lo...



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Franchise & Invest

FREE Credit Report

Credit protection

Auto loan

Insurance

Credit cards

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Congratulations! You just 3 steps away from getting cash advance deposited into your checking account tonight. All you need to have is the job or any other source of verifiable permanent income, e-mail address, working phone and the checking account. Best of all, the cash advance process is faxless and confidential: your employer and family members wouldn't know if you are applying for payday loan.


Get Payday Loan is Easy As 1-2-3

1. **Apply** - Fill out payday loan Completely Confidential Cash Advance Application in under 5 minutes. No faxing necessary!
2. **Approved** - No waiting! Get an instant approval decision. Over 96% of the loans are instantly approved.
3. **Funded** - Your funds will be automatically deposited into your bank account the next business day or you can stop by and pick up cash in person at one of our Los Angeles branches. No further action necessary on your part. We will automatically debit your account on the loan due date.



Get funds tomorrow. We will approve your payday loan application and send money directly into your checking account overnight assuming transaction was completed by 3:45 pm PST. And if you are in California, just pick up your cash advance in our Los Angeles branches 7 days a week! When your payday advance is due, Americancashmarket.com will remind you via e-mail or by phone if you want 2-3 days before your payday loan due date.

Get approved in minutes and money will be deposited into your checking account or pick up cash at our Los Angeles branches. Open 7 days a week!



Customers Testimonials


You may be familiar with payday loans and cash advance

Contact us info@americancashmarket.com

CHECKS CASHED 1% (ask for details)

To apply by phone call


(310) 255-3737
(310) 678-2247



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Complaint

payday loan & cash advance online - fast payday money - Fees http://americancashmarket.com/PaydayLoans/cash-advance-low-fees.




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Apply Online

Cash Advance FAQ

Low Fees

Payday Loan Legal Disclosure

Requirements

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American Cash Market low fees are highly competitive and in compliance with all applicable California state and federal laws. The **payday loan agreement** would be governed by the California Deferred Deposit Transaction Law. **ACH** never charges customer a fee to qualify for a **payday loan**. California Law regulates and limits the maximum payday loan amount from \$50 to \$255 range, and you qualify for a payday loan amount based on your current income.

Loan Amount	Advance Fee	Total payback amount
\$50.00	\$8.82	\$58.82
\$100.00	\$17.65	\$117.65
\$150.00	\$26.47	\$176.47
\$200.00	\$35.29	\$235.29
\$255.00	\$45.00	\$300.00

The agreement is a contract that complies with California State and federal disclosure requirements. American Cash Market completely outlines the terms of **payday loan**, including the service fee both as dollar amount and as an annual percentage rate. American Cash Market payday loan and cash advance are generally repaid back when you receive your next paycheck. At this time American Cash Market can only process your **payday loan and cash advance** if your paycheck is direct deposited; it is the way to offer payday loan and cash advance as quickly as we do. You can also pay back your cash advance anytime before the loan due date. American Cash Market never charges customers any prepayment penalties or extra fees. You can get cash advance at any time after your previous payday loan was paid. Whenever an immediate or urgent cash need arises, American Cash Market is here to help.

We respect our customer's privacy needs in managing their personal financial information and use a variety of security measures and newest technology to maintain the safety of your personal information. **Qualifying for payday loan and cash advance is easier and faster** than any other type of traditional credit. We do not obtain a credit bureau report (like TRW Experian etc.) to qualify you for a payday advance.

Franchise & Invest

FREE Credit Report

Credit protection

Auto loan

Insurance

Credit card

» Cash deposited directly into your account

» Fast and easy approval

» No credit check

» Confidential and Secure

» No application fee

Apply online for a Payday Loan today!

Get CASH Now!

Americancashmarket.com will electronically deposit cash into your checking account.

Get approved in minutes and money will be deposited into your checking account or pick up cash at our Los Angeles branches. Open 7 days a week!

Contact us info@americancashmarket.com CHECKS CASHED 1% (see for details)

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Smart and easy steps of debt free life

Being in debts is not a crime. This is what all consumers should keep in mind before they start taking loans and credits. But the fact remains that most debtors take loans often going beyond their affordability and fail to make the payments. What is required is a little awareness on debt related issues along with a planned budget that will help you to resolve your debt problems. Here are some useful tips to guide you when you are in debts.

Try out various options to repay debts:

Accept the fact that you are in debt and you have to pay off your loans. Do not file for bankruptcy without trying out the other options to get rid off your debts. It is always better to pay off the debt rather than declare a bankruptcy, which will have a negative impact on your credit profile.

So coordinate with your creditors, discuss your situation with them and initiate the negotiation. Some of your creditors may not be cooperative at all. But then negotiate with those who are willing to cooperate with you. Professional debt help from credit counselors or online debt consolidation can make it easier to deal with debts.

Do not acquire any more credit:

It is a general conception that one can repay previous debts by taking credit from some other creditor. This may help in some cases but if your income level does not support it then you better not go for this option. This is because you have already piled up a lot of debts and it may become difficult for you to deal with so many loans at the same time.

You may also think of converting unsecured debts into secured debt but you may lose your home or car in case you fail to pay off the secured debt. Moreover, you may not be able to find a suitable debt settlement program, as these programs do not support consolidation of secured debts.

Assign a priority to your debts:

Prioritize your debts and try to pay off those accounts first which may lead you to trouble in the near future. For instance, if you have not paid the power bills, then pay them off first; otherwise, it may lead to termination of the power supply. Also, go for a tight budget and restrict your expenses to those items which are absolutely necessary.

Look for ways to add on to your income:

Look out for a part time job so that you can supplement your primary income with some extra dollars. This will add on to your budget and help you to repay the debts. Along with this, also ensure that you are utilizing all the benefits that you are allowed to get. You may contact the independent Welfare Rights Agency to know about the benefits that you can possibly avail.

For instance, if your income level is low, then you may get a discount on your rental expenses or on the council tax payments. Also, go for an insurance policy that can help you with payments if you come across an accident.

Seek debt consolidation services:

Analyze your situation and then opt for a suitable debt consolidation company. Know how much their services can help you to recover from bad credit. Carefully go through the terms and conditions of the company and try to find out if there are any hidden costs involved.

Provide the counselor of the company with all the relevant details of your credit history and financial situation. This will help him to have a clear idea of how much you can pay towards the repayment of your debts and then he can come up with a suitable repayment plan so that you can get rid off debts within a shorter period of time. But the plan will only work out if you follow it strictly. For this, you may have to spend as little as possible; but this is nothing against a debt free life.

Know-how of some useful tips can relieve you from your debt problems as these provide solutions as to how you can manage to pay off debt. These simple and easy steps will help you to get over your debt problems. Online debt consolidation could really be a good option.

Author: Debt Samaritan - Debt Samaritan is dedicated to help debt burdened people. Many have been benefited with this voluntary approach of Debt Samaritan. Debt Samaritan is involved in forum management @[http://www.debt.com](#) and develops content for the site.

Contact us info@americancashmarket.com CHECKS CASHED 1% (only for orders)

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Complied by California Department of Corporation Deferred Deposit Transaction Law.

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Decision and Order

DECISION AND ORDER

The Federal Trade Commission has conducted an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Truth in Lending Act and its implementing Regulation Z; and

The respondent and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in 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 had reason to believe that the respondent has violated the Truth in Lending Act and its implementing Regulation Z, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comment filed by an interested person, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent American Cash Market, Inc. is a corporation with its principal office or place of business at 2207 S. Sepulveda Blvd., Los Angeles, C.A. 90064.

Decision and Order

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

ORDER

DEFINITIONS

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

1. “Advertisement” shall mean a commercial message in any medium that promotes, directly or indirectly, a credit transaction.
2. “Consumer” means a cardholder or a natural person to whom consumer credit is offered or extended. The term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person’s ownership interest in the dwelling is or will be subject to a security interest.
3. “Consumer Credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes.
4. “Clearly and conspicuously” shall mean as follows:
 - A. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read and comprehend it.
 - B. In an electronic medium, the disclosure shall be:
 - (a) unavoidable;

Decision and Order

- (b) of a size and shade, and appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it;
 - (c) understandable language and syntax; and
 - (d) prior to the consumer incurring any financial obligation.
- C. In a television or video advertisement, the audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it, and shall be in understandable language and syntax.
- D. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

Nothing contrary to, inconsistent with, or in mitigation of the material terms shall be used in any advertisement or promotion.

5. "Respondent" unless otherwise specified, shall mean American Cash Market, Inc., its successors and assigns and its officers, agents, representatives, and employees.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit in or affecting commerce, shall not, in any manner, expressly or by implication:

Decision and Order

- A. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, as amended, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c), as amended, as more fully set out in Section 226.24(c) of the Federal Reserve Board’s Official Staff Commentary to Regulation Z, 12 C.F.R. § 226.24(c), as amended, including, but not limited to:
1. The amount or percentage of the downpayment;
 2. The terms of repayment;
 3. The annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after the consummation of the credit transaction, that fact must also be disclosed.
- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term, as required by Section 144 of the TILA, 15 U.S.C. § 1664, as amended, and Section 226.24(b) of Regulation Z, 12 C.F.R. § 226.24(b), as amended, as more fully set out in Section 226.24(b) of the Federal Reserve Board’s Official Staff Commentary to Regulation Z, 12 C.F.R. § 226.24(b), as amended.
- C. Fail to comply in any other respect with the TILA, 15 U.S.C. §§ 1601-1667, as amended, and Regulation Z, 12 C.F.R. § 226, as amended.

Decision and Order

II.

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 Federal Trade Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

III.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, for a period of five (5) years from the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, for a period of five (5) years from the date of issuance of this order, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place,

Decision and Order

respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VI.

This order will terminate on June 3, 2028, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though

Analysis to Aid Public Comment

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 has accepted, subject to final approval, an agreement containing a consent order from American Cash Market, Inc. (“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.

Respondent engaged in practices that violate Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, and Section 226.24(c) of its implementing Regulation Z, 12 C.F.R. § 226.24(c). Respondent disseminated payday loan advertisements on the Internet stating the number of payments or period of repayment, or the amount of a finance charge, as terms for obtaining a payday loan. These advertisements failed, however, to disclose the “annual percentage rate” or “APR” for these loans as required by TILA and its implementing Regulation Z.

Analysis to Aid Public Comment

TILA and Regulation Z require that advertisers, including payday loan advertisers, disclose APRs on their loans to assist consumers in comparison shopping. The respondent's failure to disclose the APR for its advertised payday loans undermined consumers' ability to compare these loans to those offered by other payday lenders. The respondent's failure to disclose the APR for its advertised payday loans also frustrated consumers' ability to compare these loans to alternative forms of credit. Through its law enforcement actions the Commission intends to promote compliance with the APR disclosure requirements of TILA and Regulation Z, thereby promoting comparison shopping relating to payday loans.

The proposed consent order contains provisions designed to prevent respondent from failing to make disclosures required by TILA and Regulation Z in the future.

Part I.A. of the proposed order prohibits respondent, in connection with any advertisement of consumer credit, from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by TILA and Regulation Z, including the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate, using that term or the abbreviation "APR."

Part I.B. of the proposed order prohibits respondent from stating a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR."

Part I.C. of the proposed order prohibits respondent from failing to comply in any other respect with TILA or Regulation Z.

Part II of the proposed order contains a document retention requirement, the purpose of which is to ensure compliance with the proposed order. It requires that respondent maintain all records that will demonstrate compliance with the proposed order.

Analysis to Aid Public Comment

Part III of the proposed order requires respondent to distribute copies of the order to various principals, officers, directors, and managers, and all current and future employees, agents and representatives having responsibilities with respect to the subject matter of the order.

Part IV of the proposed order requires respondent to notify the Commission of any changes in its corporate structure that might affect compliance with the order.

Part V of the proposed order requires respondent to file with the Commission one or more reports detailing compliance with the order.

Part VI of the proposed order is a “sunset” provision, dictating the conditions under which the order will terminate twenty years from the date it is issued or twenty years after a complaint is filed in federal court, by either the United States or the FTC, alleging any violation of the order.

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

ANDERSON PAYDAY LOANSCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 144 OF THE TRUTH IN LENDING ACT*Docket C-4222; File No. 072 3212**Complaint, June 3, 2008 – Decision, June 3, 2008*

This consent order addresses payday loan advertisements disseminated by Anderson Payday Loans that failed to disclose the annual percentage rate for these loans, undermining consumers' ability to compare them to loans offered by other payday lenders or to alternative forms of credit. The order prohibits the respondent, in connection with any advertisement of consumer credit, from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by the Truth in Lending Act and its implementing Regulation Z, including the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate. The order prohibits the respondent from stating a rate of finance charge without stating the rate as an annual percentage rate, and from failing to comply in any other respect with the Truth in Lending Act or Regulation Z. It requires that the respondent maintain all records that will demonstrate compliance with the order. The respondent must distribute copies of the order to various principals, officers, directors, and managers, and all current and future employees, agents and representatives having responsibilities with respect to the subject matter of the order. In addition, Anderson Payday Loans is required to notify the Commission of any changes in its corporate structure that might affect compliance with the order and to file with the Commission one or more reports detailing compliance with the order.

Participants

For the Commission: *Beverly Childs, Thomas Pahl, Cara Petersen, Patti Poss, Peggy L. Twohig, and Quisaira Whitney.*

For the Respondent: *Pro se.*

Complaint

COMPLAINT

The Federal Trade Commission, having reason to believe that Anderson Payday Loans (“respondent”), a sole-proprietorship owned by Monika Beyer has violated the provisions of the Truth in Lending Act, 15 U.S.C. §§ 1601-1667, as amended, and its implementing Regulation Z, 12 C.F.R. § 226, as amended, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Anderson Payday Loans is a sole proprietorship with its principal office or place of business at 8971 Hewitt Place, Suite 1, Garden Grove, CA 92844.
2. Respondent has disseminated advertisements to the public that promote extensions of closed-end credit in consumer credit transactions, as the terms “advertisement,” “credit,” “closed-end credit,” and “consumer credit” are defined in Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended.
3. Respondent offers credit to consumers in the form of payday loans. Credit is defined as “the right to defer payment of debt or to incur debt and defer its payment.” Section 226.2 of Regulation Z, 12 C.F.R. § 226.2, as amended. Credit includes “a transaction in which a cash advance is made to a consumer in exchange for the consumer’s personal check, or in exchange for the consumer’s authorization to debit the consumer’s deposit account, and where the parties agree either that the check will not be cashed or deposited, or that the consumer’s deposit account will not be debited, until a designated future date. This type of transaction is often referred to as a ‘payday loan’ or ‘payday advance’ or ‘deferred-presentment loan.’” Comment 2 to Section 226.2(a)(14) of the Official Staff Commentary to Regulation Z; 12 C.F.R. Section 226.2(a)(14)-2, Supp.1, as amended. Payday loans have high rates and short repayment periods; they are often due on the borrower’s next payday, usually about every two weeks.

Complaint

4. Respondent has disseminated or has caused to be disseminated payday loan advertisements on the Internet, including but not necessarily limited to the attached Exhibit 1.

A. The advertisement states that “Payday loans are \$20 to \$30 per hundred dollars borrowed until your payday, depending on individual circumstances and locale.”

5. On a \$100 loan with a \$20 fee repayable in a typical pay period of 14 days, the APR would be 521%. On a \$100 loan with a \$30 fee repayable in a typical pay period of 14 days, the APR would be 782%.

Failure to Disclose Information Required by TILA

6. In credit advertisements, including but not necessarily limited to Exhibit 1, respondent has stated the number of payments or period of repayment and/or the amount of any finance charge, as terms for obtaining consumer credit in the form of a payday loan.

7. These advertisements have failed to disclose the “annual percentage rate” or “APR” using that term as required by Regulation Z.

8. Respondent’s practices have violated Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c).

THEREFORE, the Federal Trade Commission this third day of June, 2008, has issued this complaint against respondent.

By the Commission.

Payday Loans, No Fax Payday Advance, No Teletrack Cash Loan

http://www.anderson-payday-loans.com/index

Anderson Payday Loans

Get Your Next Payday Loan Online

The ultimate source for a quick cash advance before payday. **Get cash money into your account today!**
No Faxing Required! No Teletrack!
Saving Account OK! Low Fees!
[Click here to Apply Now!](#)

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ANDERSON PAYDAY LOANS

No Fax Payday Advance Loans - No Teletrack Check!!

Need a Payday Loan fast? - Welcome to Anderson-Payday-Loans.com the best stop for all you need in No Teletrack Payday Loans.

News February 20, 2007

In Payday Loans We Trust

The US government has said that they have a concern on payday loan companies that "are preying on low income housing areas". To be honest, payday advance lenders (people who lend you their money) are taking a hit just as much as any one else is in the world. When someone refuses to pay then the lender is forced to take a drastic step that is fortunate for them legally. One of many courses of action to retrieving their money back is to garnish the borrower's wages. That's never good especially if one is placed in a situation that can't afford to lose any more money. Lenders patiently wait for their money to be collected back to them so that some one else can have an opportunity of borrowing money.

The way payday loans work is this. You are granted a payday advance loan for a period of time for some of money, your dead line is usually a week or so more depending on the particular lender's policy. The most commonly used time line is in between 8 to 15 days. If you can't pay the money back in time, then the lender must be notified and an extension will be granted. Extensions are time-lime added to your due date. Essentially giving you a new due date for your payment. This means that for every new due date that is assigned you pay a new fee. This particular fee is called an extension fee. For every extension fee that you apply for this fee gets tacked onto your bill which in turn causes you to pay more than you originally wanted to pay for the payday advance loan. Of course, these fees are normally associated with the Teletrack service you have heard about.

Some payday advance service lenders also have a small fee for the cash advance applications. Most people are not aware of this because some people can't take the time to look at the page carefully enough to see that it clearly states there will be an application fee charged to there account for the payday loans they apply for. Some people fill out dozens of applications in one sitting, not reading the applications and charging their own accounts. By the time they're finished they owe about two hundred dollars on top of some of the money they borrowed from other lenders further putting themselves in debt.

Don't be alarmed by these things that happen to some. There are 3 easy ways to keep from having to deal with things of that nature.

- Pay the loan in advance so that you won't be charged any extra fees.
- Get extensions only if its unavoidable and there is no other way you can pay it back.
- Read the page in full and make sure you understand every thing there's on the page.

Hot Tip

A payday advance is easy with Anderson Payday Loans. It's like using your computer as an ATM!

Get Cash Advance Money Today!

Can't wait till payday? Our advance loans are direct deposited right into your bank account just like your paycheck!

Email Me info@anderson-payday-loans.com

STARTED

Requirements:

- Steady job
- Must be over 18
- Have a Checking or Savings Account
- Bad credit, no credit is OK!
- Fill out our easy 2-minute online application NOW!

APPLY NOW!


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Complaint

Online Cash Advance, Payday Advances, Payday Loans Faxless, Ea...

http://www.anderson-payday-loans.com/about-us.f

Anderson Payday Loans



Get Your Next Payday Loan Online

The ultimate source for a quick cash advance before payday. [Get cash money into your account today!](#)

No Faxing Required!
Savings Account OK!

[Click here to Apply Now!](#)

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HOME -> ABOUT US

Anderson Payday Loans.com aim to become the premier online cash advance supplier. We built our company, business and customer database by providing quality products and services to our customers. At Anderson Payday Loans.com the customer is always number one, and we establish our products to reflect this belief.

Providing an online cash advance allows clients throughout the US to apply, we do not discriminate against the county or state of our applicants. As our company is an electronically based service our customers can apply for an online cash advance at any time that suits them, we do not restrict our customers to any business hours. We believe a customer services should be available when the customer needs them not when it suits the company.

At Anderson Payday Loans.com we educate our clients in the entire online cash advance process so they know exactly what to expect. Our informative guide tells our customers exactly what they can expect from the online cash advance service. Before applying for a cash advance our customers are aware of the entire process from qualifying for an online cash advance to making repayments for the advance. If at any stage in the process you have any questions please do not hesitate to contact a member of our staff.

Hot Tip
A payday advance is easy with Anderson Payday Loans. It's like using your computer as an ATM!

Get Cash Money Today!
Can't wait 'til payday? Our payday loans are direct deposited right into your bank account just like your paycheck!

Email Us: info@anderson-payday-loans.com

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Complaint

Payday Advances, Payday Advance Loans, Paycheck Advance, No F... <http://www.anderson-payday-loans.com/online-payday-advance>.

Anderson Payday Loans



Get Your Next Payday Loan Online

The ultimate source for a quick cash advance before payday. **Get cash money into your account today!**
No Paying Required!
Saving Accounts OK!

[Click Here to Apply Now!](#)

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HOME > SERVICES > ONLINE PAYDAY ADVANCE

Want to learn more about Payday Advance Loans?

Applying is easy and there are so many advantages to it! Our payday advance loans are designed to help our clients overcome tough financial periods in their lives. Our loans are short term and temporary, which means applying is quick and easy with none of the usual financial history checks required. At AndersonPaydayLoans.com we understand the sensitive nature attached to financial situations, that is why we operate a completely electronic service that eliminates lengthy and unnecessary paper work.

So What Is Needed For Our Payday Advance Loans?

At AndersonPaydayLoans.com, requirements to qualify for one of our loans are kept to a minimum. We do not perform credit checks and require no bank statements or financial documents. However, we do require that applicants:

- Must be over 18 years of age
- Be employed in a steady job
- Must be in receipt of a savings or checking account

If you fit all the above criteria and are interested in finding out more about our financial services, contact us today or simply complete our online form within minutes.

We receive application forms 24 hours a day throughout the US from all categories of people. Join our database of satisfied clients now and let AndersonPaydayLoans.com help you through any financial difficulties you're facing.

Hot Tip
 A payday advance is easy with Anderson Payday Loans. It's like using your computer as an ATM!



Get Cash Money Today!
 Can't wait 'til payday? Our payday loans are direct deposited right into your bank account just like your paycheck!

Email Us: info@anderson-payday-loans.com

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Complaint

Anderson Payday Loans :: <http://www.anderson-payday-loans.com/faq>

Get Your Next Payday Loan Online

The ultimate source for a quick cash advance before payday. **Get cash money into your account today!**
No Financing Required!
Saving Accounts OK!
[Click Here to Apply Now!](#)

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Click Here to Apply NOW!

How long does it take to get a payday loan?
 We can have funds in your account the next business day if we have your information processed by 1:00 PM Eastern time.

How much does it cost?
 Payday loans are \$20 to \$30 per hundred dollars borrowed until your payday, depending on individual circumstances and locale.

What is a payday loan exactly?
 Overnight payday loans are a fast, easy, and secure way to get the extra money you need before your next payday.

How much money can I borrow?
 Anywhere from ten percent to thirty percent of your monthly take home pay.

Click Here to Apply NOW!

Is there a credit check?
 Your credit is not checked through the major credit bureaus, but we do use TeleCheck, TeleTrack, and SCAN which are NSF and Closed Account check reporting services.

Is it safe?
 Our application page is protected by THAWTE® secure encryption. The Secure Application page is secured using a Thawte Digital Certificate. This guarantees that all information that you send to us via the World Wide Web will be encrypted. If any other internet user intercepts the communication he/she will only be able to see the encrypted form. Certificate Technology allows us to decrypt the information and view it as plain text. For more information on SSL digital certificates for web servers, please see <http://www.thawte.com>.

Is this available in my state?
 Yes, we're available in the United States.

How do I repay my loan?
 Funds are deducted from your account on your payday by electronic transfer. Extensions or rollovers are available options.

Click Here to Apply NOW!

Hot Tip
 A payday advance is easy with Anderson Payday Loans. It's like using your computer as an ATM!

Get Cash Money Today!
 Can't wait 'til payday? Our payday loans are direct deposited right into your bank account just like your paycheck!

Email Us: info@anderson-payday-loans.com

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Decision and Order

DECISION AND ORDER

The Federal Trade Commission has conducted an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Truth in Lending Act and its implementing Regulation Z; and

The respondent and counsel for the Federal Trade Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in 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 had reason to believe that the respondent has violated the Truth in Lending Act and its implementing Regulation Z, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comment filed by an interested person, now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Anderson Payday Loans is a sole proprietorship with its principal office or place of business at 8971 Hewitt Place, Suite 1, Garden Grove, CA 92844.

Decision and Order

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

ORDER

DEFINITIONS

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

1. “Advertisement” shall mean a commercial message in any medium that promotes, directly or indirectly, a credit transaction.
2. “Consumer” means a cardholder or a natural person to whom consumer credit is offered or extended. The term also includes a natural person in whose principal dwelling a security interest is or will be retained or acquired, if that person’s ownership interest in the dwelling is or will be subject to a security interest.
3. “Consumer Credit” shall mean credit offered or extended to a consumer primarily for personal, family, or household purposes.
4. “Clearly and conspicuously” shall mean as follows:
 - A. In a print advertisement, the disclosure shall be in a type size, location, and in print that contrasts with the background against which it appears, sufficient for an ordinary consumer to notice, read and comprehend it.
 - B. In an electronic medium, the disclosure shall be:
 - (a) unavoidable;

Decision and Order

- (b) of a size and shade, and appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it;
 - (c) understandable language and syntax; and
 - (d) prior to the consumer incurring any financial obligation.
- C. In a television or video advertisement, the audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it, and shall be in understandable language and syntax.
- D. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

Nothing contrary to, inconsistent with, or in mitigation of the material terms shall be used in any advertisement or promotion.

5. "Respondent" unless otherwise specified, shall mean Anderson Payday Loans, its successors and assigns and its officers, agents, representatives, and employees.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with any advertisement to promote, directly or indirectly, any extension of consumer credit in or affecting commerce, shall not, in any manner, expressly or by implication:

Decision and Order

- A. State the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, as amended, and Section 226.24(c) of Regulation Z, 12 C.F.R. § 226.24(c), as amended, as more fully set out in Section 226.24(c) of the Federal Reserve Board’s Official Staff Commentary to Regulation Z, 12 C.F.R. § 226.24(c), as amended, including, but not limited to:
1. The amount or percentage of the downpayment;
 2. The terms of repayment;
 3. The annual percentage rate, using that term or the abbreviation “APR.” If the annual percentage rate may be increased after the consummation of the credit transaction, that fact must also be disclosed.
- B. State a rate of finance charge without stating the rate as an “annual percentage rate” or the abbreviation “APR,” using that term, as required by Section 144 of the TILA, 15 U.S.C. § 1664, as amended, and Section 226.24(b) of Regulation Z, 12 C.F.R. § 226.24(b), as amended, as more fully set out in Section 226.24(b) of the Federal Reserve Board’s Official Staff Commentary to Regulation Z, 12 C.F.R. § 226.24(b), as amended.
- C. Fail to comply in any other respect with the TILA, 15 U.S.C. §§ 1601-1667, as amended, and Regulation Z, 12 C.F.R. § 226, as amended.

Decision and Order

II.

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 Federal Trade Commission for inspection and copying all records that will demonstrate compliance with the requirements of this order.

III.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, for a period of five (5) years from the date of issuance of this order, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

IV.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, for a period of five (5) years from the date of issuance of this order, shall notify the Commission at least thirty (30) days prior to any change in the corporation(s) that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place,

Decision and Order

respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580.

V.

IT IS FURTHER ORDERED that respondent, and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

VI.

This order will terminate on June 3, 2028, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order's application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though

Analysis to Aid Public Comment

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 has accepted, subject to final approval, an agreement containing a consent order from Anderson Payday Loans (“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.

Respondent engaged in practices that violate Section 144 of the Truth in Lending Act (“TILA”), 15 U.S.C. § 1664, and Section 226.24(c) of its implementing Regulation Z, 12 C.F.R. § 226.24(c). Respondent disseminated payday loan advertisements on the Internet stating the number of payments or period of repayment, or the amount of a finance charge, as terms for obtaining a payday loan. These advertisements failed, however, to disclose the “annual percentage rate” or “APR” for these loans as required by TILA and its implementing Regulation Z.

Analysis to Aid Public Comment

TILA and Regulation Z require that advertisers, including payday loan advertisers, disclose APRs on their loans to assist consumers in comparison shopping. The respondent's failure to disclose the APR for its advertised payday loans undermined consumers' ability to compare these loans to those offered by other payday lenders. The respondent's failure to disclose the APR for its advertised payday loans also frustrated consumers' ability to compare these loans to alternative forms of credit. Through its law enforcement actions the Commission intends to promote compliance with the APR disclosure requirements of TILA and Regulation Z, thereby promoting comparison shopping relating to payday loans.

The proposed consent order contains provisions designed to prevent respondent from failing to make disclosures required by TILA and Regulation Z in the future.

Part I.A. of the proposed order prohibits respondent, in connection with any advertisement of consumer credit, from stating the amount or percentage of any down payment, the number of payments or period of repayment, the amount of any payment, or the amount of any finance charge, without disclosing clearly and conspicuously all of the terms required by TILA and Regulation Z, including the amount or percentage of the down payment, the terms of repayment, and the annual percentage rate, using that term or the abbreviation "APR."

Part I.B. of the proposed order prohibits respondent from stating a rate of finance charge without stating the rate as an "annual percentage rate" or the abbreviation "APR."

Part I.C. of the proposed order prohibits respondent from failing to comply in any other respect with TILA or Regulation Z.

Part II of the proposed order contains a document retention requirement, the purpose of which is to ensure compliance with the proposed order. It requires that respondent maintain all records that will demonstrate compliance with the proposed order.

Analysis to Aid Public Comment

Part III of the proposed order requires respondent to distribute copies of the order to various principals, officers, directors, and managers, and all current and future employees, agents and representatives having responsibilities with respect to the subject matter of the order.

Part IV of the proposed order requires respondent to notify the Commission of any changes in its corporate structure that might affect compliance with the order.

Part V of the proposed order requires respondent to file with the Commission one or more reports detailing compliance with the order.

Part VI of the proposed order is a “sunset” provision, dictating the conditions under which the order will terminate twenty years from the date it is issued or twenty years after a complaint is filed in federal court, by either the United States or the FTC, alleging any violation of the order.

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

**AGRIUM, INC.
AND
UAP HOLDING CORP.**CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL
TRADE COMMISSION ACT

*Docket C-4219; File No. 081 0073
Complaint, May 1, 2008 – Decision, June 10, 2008*

This consent order addresses the \$2.65 billion acquisition by Agrium of all outstanding shares of UAP stock. The Complaint alleges that the transaction may substantially lessen competition in the market for the retail sale of bulk fertilizer, and in certain cases related services, by farm stores in or near the towns of Croswell, MI; Richmond, MI; Imlay City, MI; Vestaburg, MI; Standish, MI; and Pocomoke/Girdletree, MD. The Complaint further alleges that the acquisition would eliminate direct competition between farm retail stores owned or controlled by Agrium and farm retail stores owned and controlled by UAP and increase the likelihood that Agrium will unilaterally exercise market power or facilitate, collude or coordinate interaction among the remaining farm retail store firms. The order requires that Agrium divest itself of five UAP stores in Michigan, and two Agrium stores in Maryland and Virginia. The order also provides that the two Agrium stores located in Snow Hill, Maryland and Keller, Virginia, be sold to a single buyer.

Participants

For the Commission: *Stephen Antonio, Donald R. Gordon, Victoria Lippincott and Victoria Luxardo.*

For the Respondents: *Deborah Feinstein, Arnold & Porter LLP; Joseph Simons, Paul, Weiss, Rifkind, Wharton & Garrison LLP; and Joseph Larson, Wachtell, Lipton, Rosen, & Katz.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (the “Commission”),

Complaint

having reason to believe that respondents Agrium Inc. (“Agrium”), a foreign corporation, and UAP Holding Corp. (“UAP”), a Delaware corporation having its principal place of business in Colorado, both subject to the jurisdiction of the Commission, have agreed to merge, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Agrium is a Canadian corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 13131 Lake Fraser Drive SE, Calgary, Alberta, Canada, T2J 7E8. In the United States, Agrium operates its chemical and agricultural business through its subsidiary, Agrium USA, headquartered at Suite 1700, 4582 South Ulster Street, Denver, Colorado, 80237. Agrium is a multinational fertilizer and farm products company that develops, manufactures, and markets chemical and agricultural products and services that it distributes to customers in the Americas and elsewhere.

2. Respondent UAP 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 7251 W 4th Street, Greeley, Colorado, 80634. UAP is an agricultural products company that develops, manufactures, and markets a line of products and value-added services including chemicals, fertilizer, and seed to farmers, commercial growers, and regional dealers throughout the world.

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II. JURISDICTION

3. Agrium and UAP 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 TRANSACTION

4. Agrium and UAP announced on December 3, 2007, that their respective boards of directors had approved the sale and purchase of all outstanding shares of UAP stock to Agrium for approximately \$2.65 billion pursuant to the stock purchase agreements by and between Agrium and UAP. As a result of the merger, Agrium will hold 100% of the voting securities of UAP. Upon completion of the merger, UAP will become a wholly owned subsidiary of Agrium.

IV. VIOLATIONS CHARGED**Product Market**

5. The relevant line of commerce in which to analyze the effects of the proposed merger described herein is the retail sale of bulk fertilizer by farm stores, together with, in certain cases, related services. Retail farm stores sell mainly three classes of products: pesticides, seed, and fertilizer. Additionally, farm stores can deliver a range of services to meet the specific needs of particular growers. Retail farm stores, for example, often deliver fertilizer directly to the grower, and in many cases apply fertilizer to growers’ fields, usually with the store’s equipment. The stores often provide a variety of agronomic services to the grower in order to help maximize the efficiency of the fields.

6. Farm stores physically consist largely of office space, a shed housing substantial storage, especially for fertilizer, and usually a

Complaint

bulk blending plant for dry fertilizer. To be a full-service operation, a farm store must have a blender. Farm stores also usually have rolling stock consisting of trucks of various sizes, and, if they perform application services, various pieces of spreader and applicator machinery.

7. Fertilizer is sold to commercial growers mostly in bulk, in three ways: solid (“dry”), liquid, and gas (anhydrous ammonia). With the exception of small quantities of micronutrients, bulk fertilizer consists of nitrogen, potash or phosphates, or some combination of them. Bulk dry fertilizer is sometimes sold and applied in pure form, but for small and medium-sized growers it is more often custom-blended at the farm store to meet the grower’s particular needs. Liquid fertilizer, unlike dry, does not require bulk blending. Bulk dry fertilizer is difficult to handle and store, expensive to ship, and generally must be blended and purchased locally.

8. Farmers typically want one-stop shopping from their farm stores, favoring a single provider who can provide all the inputs and services they require. Although farmers sometimes visit the store, sales representatives from the stores invariably call upon the farmers, and bulk fertilizer is usually delivered to the farms in trucks or spreaders.

9. Bulk fertilizer is a critical product without which most agricultural growers cannot profitably operate. Growers must have it, must have the proper amount, and must have it exactly on time, to produce their harvest. Fertilizer is usually applied before planting, and then again at the same time as planting. Along with occasional applications during the growing season, there is usually a fall application of fertilizer. Agricultural growers have no close substitutes for bulk fertilizer purchased through farm stores.

Complaint

Geographic Market

10. The relevant geographic markets within which to analyze the likely effects of the proposed transaction are a series of small areas within the United States, typically extending 20-30 miles from a farm store. Transportation costs can make fertilizer prices less competitively attractive at distances over about 25-30 miles because of high fuel costs and the low price-to-weight ratio of bulk fertilizer. Furthermore, application services require application equipment that often travels slowly, and can tie up several employees and pieces of equipment if traveling more than 20-30 miles. Beyond this distance, farm stores cannot effectively service growers, since their sales and operations staff need to visit customers' farms frequently and thereby maintain the relationship upon which the business depends.

Market Structure

11. The proposed merger of Agrium and UAP would impact six geographic markets, including three in the central "thumb" of Michigan, two in east/central Michigan, and one on the eastern shore of Maryland. Specifically these areas are Croswell, MI; Richmond, MI; Imlay City, MI; Vestaburg, MI; Standish, MI; and Pocomoke/Girdletree, MD. In each of these identified areas, Agrium and UAP own farm stores that are well-situated among a small number of competitors in the market for the group of growers located proximate to their stores. The pricing of bulk fertilizer by the retail farm store to any particular customer within the store's trade area depends on a number of factors, and typically is the product of individual negotiations between a farm store and a grower.

12. In Croswell, Agrium has four farm stores between 10 and 19 miles from UAP's Croswell store. Agrium and UAP together account for the largest share of the sales of bulk fertilizer in the highly concentrated market composed primarily of the area broadly between the respondents' stores and east of Croswell.

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13. In Richmond, UAP's Richmond store is 26 miles southeast of Agrium's Melvin store. Agrium and UAP together account for the largest share of the sales of bulk fertilizer in the highly concentrated market composed primarily of the area broadly between the respondents' stores and east of Richmond.

14. In Imlay City, UAP's Imlay City store is 17 miles northeast of Agrium's Melvin store, and 13 miles northeast of Agrium's Brown City store. Agrium and UAP together account for the largest share of the sales of bulk fertilizer in the highly concentrated market composed primarily of the area broadly between the respondents' stores, and the area north and east of Melvin.

15. In Standish, UAP's Standish store is 16 miles north of Agrium's store in Linwood, and eight miles north of an Agrium satellite location at Pinconning. Agrium and UAP together account for the largest share of the sales of bulk fertilizer in the highly concentrated market composed primarily of the area broadly between the respondents' stores, and the area north of Standish.

16. In Vestaburg, UAP's Vestaburg store is located 22 miles west of Agrium's store in Breckenridge. Agrium and UAP together account for the largest share of the sales of bulk fertilizer in the highly concentrated market composed primarily of the area broadly between the respondents' stores.

17. In Girdletree and Pocomoke, Agrium's Snow Hill store is 12 miles northeast of UAP's store in Pocomoke City, and six miles north of UAP's Girdletree location. Agrium and UAP together account for the largest share of the sales of bulk fertilizer in the highly concentrated market composed primarily of the area broadly between the respondents' stores, extending a few miles south of UAP's locations and a few miles north of Agrium's location.

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Conditions of Entry

18. New entry would not prevent or counteract the anticompetitive effects of this acquisition in these relevant markets. New farm store entry has become highly infrequent, due to the risks involved in expending significant sunk costs to obtain enough customers to make a new store viable in a mature industry. Furthermore, because reliable supply and service is so important, loyalty to existing suppliers is typically high among growers, making it particularly difficult for a new entrant to develop a sufficient customer base.

Effects of the Acquisition

19. In the areas identified in paragraphs 11 through 17, above, UAP and Agrium compete directly with each other in the retail sales of bulk fertilizer. Other competitors are not effective competitive constraints to Agrium or UAP throughout each relevant trade area, due to factors such as location, and size and scale of their operations.

20. The effects of the merger, if consummated, may be to substantially lessen competition or tend to create a monopoly in each of the relevant retail farm store markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically, the merger would:

- a. eliminate actual, direct, and substantial competition between Agrium and UAP in the relevant markets;
- b. increase Respondents' ability to exercise market power unilaterally in the relevant markets; and
- c. substantially increase the level of concentration in the relevant markets and enhance the probability of coordination.

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21. The merger agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

22. The merger described in Paragraph 4, if consummated, would constitute a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this first day of May, 2008, issues its Complaint against said Respondents.

By the Commission.

ORDER TO HOLD SEPARATE AND MAINTAIN ASSETS
(Public Record Version)

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Agrium Inc. (“Agrium”) of the outstanding voting securities of Respondent UAP Holding Corporation (“UAP”), hereinafter referred to collectively as “Respondents,” and Respondents 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 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

Order to Hold Separate

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 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.P.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 Agrium is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7E8. Agrium's principal subsidiary in the United States is located at 4582 South Ulster Street, Suite 1700, Denver, Colorado 80237.

2. Respondent UAP 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 7251 W. 4th Street, Greeley, Colorado 80634.

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 to Hold Separate

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. “Additional Hold Separate Business” means all business activities and related assets conducted by UAP, prior to the Acquisition, at the locations identified in Appendix C of this Hold Separate.
- B. “Agrium Assets & Business” means all business activities and related assets conducted by Agrium at or based out of (i) 308 Timmons St., Snow Hill, Maryland, and (ii) 18432 Wachapreague Road, Melfa, Virginia, prior to the Acquisition.
- 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 Farm Supply Assets, the date on which Respondents (or a Divestiture Trustee) close on the divestiture of those assets completely and as required by Paragraph II (or Paragraph V) of the Decision and Order to an Acquirer approved by the Commission.
- E. “Hold Separate Business” means the Farm Supply Assets, Farm Supply Business, each Farm Supply Employee, and the Additional Hold Separate Business, but shall not include the

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Agrium Assets & Business.

- F. “Hold Separate” means this Order to Hold Separate and Maintain Assets.
- 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 V hereof.
- H. “Interim Monitor” means the Person appointed pursuant to Paragraph IT.C. of this Hold Separate.
- I. “Orders” means the Decision and Order and this Hold Separate.

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

- A. During the Hold Separate Period, Respondents shall 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. Respondents shall not exercise direction or control over, or influence directly or indirectly, the Hold Separate Business or any of its operations, or the Interim Monitor, except to the extent that Respondents must exercise direction and control over the Hold Separate Business as is necessary to assure compliance with this Hold Separate, the Consent Agreement, the Decision and Order, and all applicable laws.
- B. From the date Respondents execute the Consent Agreement and during the Hold Separate Period, Respondents 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

Order to Hold Separate

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.

- C. Respondents shall hold the Hold Separate Business separate, apart, and independent of Agrium and UAP on the following terms and conditions:
1. Richard Gilmore shall serve as Interim Monitor, pursuant to the agreement executed by the Interim Monitor and Respondents and attached as Confidential Appendix A (“Monitor Agreement”).
 - (a) Respondents shall, no later than one (1) day after the Acquisition Date, pursuant to the Monitor Agreement, transfer to and confer upon the Interim Monitor all rights, powers, and authority necessary to permit the Interim Monitor to perform his duties and responsibilities pursuant to this Hold Separate, in a manner consistent with the purposes of the Decision and Order and in consultation with Commission staff, and shall include in the Monitor Agreement all provisions necessary to effectuate this requirement.
 - (b) The Monitor Agreement shall require that the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 - (c) The Interim Monitor 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 the Hold Separate Business; and monitoring Respondents’ compliance with their obligations pursuant to the Orders, including maintaining the viability, marketability and

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competitiveness of the Hold Separate Business pending divestiture.

- (d) Subject to all applicable laws and regulations, the Interim Monitor 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 Interim Monitor may reasonably request including, but not limited to, all documents and records kept by Respondents in the ordinary course of business that relate to the Hold Separate Business. Respondents shall develop such financial or other information as the Interim Monitor may reasonably request and shall cooperate with the Interim Monitor. Respondents shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' 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.
- (e) The Interim Monitor shall have the authority to employ, at the cost and 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.
- (f) The Commission may 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 relating to materials and information received from the Commission in connection with performance of the Interim Monitor's duties.

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- (g) Respondents may 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; *provided, however*, such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- (h) Thirty (30) days after the Acquisition Date, and every thirty (30) days thereafter until the Hold Separate terminates, the Interim Monitor shall report in writing to the Commission concerning the efforts to accomplish the purposes of this Hold Separate and Respondents' compliance with their obligations under the Hold Separate and the Decision and Order. Included within that report shall be the Interim Monitor's assessment of the extent to which the businesses comprising the Hold Separate Business are meeting (or exceeding) their projected goals as are reflected in operating plans, budgets, projections or any other regularly prepared financial statements.
- (i) If the Interim Monitor ceases to act or fails to act diligently and consistent with the purposes of this Hold Separate, the Commission may appoint a substitute Interim Monitor consistent with the terms of this Hold Separate, 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 the substitute Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any substitute Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed substitute Interim Monitor. Respondents and the substitute Interim Monitor shall execute a

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Monitor Agreement, subject to the approval of the Commission, consistent with this paragraph.

- (j) The Interim Monitor shall serve until the day after the Divestiture Date pertaining to the last divestiture of the Farm Supply Assets and Farm Supply Business in the Hold Separate Business; *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 one (1) day after the Acquisition Date, Respondents shall enter into a management agreement with, and shall transfer all rights, powers, and authority necessary to manage and maintain the Hold Separate Business, to David McClain (“Manager”).
- (a) In the event that the aforementioned individual declines an offer to act as a Manager, or accepts the position of Manager and subsequently ceases to act as a Manager, then Respondents shall select a substitute Manager, subject to the approval of the Commission, and transfer to the substitute Manager all rights, powers and authorities necessary to permit the substitute Manager to perform his/her duties and responsibilities, pursuant to this Hold Separate.
 - (b) The Manager shall report directly and exclusively to the Interim Monitor and shall manage the Hold Separate Business independently of the management of Respondents. The Manager shall not be involved, in any way, in the operations of the other businesses of Respondents during the term of this Hold Separate.
 - (c) The management agreement between Respondents

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and the Manager shall provide that:

- (1) Respondents shall provide the individual who agrees to serve as Manager with reasonable financial incentives to undertake 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 applicable Divestiture Date(s) have occurred, and as may otherwise be necessary to achieve the purposes of this Hold Separate; and
 - (2) Respondents shall, at the option of the Manager, offer to continue the Manager's employment for a period of no less than one (1) year following the Manager's acceptable completion of service as a Manager at terms no less favorable than those pursuant to which the Manager was employed prior to the Acquisition; *provided, however*, this requirement shall not apply if the Manager was removed from service for cause.
- (d) The Manager shall make no material changes in the ongoing operations of the Hold Separate Business except with the approval of the Interim Monitor, in consultation with the Commission staff.
- (e) The Manager shall have the authority, with the approval of the Interim Monitor, to remove Hold Separate Business employees and replace them with others of similar experience or skills. If any Person ceases to act or fails to act diligently and consistent

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with the purposes of this Hold Separate, the Manager, in consultation with the Interim Monitor, may request Respondents to, and Respondents shall, appoint a substitute Person, which Person the Manager shall have the right to approve.

- (f) In addition to Hold Separate Business employees, the Manager may, with the approval of the Interim Monitor, employ such Persons as are reasonably necessary to assist the Manager in managing the Hold Separate Business.
 - (g) The Interim Monitor shall be permitted, in consultation with the Commission staff, to remove the Manager for cause. Within fifteen (15) days after such removal of the Manager, Respondents shall appoint a replacement Manager, subject to the approval of the Commission, on the same terms and conditions as provided in this paragraph.
3. The Interim Monitor and the Manager 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.
 4. Respondents shall indemnify the Interim Monitor and Manager and hold each harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's or the Manager's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from gross negligence or willful misconduct by the Interim Monitor or the Manager.

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5. The Hold Separate Business shall be staffed with sufficient employees (including any full-time, part-time, or contract employee of the Farm Supply Business) 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 Interim Monitor, may replace departing or departed employees with persons who have similar experience and expertise or determine not to replace such departing or departed employees.
6. In connection with support services or products not included within the Hold Separate Business, Respondents shall continue to provide, or offer to provide, the same support services to the Hold Separate Business as customarily have been or were being provided to such businesses by Respondent UAP prior to the date the Consent Agreement is signed by Respondent UAP. For any services or products that Respondents may provide to the Hold Separate Business, Respondents may charge no more than the same price they charge others for the same services or products. Respondents' personnel providing such services or products 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, such persons shall be prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any person whose employment involves any of Respondents' businesses, other than the Hold Separate Business. Such personnel shall also execute confidentiality agreements prohibiting the disclosure of any Confidential Business Information of the Hold Separate Business.

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- (a) Respondents shall offer to the Hold Separate Business any services and products that Respondents provide, in the ordinary course of their businesses, to their other businesses directly or through third party contracts, or that they have provided in the ordinary course of their businesses directly or through third party contracts to the businesses constituting the Hold Separate Business at any time since September 1, 2007. The Hold Separate Business may, at the option of the Manager with the approval of the Interim Monitor, obtain such services and products from Respondents. Subject to the foregoing, the services and products that Respondents shall offer the Hold Separate Business shall include, but shall not be limited to, the following:
- (1) human resources and administrative services, including but not limited to payroll processing, labor relations support, pension administration, and procurement and administration of employee benefits, including health benefits;
 - (2) federal and state regulatory compliance and policy development services;
 - (3) environmental health and safety services, which are used to develop corporate policies and insure compliance with federal and state regulations and corporate policies;
 - (4) financial accounting services;
 - (5) preparation of tax returns;
 - (6) audit services;
 - (7) information technology support services;

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- (8) processing of accounts payable and accounts receivable;
 - (9) technical support;
 - (10) procurement of supplies;
 - (11) maintenance and repair of facilities;
 - (12) procurement of goods and services utilized in the ordinary course of business by the Hold Separate Business; and
 - (13) legal services.
- (b) The Hold Separate Business shall have, at the option of the Manager with the approval of the Interim Monitor, the ability to acquire services and products from third parties unaffiliated with Respondents.
7. Respondents shall provide the Hold Separate Business with sufficient financial and other resources:
- (a) as are appropriate in the judgment of the Interim Monitor to operate the Hold Separate Business as it is currently operated;
 - (b) to perform all maintenance to, and replacements of, the assets of the Hold Separate Business;
 - (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.

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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 Interim Monitor, the Manager may reduce in scale or pace any capital or research and development project, or substitute any capital or research and development project for another of the same cost.

8. Respondents shall cause the Interim Monitor, the Manager, and each of Respondents' employees 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, 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 Respondents' businesses or activities other than the Hold Separate Business.
9. Except for the Manager, Hold Separate Business employees, and support services employees involved in providing services to the Hold Separate Business pursuant to this Hold Separate, and except to the extent provided in this Hold Separate, Respondents shall not permit any other of its employees, officers, or directors to be involved in the operations of the Hold Separate Business.

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10. Respondents' employees (excluding the Hold Separate Business employees and employees involved in providing support services to the Hold Separate Business pursuant to Paragraph II.C.6.) 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
- (b) to the extent that necessary information is exchanged:
 - (1) in the course of consummating the Acquisition;
 - (2) in negotiating agreements to divest assets pursuant to the Consent Agreement and engaging in related due diligence;
 - (3) in complying with this Hold Separate or the Consent Agreement;
 - (4) in overseeing compliance with policies and standards concerning the safety, health and environmental aspects of the operations of the 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

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employees receive or have access to, or use or continue to use, any Confidential Business Information about Respondents and relating to Respondents' businesses, except such information as is necessary to maintain and operate the Hold Separate Business. Respondents may receive aggregate financial and operational information relating to the Hold Separate Business only to the extent necessary to allow Respondents 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 Separate. Any such information that is obtained pursuant to this subparagraph shall be used only for the purposes set forth in this subparagraph.

11. Respondents 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 Interim Monitor, 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 Interim Monitor, on terms and conditions agreed to with Respondents, to audit Respondents' networks and systems to verify compliance with this Hold Separate.
12. No later than five (5) days after the Acquisition Date, Respondents shall establish written procedures, subject to the approval of the Interim Monitor, covering the management, maintenance, and independence of the Hold Separate Business consistent with the provisions of this Hold Separate.
13. No later than five (5) days after the date this Hold Separate becomes final, Respondents shall circulate to employees of the Hold Separate Business, and to persons

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who are employed in Respondents' 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 B.

- D. From the date Respondents execute 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 Agrium Assets & Business. Among other things that may be necessary, Respondent shall:
1. Maintain the operations of the Agrium Assets & Business in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance);
 2. Provide sufficient working capital to operate the Agrium Assets & Business at least at current rates of operation, to meet all capital calls with respect to the Agrium Assets & Business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities;
 3. Make available for use by the Agrium Assets & Business funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the Agrium Assets & Business;
 4. Continue, at least at their scheduled pace, any additional expenditures relating to the Agrium Assets & Business authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all marketing expenditures;
 5. Use best efforts to maintain and increase sales of the Agrium Assets & Business, and to maintain at budgeted

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levels for the year 2007 or the current year, whichever are higher, all administrative, technical, and marketing support for the Agrium Assets & Business;

6. Provide such support services to the Agrium Assets & Business as were being provided to these businesses as of the date the Consent Agreement was signed by Respondents;
 7. Maintain a work force at least as equivalent in size, training, and expertise to what has been associated with the Agrium Assets & Business prior to the Acquisition;
 8. Assure that Respondents' employees with primary responsibility for managing and operating the Agrium Assets & Business are not transferred or reassigned to other areas within Respondents' organizations except for transfer bids initiated by employees pursuant to Respondents' regular, established job posting policy; and
 9. 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 Agrium Assets & Business.
- E. Until the respective Divestiture Date for each of the Farm Supply Assets and Farm Supply Business in the Hold Separate Business has occurred, Respondents shall provide each Farm Supply 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 relevant Farm Supply Assets and Farm Supply Business 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

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continuation and prevent any diminution of the viability, marketability and competitiveness of the Farm Supply Assets and Farm Supply Business until the applicable Divestiture Date(s) occur(s), and as may otherwise be necessary to achieve the purposes of this Hold Separate.

- F. From the date Respondents execute the Consent Agreement until this Hold Separate terminates, Respondents shall not, directly or indirectly, solicit, induce, or attempt to solicit or induce any Farm Supply Employee for a position of employment with Respondents. The Acquirer shall have the option of offering employment to any Farm Supply Employee. Respondents shall not interfere with the employment by the Acquirer of such employee; shall not offer any incentive to such employee to decline employment with the Acquirer or to accept other employment with the Respondents; and shall remove any impediments that may deter such employee from accepting employment with the Acquirer including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts that would affect the ability of such employee to be employed by the Acquirer, and the payment, or the transfer for the account of the employee, of all current and accrued bonuses, pensions and other current and accrued benefits to which such employee would otherwise have been entitled had he or she remained in the employment of the Respondents.
- G. Respondents shall not, directly or indirectly, solicit, induce or attempt to solicit or induce any Farm Supply Employee who has accepted an offer of employment with the Acquirer, or who is employed by the Acquirer, to terminate his or her employment relationship with the Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the person's employment has been terminated by the Acquirer, (2) Respondents advertise for employees in newspapers, trade publications, or other media not targeted

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specifically at the employees, or (3) Respondents hire an employee who applies for employment with Respondents, so long as such employee was not solicited by Respondents in violation of this paragraph.

- H. 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 Respondents until the divestitures required by the Decision and Order are achieved; (2) assure that no Confidential Business Information is exchanged between Respondents and the Hold Separate Business, except in accordance with the provisions of this Hold Separate; (3) prevent interim harm to competition pending the relevant divestitures and other relief; and (4) maintain the full economic viability, marketability and competitiveness of the relevant Farm Supply Assets and Farm Supply Business, and prevent the destruction, removal, wasting, deterioration, or impairment of any of the relevant Farm Supply Assets and Farm Supply Business except for ordinary wear and tear.

III.

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

IV.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Hold Separate, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, relating to compliance with

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this Hold Separate, Respondents shall permit any duly authorized representative of the Commission:

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

V.

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

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The day after the Divestiture Date of the last of the Farm Supply Assets required to be, divested pursuant to the Decision and Order; *provided, however*, that (1) the Farm Supply Assets relating to each Farm Supply Business identified in Appendix A of the Decision and Order shall be included in the Hold Separate Business only until such assets are divested pursuant to Paragraph II.A. of the Decision and Order and (2) each business identified in Appendix C of this Hold Separate shall be included in the Hold Separate Business only until Respondents have divested the corresponding Agrium Assets & Business in the relevant market pursuant to Paragraph II.A. of the Decision and Order.

By the Commission.

AGRIUM, INC.

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Appendix A

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

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Appendix B**NOTICE OF DIVESTITURE AND REQUIREMENT FOR CONFIDENTIALITY**

Agrium Inc. ("Agrium") and UAP Holding Corporation ("UAP"), referred to as "Respondents," have entered into an Agreement Containing Consent Orders ("Consent Agreement") with the Federal Trade Commission ("Commission") providing for divestiture of certain businesses and assets and other relief, in connection with the acquisition of UAP by Agrium. Under the terms of the Consent Agreement, Agrium must divest the businesses and assets, at the locations identified in Attachment A, to persons approved by the Commission and in a manner acceptable to the Commission, within 180 days of the consummation of Agrium's acquisition of UAP.

As used in the Consent Agreement, the term "Hold Separate Business" means the businesses and assets identified in Attachment A, and all full-time, part-time or contract employees of those businesses. During the Hold Separate Period, which begins on the date Agrium acquires UAP and ends after Agrium has completed the required divestitures, Agrium must hold the Hold Separate Business separate, apart, and independent from Agrium's other businesses. The businesses within the Hold Separate Business must be maintained as ongoing, competitive businesses until Agrium has completed the required divestitures.

All competitive information relating to the businesses within the Hold Separate Business must be retained and maintained on a confidential basis by the persons who have been and continue to be involved in the operations or sale of any of the businesses within the Hold Separate Business. Except as provided in the Decision and Order or the Order to Hold Separate and Maintain Assets, all such persons are prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any such information to or with any other person employed by Agrium or whose employment relates to any of Agrium's businesses other than the Hold Separate Business, and may be required to sign a statement agreeing to keep such information confidential. Similarly, persons involved in similar activities with respect to Agrium's businesses are prohibited from disclosing, providing, discussing, exchanging, circulating, or otherwise furnishing any similar Agrium information to or with any other person whose employment involves the Hold Separate Business, except as otherwise provided in the Consent Agreement.

In addition, until divestiture occurs, Respondents must take such actions as are necessary to maintain the economic viability, marketability, and competitiveness of each of the businesses and assets identified in Attachment A, and must prevent the destruction, removal, wasting, deterioration, sale, disposition, transfer, or impairment of these businesses and assets except for ordinary wear and tear.

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The Commission has appointed [Name] to serve as Interim Monitor until the divestitures are completed to oversee compliance with the hold separate and asset maintenance requirements of the Consent Agreement. [Name] can be contacted at: [toll free number; e-mail address]. Because any violation of the Consent Agreement may subject Respondents to civil penalties and other relief as provided by law, it is important that the letter and spirit of the Consent Agreement be honored.

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Appendix C

Additional Hold Separate Business

Relevant Area	Business Name & Address
Pocomoke City, MD	UAP 7311 Ocean Hwy. Pocomoke City, MD 21851
Pocomoke City, MD	UAP 5708 Onley Rd. Girdletree, MD 21829

Decision and Order

DECISION AND ORDER
(Public Record Version)

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Agrium Inc. (“Agrium”) of the outstanding voting securities of Respondent UAP Holding Corporation (“UAP”), hereinafter referred to collectively as “Respondents,” and Respondents 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 Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and 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.P.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision

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and Order (“Order”):

1. Respondent Agrium is a corporation organized, existing, and doing business under, and by virtue of, the laws of Canada, with its office and principal place of business located at 13131 Lake Fraser Drive S.E., Calgary, Alberta, Canada T2J 7E8. Agrium’s principal subsidiary in the United States is located at 4582 South Ulster Street, Suite 1700, Denver, Colorado 80237.

2. Respondent UAP 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 7251 W. 4th Street, Greeley, Colorado 80634.

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

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

- A. “Agrium” means Agrium Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by Agrium (including, after the Acquisition Date, UAP) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “UAP” means UAP Holding Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups, and affiliates controlled by UAP, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.

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- D. “Acquirer” means any Person that receives the prior approval of the Commission to acquire all or any of the Farm Supply Assets pursuant to Paragraphs II or V of this Order.
- E. “Acquisition” means the proposed acquisition described in the Agreement and Plan of Merger, dated December 2, 2007, between Agrium Inc., Utah Acquisition, Inc., and UAP Holding Corporation.
- F. “Acquisition Date” means the date the Acquisition is consummated.
- G. “Confidential Business Information” means competitively sensitive, proprietary and all other business information of any kind owned by or pertaining to the Farm Supply Business, Farm Supply Assets, or Respondents, as the case may be (including, but not limited to, financial statements, financial plans and forecasts, operating plans, price lists, cost information, supplier and vendor contracts, marketing analyses, customer lists, customer contracts, employee lists, salary and benefits information, technologies, processes, and other trade secrets), except for any information that Respondents demonstrate (i) was or becomes generally available to the public other than as a result of a disclosure by Respondents, or (ii) was available, or becomes available, to Respondents on a non-confidential basis, but only if, to the knowledge of Respondents, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information.
- H. “Direct Cost” means the cost of direct material and direct labor used to provide the relevant goods or service.

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- I. “Divestiture Agreement” means any agreement that receives the prior approval of the Commission between Respondents (or between a Divestiture Trustee appointed pursuant to Paragraph V of this Order) and an Acquirer to purchase all or any of the Farm Supply Assets, and all amendments, exhibits, attachments, agreements, and schedules thereto that have been approved by the Commission.

- J. “Divestiture Date” means, with regard to any of the Farm Supply Assets, the date on which Respondents (or a Divestiture Trustee) close on the divestiture of those assets completely and as required by Paragraph II (or Paragraph V) of this Order.

- K. “Farm Supply Assets” means all of Respondents’ 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 operation of the Farm Supply 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 Farm Supply Business since the date of the announcement of the Acquisition;
 - 3. All inventories;
 - 4. All accounts receivable;
 - 5. All agreements, contracts, and leases and all rights

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thereunder and related thereto;

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;
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, 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, subject to legal requirements, and copies of all personnel Records;
9. All insurance benefits, including rights and proceeds; and
10. All rights relating to deposits and prepaid expenses, claims for refunds and rights to offset in respect thereof.

Provided, however, that the Farm Supply Assets need not include:

- (i) assets not located at the facilities identified in Appendix A whose use is shared with or among other facilities unless such assets are primarily related to the operation of the Farm Supply Business;
- (ii) commercial names, trade names, “doing business as”

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(d/b/a) names, registered and unregistered trademarks, service marks and applications using the words “Agrium,” “Crop Production Services,” “CPS,” “Loveland,” “Royster Clark,” “UAP,” “United Agri Products,” or any trade names, trademarks, or registered product names used in any product manufactured, blended, or sold by Respondents; and

(iii) any part of the Farm Supply Assets if not needed by an Acquirer and the Commission approves the divestiture without such assets.

L. “Farm Supply Business” means all business activities conducted by either Agrium or UAP, prior to the Acquisition, at or based out of the locations identified in Appendix A of this Order (or applicable locations if Respondents propose to divest the Farm Supply Assets to more than one Acquirer).

M. “Farm Supply Employee” means, as of the date the Acquisition was announced, (i) any full-time, part-time, or contract employee of the Farm Supply Business (at the applicable locations of the Farm Supply Business if Respondents propose to divest the Farm Supply Assets to more than one Acquirer) and (ii) any other person employed by Respondents whose work primarily relates to the Farm Supply Business.

N. “Farm Supply 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 Farm Supply Business (other than Intellectual Property already included in the Farm Supply Assets); and

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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 each Acquirer to use the rights.

Provided, however, that the Farm Supply License need not include rights to (i) commercial names, trade names, “doing business as” (d/b/a) names, registered and unregistered trademarks, service marks and applications using the words “Agrium,” “Crop Production Services,” “CPS,” “Loveland,” “Royster Clark,” “UAP,” “United Agri Products,” or any trade names, trademarks, or registered product names used in any product manufactured, blended, or sold by Respondents, (ii) Intellectual Property relating to the manufacture and blending of any products sold by Respondents, except to the extent such Intellectual Property is necessary for the Acquirer to blend products at any of the locations of the Farm Supply Business in substantially the same manner as Respondents blended products at those locations prior to the divestiture, and (iii) Intellectual Property if not needed by the Acquirer and the Commission approves the divestiture without it.

- O. “Intellectual Property” means all intellectual property owned or licensed (as licensor or licensee) by Respondents, in which Respondents have a proprietary interest, including (i) commercial names, trade names, “doing business as” (d/b/a) names, registered and unregistered trademarks, logos, service marks and applications; (ii) all patents, patent applications and inventions and discoveries that may be patentable; (iii) all registered and unregistered copyrights in both published works and unpublished works; (iv) all knowhow, trade secrets, confidential or proprietary information, protocols, quality control information, customer lists, software, technical information, data, process technology, plans, drawings and blue prints; (v) and all rights in internet web sites and internet domain names

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presently used by Respondents.

- P. “Key Employee” means any Farm Supply Employee (i) whose job title is location manager or sales representative or any other Farm Supply Employee with responsibilities similar to those of location manager or sales representative or (ii) whose responsibilities include field application services.
- Q. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other business entity.
- R. “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.
- S. “Respondents” means Agrium and UAP, individually and collectively.
- T. “Tangible Personal Property” means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, rolling stock, and other items of tangible personal property (other than inventories) of every kind owned or leased by Respondents, 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.
- U. “Transitional Assistance” means any (i) administrative services (including, but not limited to, order processing, warehousing, shipping, accounting, and information transitioning services) or (ii) technical assistance with respect to product application services.

I.

IT IS FURTHER ORDERED that:

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- A. Respondents shall divest the Farm Supply Assets at no minimum price, absolutely and in good faith, as on-going businesses, no later than 180 days from the Acquisition Date, to an Acquirer or Acquirers that receive the prior approval of the Commission and in a manner (including execution of a Divestiture Agreement with each Acquirer) that receives the prior approval of the Commission.
- B. Respondents shall comply with all provisions of any Divestiture Agreement approved by the Commission, and failure by Respondents to comply with any provision of a Divestiture Agreement shall constitute a failure to comply with this Order.
- C. Respondents shall divest the Farm Supply Assets relating to the Farm Supply Business located at 308 Timmons Street, Snow Hill, Maryland, and 18432 Wachapreague Road, Melfa, Virginia 23410, to no more than one Acquirer.
- D. No later than the date of divestiture of the Farm Supply Assets relating to any location of the Farm Supply Business, Respondents shall:
 - 1. Secure all consents, assignments, and waivers from all Persons that are necessary for the divestiture of such business or assets to an Acquirer.
 - 2. Grant to each Acquirer a Farm Supply License for any use in any business selling agricultural products and related services, and shall take all actions necessary to facilitate the unrestricted use of the license.

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- E. At the request of any Acquirer, within sixty (60) days of consummating the divestiture of any of the Farm Supply Assets, for a period not to exceed twelve (12) months from the date Respondents divest the assets, and in a manner (including pursuant to an agreement) that receives the prior approval of the Commission:
1. Respondents shall provide Transitional Assistance to such Acquirer sufficient to enable the Acquirer to operate the divested assets and business in substantially the same manner that Respondents conducted the divested assets and business prior to the divestiture; and
 2. Respondents shall provide the Transitional Assistance required by this Paragraph at substantially the same level and quality as such services are provided by Respondents in connection with its operation of the divested assets and business prior to the divestiture.

Provided, however, that Respondents shall not (i) require the Acquirer to pay compensation for Transitional Assistance that exceeds the Direct Cost of providing such goods and services, or (ii) terminate its obligation to provide Transitional Assistance because of a material breach by the Acquirer of any agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction, 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 Respondents' breach of any agreement to provide Transitional Assistance.

- F. At the request of any Acquirer prior to the divestiture of any of the Farm Supply Assets, for a period not to exceed twelve (12) months from the date Respondents divest the assets, and in a manner (including pursuant to an agreement) that receives the prior approval of the Commission, Respondents shall provide a supply of any product manufactured or blended by Respondents sufficient to enable the Acquirer to

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operate the divested assets and business in substantially the same manner as Respondents prior to the divestiture; *provided, however*, that Respondents shall not (i) require the Acquirer to pay compensation for the products that exceeds the price paid by any other purchaser, including any Agrium purchaser, for like volumes on like terms, or (ii) terminate its obligation to provide products because of a material breach by the Acquirer of any agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction, 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 Respondents' breach of any agreement to provide products.

- G. Respondents shall allow each Acquirer an opportunity to recruit and employ any Farm Supply Employee under the following terms and conditions:
1. Prior to the execution of a Divestiture Agreement, Respondents shall (i) identify each Farm Supply Employee, (ii) allow the Acquirer an opportunity to interview any such employee, and (iii) allow the Acquirer to inspect the personnel files and other documentation relating to any such employee, to the extent permissible under applicable laws.
 2. Respondents shall (i) not offer any incentive to any Farm Supply Employee to decline employment with the Acquirer, (ii) remove any contractual impediments with Respondents that may deter any Farm Supply Employee from accepting employment with the Acquirer, including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect the ability of such employee to be employed by the Acquirer, and (iii) not otherwise interfere with the recruitment of any Farm Supply Employee by the Acquirer.

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3. Respondents shall (i) vest all current and accrued pension benefits as of the date of transition of employment with the Acquirer for any Farm Supply Employee who accepts an offer of employment from the Acquirer no later than thirty (30) days from the date Respondents divest the relevant assets and (ii) provide any Farm Supply Employee 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 each divestiture of the Farm Supply Assets, Respondents shall not, directly or indirectly, solicit, induce or attempt to solicit or induce any Farm Supply Employee who has accepted an offer of employment with the Acquirer, or who is employed by the Acquirer, to terminate his or her employment relationship with the Acquirer; *provided, however*, a violation of this provision will not occur if: (1) the individual's employment has been terminated by the Acquirer, (2) Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (3) Respondents hire employees who apply for employment with Respondents, so long as such employees were not solicited by Respondents in violation of this paragraph.
- H. The purpose of the divestiture of the Farm Supply Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

II.

Decision and Order

IT IS FURTHER ORDERED that:

- A. Except in the course of performing obligations under any Divestiture Agreement, this Order, or as permitted by the Order to Hold Separate and Maintain Assets, Respondents shall not (i) provide, disclose or otherwise make available Confidential Business Information relating to any Farm Supply Assets or Farm Supply Business to any Person or (ii) use Confidential Business Information relating to any Farm Supply Assets or Farm Supply Business for any reason or purpose.
- B. Respondents shall disclose Confidential Business Information relating to any Farm Supply Assets or Farm Supply Business (i) only to those Persons who require such information for the purposes permitted under Paragraph III.A., (i) 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. Respondents shall enforce the terms of this Paragraph ill as to any Person other than the Acquirers of the Farm Supply Assets and take such action as is necessary to cause each such Person to comply with the terms of this Paragraph ill, including training of Respondents' employees and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

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

- A. For a period of ten (10) years from the date this Order becomes final, Respondents shall not, without providing advance written notification to the Commission, with respect to any of the areas listed in Appendix C of this Order,

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acquire, directly or indirectly, through subsidiaries or otherwise, any leasehold, ownership interest, or any other interest, in whole or in part, in any concern, corporate or non-corporate, or in any assets engaged in the sale of agricultural products or related services.

- B. The prior notification required by this Paragraph IV shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as “the Notification”), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of the Respondents and not of any other party to the transaction. Respondents shall provide 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.P.R. § 803.20), the acquiring party 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 IV 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.

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V.

IT IS FURTHER ORDERED that:

- A. If Respondents have not divested all of the Farm Supply Assets as required by Paragraph II.A. of this Order, the Commission may appoint one or more Persons as Divestiture Trustee to divest the Farm Supply Assets 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 Interim Monitor pursuant to the relevant provisions of the Order to Hold Separate and Maintain Assets.
- 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, Respondents 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(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.
- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the

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identity of any proposed Divestiture Trustee, Respondents 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, 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 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 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

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

4. The Divestiture Trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to 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 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 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,

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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 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 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 Respondents and to the Commission every sixty (60)

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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 shall not restrict the Divestiture Trustee from providing any information to the Commission.
- 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 date this Order becomes final and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs IT and V 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, and the Order to Hold Separate and Maintain Assets. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with this Order and with the

Decision and Order

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. Respondents shall include in their compliance reports 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 divestiture(s) approved by the Commission have been accomplished, including a description of the manner in which Respondents completed such divestitures 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, 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 and any Divestiture Agreement.

VII.

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.

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 with

Decision and Order

reasonable notice to Respondents, with respect to any matter contained in this Order, Respondents shall permit any duly authorized representative of the Commission:

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

IX.

IT IS FURTHER ORDERED that this Order shall terminate on June 10, 2018.

By the Commission.

Decision and Order

Appendix A

Farm Supply Business As To Which Assets Are To Be Divested

Relevant Market	Business Name & Address
Croswell, MI	UAP 41 Ward St. Croswell, MI 48422
Imlay City, MI	UAP 7245 Imlay City Rd. Imlay City, MI 48444
Richmond, MI	UAP 68790 Oak St. Richmond, MI 48062
Standish, MI	UAP 4250 S. Huron Rd. Standish, MI 48658
Vestaburg, MI	UAP 7460 N. Crystal Rd. Vestaburg, MI 48891
Snow Hill, MD	Agrium 308 Timmons St. Snow Hill, MD 21863 Agrium 18432 Wachapreague Rd. Melfa, VA 23410

Decision and Order

Appendix B

[Redacted From the Public Version But Incorporated By Reference]

Decision and Order

Appendix C

Prior Notice

Area	Area Definition
Croswell, MI	Within a 40 mile radius of 41 Ward St., Croswell, MI 48422
Imlay City, MI	Within a 40 mile radius of 7245 Imlay City Rd., Imlay City, MI 48444
Richmond, MI	Within a 40 mile radius of 68790 Oak St., Richmond, MI 48062
Standish, MI	Within a 40 mile radius of 4250 S. Huron Rd., Standish, MI 48658
Vestaburg, MI	Within a 40 mile radius of 7460 N. Crystal Rd., Vestaburg, MI 48891
Snow Hill, MD	Within a 40 mile radius of 308 Timmons St., Snow Hill, MD 21863

Analysis to Aid Public Comment

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

The Federal Trade Commission (“Commission”) has accepted for public comment from Agrium Inc. (“Agrium”), and UAP Holding Corporation, (“UAP”) (collectively “the Parties”) an Agreement Containing Consent Orders (“the proposed consent order”). The Parties have also reviewed a draft complaint contemplated by the Commission. The proposed consent order is designed to remedy likely anticompetitive effects arising from Agrium’s proposed acquisition of all of the outstanding voting stock of UAP.

II. Description of the Parties and the Proposed Acquisition

Agrium is a Calgary, Alberta-based agricultural products company, a major producer of fertilizer in the Americas, and is the largest operator of retail farm stores in the United States. Agrium has approximately 433 retail locations in 31 states, in all areas of the country except for a north-south band from the Northern plains to Texas. Agrium’s stores operate under the “Crop Production Services” brand in the East and Midwest, and under “Western Farm Service” in the West. Agrium had nearly \$4.2 billion in sales in 2006, of which more than \$1 billion came from its U.S. farm stores, the majority from fertilizer sales. Agrium is a multinational fertilizer and farm products company that develops, manufactures, and markets chemical and agricultural products and services that it distributes to customers in the Americas and elsewhere.

UAP is a publicly-traded U.S. company based in Colorado that develops, manufactures, and markets a line of products and value-added services including chemicals, fertilizer, and seed to farmers, commercial growers, and regional dealers throughout the world. UAP is the second-largest operator of farm stores in the U.S., measured by sales, and its 370 retail stores operate in all 50 states -

Analysis to Aid Public Comment

making it, with Helena Chemical, one of only two farm store operators with a national footprint. UAP's U.S. farm store sales in 2006 constituted more than one-third of its \$2.85 billion in total sales. UAP's retail sales are weighted more toward pesticides, though fertilizer sales account for about 30% of its revenue.

Agrium and UAP announced on December 3, 2007, that their respective boards of directors had approved the sale and purchase of all outstanding shares of UAP stock to Agrium for approximately \$2.65 billion pursuant to the stock purchase agreements by and between Agrium and UAP. As a result of the merger, Agrium will hold 100% of the voting securities of UAP. Upon completion of the merger, UAP will become a wholly owned subsidiary of Agrium.

III. The Draft Complaint

The draft complaint alleges that the transaction may substantially lessen competition in the market for the retail sale of bulk fertilizer, and in certain cases related services, by farm stores. Retail farm stores sell mainly three classes of products: pesticides, seed, and fertilizer. Additionally, farm stores can deliver a range of services to meet the specific needs of particular growers. Retail farm stores, for example, often deliver fertilizer directly to the grower, and in many cases apply fertilizer to growers' fields, usually with the store's equipment. The stores often provide a variety of agronomic services to the grower in order to help maximize the efficiency of the fields.

Farmers typically want one-stop shopping from their farm stores, favoring a single provider who can provide all the inputs and services they require. Although farmers sometimes visit the store, sales representatives from the stores also call upon the farmers, and bulk fertilizer is usually delivered to the farms in trucks or spreaders.

Bulk fertilizer is a critical product without which most agricultural growers cannot profitably operate. Growers must have it, must have the proper amount, and must have it exactly on time, to produce their harvest. Fertilizer is usually applied before planting, and then again at the same time as planting. Along with occasional

Analysis to Aid Public Comment

applications during the growing season, there is usually a fall application of fertilizer. Agricultural growers have no close substitutes for bulk fertilizer purchased through farm stores.

The relevant geographic markets within which to analyze the likely effects of the proposed transaction are a series of small areas within the United States, typically extending 20-30 miles from a farm store. Transportation costs can make fertilizer prices less competitively attractive at distances over about 25-30 miles because of high fuel costs and the low price-to-weight ratio of bulk fertilizer. Furthermore, application services require application equipment that often travels slowly, and can tie up several employees and pieces of equipment if traveling more than 20-30 miles.

The proposed merger of Agrium and UAP would impact six geographic markets, including three in the central “thumb” of Michigan, two in east/central Michigan, and one on the eastern shore of Maryland. The draft complaint alleges that the relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition are the areas in or near the towns of Croswell, MI; Richmond, MI; Imlay City, MI; Vestaburg, MI; Standish, MI; and Pocomoke/Girdletree, MD. In each of these identified areas, Agrium and UAP own farm stores that are well-situated among a small number of competitors in the market for the group of growers located proximate to their stores.

The draft complaint further alleges that new entry would not prevent or counteract the anticompetitive effects of this acquisition in the relevant geographic markets. New farm store entry has become highly infrequent, due to the risks involved in expending significant sunk costs to obtain enough customers to make a new store viable in a mature industry. Furthermore, because reliable supply and service is so important, loyalty to existing suppliers is typically high among growers, making it particularly difficult for a new entrant to develop a sufficient customer base.

The draft complaint also alleges that Agrium’s acquisition of all

Analysis to Aid Public Comment

of the outstanding voting securities of UAP, if consummated, may substantially lessen competition in the relevant line of commerce in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by eliminating direct competition between farm retail stores owned or controlled by Agrium and farm retail stores owned and controlled by UAP; by increasing the likelihood that Agrium will unilaterally exercise market power; and by increasing the likelihood of, or facilitating, collusion or coordinated interaction among the remaining farm retail store firms. Each of these effects increases the likelihood that the prices of bulk fertilizer or related services will increase, in the geographic markets alleged in the complaint. Other competitors are not effective competitive constraints to Agrium or UAP throughout each relevant trade area, due to factors such as location, and size and scale of their operations.

IV. The Terms of the Agreement Containing Consent Orders

The Agreement Containing Consent Orders (“proposed consent order”) will remedy the Commission’s competitive concerns about the proposed acquisition. Under the terms of the proposed consent order, Agrium must divest five UAP farm stores and two Agrium farm stores. UAP’s farm stores that will be divested are located in Crosswell, MI; Richmond, MI; Imlay City, MI; Vestaburg, MI; and Standish, MI. Agrium’s farm stores that will be divested are located in Snow Hill, MD and Keller, VA. An Order to Hold Separate and Maintain Assets requires that the stores to be divested be operated independently, and appoints an Interim Monitor to ensure that the Commission’s interests are protected.

A. Key Provisions of the Decision and Order

The proposed Orders will allow for effective divestiture of the key assets that today allow UAP to provide an independent competitive presence to Agrium in the relevant markets, and therefore will preserve the market structure. Paragraph II of the Decision and Order provides that Agrium divest itself of five UAP

Analysis to Aid Public Comment

stores in Michigan, and two Agrium stores in Maryland and Virginia within 180 days of its acquisition of UAP, and that Agrium further comply with all provisions of a divestiture agreement to be approved by the Commission. The agreement also provides that the two Agrium stores located in Snow Hill, Maryland and Keller, Virginia, be sold to a single buyer. Because Agrium's Keller location provides the Snow Hill location with dry bulk blended fertilizer, the Keller store must be sold to maintain the existing market dynamic. If the Snow Hill store were sold alone, it would be unable to sell bulk dry blended fertilizer to local farmers.

The Decision and Order defines the scope of the assets to include the attributes of an ongoing business, such as necessary real property, tangible personal property, inventories, contracts, records of the business, accounts receivable permits, and intellectual property (other than the UAP and Agrium trade names). Pursuant to Paragraph II.E. of the proposed Decision and Order, Agrium also is required, for a period of up to a year, provide necessary transition services to the buyer at cost. The purpose of this provision is to allow for a relatively smooth transition of the store operation to the acquirer. Paragraph II.F. of the Decision and Order provides mechanisms for retention of each UAP store's employees by the acquiring party.

Paragraph III of the proposed Decision and Order requires that the Parties keep private, except where necessary under the agreement, confidential business information related to the divested UAP stores. Paragraph IV of the proposed Decision and Order requires that the Parties provide the Commission with "advance written notification" of intent to acquire any assets engaged in the sale of agricultural products in any area affected by the proposed divestitures. Paragraph V of the proposed Decision and Order provides for appointment of a divestiture trustee. Paragraphs VI-VIII define reporting obligations.

B. Key Provisions of the Order to Hold Separate

Analysis to Aid Public Comment

The Order to Hold Separate and Maintain Assets requires the Parties to maintain the assets to be divested as independent businesses pending divestiture, and to maintain the viability of these businesses. The proposed Order also provides for the appointment of an interim monitor to oversee the UAP assets in the relevant markets. The proposed Order incorporates the traditional provisions that allow the Interim Monitor broad oversight of the assets, and requiring the Monitor to report to the Commission on a regular basis. Furthermore, the proposed Order has provisions requiring the Parties to appoint a Manager who would run the assets on an independent basis, and requiring the Parties to give that Manager financial incentives in the success of the assets. The Parties will also be required to provide the held separate businesses with necessary support, but provides that employees of the Parties will not have access to confidential information, except to the extent necessary to accomplish the divestitures, comply with laws or regulations, or comply with the Orders. The Order requires that the Parties establish a system to prevent unauthorized disclosure of such confidential information, and, more generally, written procedures covering the management, maintenance and independence of the held separate assets. The Order also requires that the Parties provide the held separate assets with the financial resources and support that the Monitor believes are necessary to run the assets on an independent basis, including maintenance and replacement of existing assets, and business expansion.

V. Opportunity for Public Comment

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

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems

Analysis to Aid Public Comment

alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

Complaint

IN THE MATTER OF

**MISSOURI BOARD OF EMBALMERS
AND FUNERAL DIRECTORS**

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

*Docket C-4223; File No. 061 0026
Complaint, June 19, 2008 – Decision, June 19, 2008*

This consent order addresses a regulation issued by the Missouri Board of Embalmers and Funeral Directors, the sole licensing authority for the practices of embalming and funeral directing in Missouri, that limited the selling of funeral merchandise to duly licensed and registered funeral directors. This regulation deterred competitive entry into the retail sale of funeral caskets by discouraging non-licensed persons from selling funeral caskets to the public. The order prevents the Board from prohibiting, restricting, impeding, or discouraging any person from engaging in the sale or rental to the public of funeral merchandise, directly or indirectly, or through any rule, regulation, policy, or conduct. The order requires the Board to publish information that its rules do not prohibit persons not licensed as funeral directors or embalmers from selling caskets, burial receptacles, or other funeral merchandise to the public in the State of Missouri, in its newsletter, on its website, and in professional publications. The Board must notify the Commission prior to any filing with the Missouri Secretary of State of any Proposed Order of Rulemaking concerning the Board's rules or regulations, or prior to proposing any change that may affect compliance obligations. The order also contains standard provisions requiring the filing of regular written reports of the Board's compliance with terms of the order.

Participants

For the Commission: *Joel Christie, Patrick J. Roach, and
Melanie Sabo.*

For the Respondent: *Jane A. Rackers, Missouri Attorney
General's Office.*

Complaint

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 the Missouri Board of Embalmers and Funeral Directors has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

NATURE OF THE CASE

This case involves Respondent Missouri Board of Embalmers and Funeral Directors (the “Board”), which is the sole licensing authority for the practices of embalming and funeral directing in Missouri. The Board is composed of six members, five of whom must be licensed embalmers or funeral directors. At the time it adopted the regulation at issue in this matter, the Board included five licensed funeral directors. Funeral directors compete in the sale of funeral caskets at-need to consumers in Missouri. Respondent is authorized to promulgate, adopt and enforce rules that it deems necessary for the public good and consistent with the laws of the State of Missouri. The Missouri statute that created and empowered Respondent to regulate the professions of embalming and funeral directing includes a provision stating that its licensing qualifications and conditions (Mo. Rev. Stat. Chapter 333 (2005)) shall not apply “to any person engaged simply in the furnishing of burial receptacles for the dead.” Mo. Rev. Stat. § 333.251 (2005). The Board promulgated a regulation that defined the practice of funeral directing to include selling funeral merchandise on an at-need basis to consumers in the State of Missouri. This regulation deterred competitive entry into the retail sale of funeral caskets.

Complaint

RESPONDENT

1. The Board is an agency of the State of Missouri, established and existing pursuant to Mo. Rev. Stat. § 333.151, for the purpose of administering and enforcing Chapter 333 and portions of Chapter 436, Mo. Rev. Stat., and the regulations promulgated thereunder. It has authority to license and regulate those persons in the businesses of embalming and funeral directing in Missouri.

2. The Board's principal office and place of business is located at 3605 Missouri Boulevard, Jefferson City, Missouri, 65102-0423.

3. The Board is comprised of six members; one public member and five members that hold a license in either funeral directing or embalming, or both. Each member is appointed by the governor with the advice and consent of the state senate.

4. Except to the extent that competition has been restrained as alleged below, and depending on their geographic location, licensed funeral directors in Missouri compete with each other and with funeral director members of the Board in, among other activities, the sale of funeral caskets at-need to the public.

5. The Board is the sole licensing authority for those who engage in the business of embalming and funeral directing in Missouri. It is unlawful for an individual to practice or offer to practice embalming or funeral directing in Missouri unless he or she holds a current license to practice.

6. Under Mo. Rev. Stat. § 333.241 (2005), the Board is empowered to seek a court order to enjoin any person from engaging or offering to engage in any act that would require a license from the Board.

7. The unlicensed practice of embalming or funeral directing in Missouri may be prosecuted as a class A misdemeanor under Mo. Rev. Stat. § 333.261 (2005).

JURISDICTION

Complaint

8. The Board is a state agency and is a “person” within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

9. The acts and practices of the Board, including the acts and practices alleged herein, have been or are affecting “commerce” within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44. In particular, funeral directors in Missouri purchase and receive funeral caskets and other funeral merchandise that are shipped across state lines by manufacturers and suppliers in other locations, transfer substantial sums of money that cross state lines in payment for that merchandise, perform funerals for residents of other states, and receive substantial sums of money that cross state lines in payment for funeral services and merchandise including funeral caskets. Furthermore, the regulation at issue deterred competitors in other states from selling funeral caskets to Missouri consumers at need, and affected interstate commerce in funeral merchandise in neighboring states.

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

THE CHALLENGED CONDUCT

11. The “practice of funeral directing” is defined in Mo. Rev. Stat. § 333.011(7) (2005) as “[E]ngaging by an individual in the business of preparing, otherwise than by embalming, for the burial, disposal or transportation out of this state of, and the directing and supervising of the burial or disposal of, dead human bodies or engaging in the general control or supervision or management of the operations of a funeral establishment.”

12. Mo. Rev. Stat. § 333.251 (2005) states that: “Nothing in this chapter shall apply to nor in any manner interfere with the duties of any officer of local or state institutions, nor shall this chapter apply

Complaint

to any person engaged simply in the furnishing of burial receptacles for the dead, but shall only apply to persons engaged in the business of embalming or funeral directing.”

13. Beginning on or about June 30, 1998, and continuing through approximately July 29, 2004, Regulation 4 CSR 120-2.060(18) stated that: “No person other than a duly licensed and registered funeral director may make the following at-need arrangements with the person having the right to control the incidents of burial: . . . (C) For the sale or rental to the public of funeral merchandise, services or paraphernalia from a funeral establishment.”

14. Prior to July 30, 2004, Regulation 4 CSR 120-2.060 (18) prohibited the sale of at-need funeral merchandise “from a funeral establishment” by anyone other than a licensed funeral director.

15. Beginning on or about July 30, 2004, and continuing through approximately September 29, 2006, 4 CSR 120-2.060(18) stated that: “No person other than a Missouri licensed funeral director shall be allowed to make the following at-need arrangements with the person having the right to control the incidents of disposition: . . . (C) Sale or rental to the public of funeral merchandise, services or paraphernalia.”

16. During the process leading up to the amendment of 4 CSR 120-2.060 that took effect in July 2004, the Board sought to amend other portions of the regulation but not 4 CSR 120-2.060(18)(C).

17. After the period for public comments for amending 4 CSR 120-2.060 was completed, the Board amended subsection 4 CSR 120-2.060(18)(C) by deleting the phrase “from a funeral establishment.”

18. Regulation 4 CSR 120-2.060(18)(C) as amended was published in the Missouri Register on June 1, 2004. This amended regulation, which was in effect beginning on or about July 30, 2004, and continuing through approximately September 29, 2006, is hereinafter referred to as the “Regulation at Issue.”

Complaint

19. Funeral directors in Missouri sell funeral caskets and provide funeral services to consumers.

20. Non-licensed persons who market and sell funeral caskets to consumers in Missouri compete with funeral directors for those sales.

21. Adoption and publication of the Regulation at Issue had the effect of restraining competition and injuring consumers in the following ways, among others:

A. discouraging non-licensed persons from selling funeral caskets to the public at-need in Missouri;

B. depriving consumers of the benefits of price competition that could have been offered by retail sellers of funeral caskets who were not licensed funeral directors; and

C. reducing consumer choices in Missouri concerning the purchase of funeral caskets.

22. The Board filed an amended order of rulemaking on February 16, 2006 to initiate the process for rescinding the Regulation at Issue. After receiving public comment on a proposed amendment, the Board voted unanimously to rescind the Regulation at Issue on May 10, 2006. The amended regulation, published at 20 CSR 2120-2.060(18)(C), became effective on September 30, 2006.

VIOLATION

23. The combination, conspiracy, acts and practices described above constitute anticompetitive and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Such combination, conspiracy, acts, and practices or the effects thereof, continued for approximately two years and may recur in the absence of the relief herein requested.

Decision and Order

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this nineteenth day of June, 2008, issues its Complaint against Respondent Missouri Board of Embalmers and Funeral Directors.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the Missouri Board of Embalmers and Funeral Directors (the “Board”), hereinafter sometimes referred to as “Respondent,” and Respondent having been furnished thereafter with a copy of the draft Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the said Act, and that a Complaint should issue stating its

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charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comment filed by an interested person, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34 (2004), the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent, the Missouri Board of Embalmers and Funeral Directors, is an industry regulatory board established by the State of Missouri with its principle office and place of business located at 3605 Missouri Boulevard, Jefferson City, Missouri 65102-0423.

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

ORDER**I.**

IT IS ORDERED that for the purposes of this Order, the following definitions shall apply:

- A. “Respondent” or “Board” means the Missouri Board of Embalmers and Funeral Directors, its officers, members, employees, consultants, agents, successors and assigns.
- B. “Licensee” means any person licensed to practice as an embalmer and/or funeral director in the State of Missouri.
- C. “Person” means both natural persons and artificial persons, including, but not limited to, corporations, unincorporated entities, and governments.

II.

Decision and Order

IT IS FURTHER ORDERED that Respondent, in connection with its activities in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall forthwith cease and desist from prohibiting, restricting, impeding or discouraging any person from engaging in the sale or rental to the public of funeral merchandise or burial receptacles for the dead, directly or indirectly, or through any rule, regulation, policy, or other conduct authorized by MO. REV. STAT. § 333.251 (2005).

III.

IT IS FURTHER ORDERED that Respondent shall:

- A. Publish in the Newsletter of the Board of Embalmers and Funeral Directors the full text of MO. REV. STAT. § 333.251 (2005), this Order, and an accompanying statement that: “The Rules and Regulations of the Board of Embalmers and Funeral Directors do not prohibit persons not licensed as funeral directors or embalmers from selling caskets, burial receptacles or other funeral merchandise to the public in the State of Missouri,” with such prominence as is given to regularly featured articles, and distribute such Newsletter to all Licensees within one hundred and twenty (120) days after the date this Order becomes final. Respondent shall similarly publish the full text of MO. REV. STAT. § 333.251 (2005) and an accompanying statement that: “The Rules and Regulations of the Board of Embalmers and Funeral Directors do not prohibit persons not licensed as funeral directors or embalmers from selling caskets, burial receptacles or other funeral merchandise to the public in the State of Missouri” in subsequent issues of such Newsletter, which shall be distributed to all Licensees at least once each calendar year, for the years 2007, 2008 and 2009;
- B. Display an advisory on its public website (<http://pr.mo.gov/embalmers.asp>) that: “The Federal Trade

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Commission and the Board Have Agreed to Settle FTC Allegations Regarding Restrictions and Prohibitions on the Sale of Funeral Merchandise or Caskets.” Such advisory shall link to a new web page on the Board’s website that contains the full text of MO. REV. STAT. § 333.251 (2005), a statement that: “The Regulations of the Board of Embalmers and Funeral Directors do not prohibit persons not licensed as funeral directors or embalmers from selling caskets, burial receptacles or other funeral merchandise to the public in the State of Missouri,” a link to MO. CODE REGS. ANN. tit. 20, § 2120-2.060 (2006), and a link to this Order. Respondent shall modify its website as described above no later than ten (10) business days after the date the Order becomes final, and shall display such modifications for no less than ninety (90) days from the date this Order becomes final. The advisory and this Order shall remain publicly accessible through common search terms and archives on the website for five (5) years from the date this Order becomes final, except in the event that the Missouri Office of Administration changes the structure or functionality of the Board’s public website, in which case the Board shall notify the Commission and propose alternative means of access to the advisory, the information on the new web page and this Order;

- C. Publish notice of this Order in three consecutive issues of *Missouri Funeral Director’s Association Magazine*, beginning with the next available placement opportunity for the Board to include its notice in the magazine following publication of this Order on the Board’s website. For purposes of this provision, such notice will be deemed satisfactory if it includes the following language: “The Missouri Board of Embalmers and Funeral Directors (the “Board”) announces agreement with the Federal Trade Commission regarding the FTC’s allegations of restrictions and prohibitions on the sale of funeral merchandise or caskets. Persons may offer for retail sale caskets and other

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funeral merchandise to customers in Missouri without obtaining a license from the Board. Full details of the settlement are posted on the Board's website at *www.pr.mo.gov.embalmers.asp*." The minimum size of such notice shall be one-half of one page in *Missouri Funeral Director's Association Magazine*;

- D. Publish the statement: "The Missouri Board of Embalmers and Funeral Directors (the "Board") has settled antitrust allegations by the FTC regarding restrictions and prohibitions on the sale of funeral merchandise or caskets. Persons may offer for retail sale caskets and other funeral merchandise to customers in Missouri without obtaining a license from the Board. Full details of the settlement are posted on the Board's website at *www.pr.mo.gov.embalmers.asp*." on Page 1 in the next version of the Missouri State Board of Embalmers and Funeral Directors Rules and Regulations, Chapters 333, 436, 193, 194, which shall be provided to all Licensees within one (1) year from the date this Order becomes final; and,
- E. Notify the Office of the Secretary, Federal Trade Commission, 600 Pennsylvania Avenue N.W., Washington, D.C. 20580, at least thirty (30) days prior to: a) filing with the Missouri Secretary of State any Proposed Order of Rulemaking concerning the Board's rules or regulations; or b) proposing any change in Respondent; if such proposed change may affect compliance obligations arising out of this Order.

Analysis to Aid Public Comment

IV.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months of the date this Order becomes final, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

V.

IT IS FURTHER ORDERED that this Order shall terminate on June 19, 2018.

By the Commission.

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT**

The Federal Trade Commission has accepted for public comment an Agreement Containing Consent Order with the Missouri Board of Embalmers and Funeral Directors (“the Board” or “Respondent”). The agreement settles charges that the Board violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, through particular acts and practices described below. The Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested members of the public. Comments received during this period will become part of the public record. After thirty (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.

Analysis to Aid Public Comment

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

I. The Respondent

Respondent is the sole licensing authority for the practices of funeral directing and embalming in the State of Missouri. It is authorized to promulgate, adopt and enforce rules and regulations governing and defining those practices. Respondent is able to seek a court order to enjoin any person from engaging or offering to engage in any act that requires a license from the Board. The unlicensed practice of funeral directing or embalming in Missouri may be prosecuted as a class A misdemeanor.

At the time it adopted the regulation at issue in the proposed complaint, the Board was composed of five (5) licensed funeral directors, all of whom competed in the sale of at-need funeral caskets to consumers in Missouri.

II. The Conduct Addressed by the Proposed Consent Order

The proposed Complaint alleges that Respondent violated Section 5 of the Federal Trade Commission Act by unlawfully restraining competition in the retail funeral casket market in the State of Missouri by promulgating a regulation that defined the practice of funeral directing to include selling at-need funeral merchandise.

The at-issue regulation stated: “No person other than a duly licensed and registered funeral director may make the following at-need arrangements with the person having the right to control the incidents of burial: . . . (C) sale or rental to the public of funeral

Analysis to Aid Public Comment

merchandise, services or paraphernalia.”¹ Under the laws of the State of Missouri, however, licensing qualifications and conditions for persons practicing or offering to practice funeral directing and embalming do not apply to anyone engaged simply in the furnishing of at-need burial receptacles to the public.²

The proposed Complaint alleges that the Board’s regulation had anticompetitive effects by discouraging non-licensed persons from selling funeral caskets to the public in Missouri, depriving consumers of the benefits of price competition, and reducing consumer choices concerning the purchase of funeral caskets.

The Commission has previously found that funeral director conduct that limits entry by non-licensed casket sellers harms competition. In its 1994 review of the Funeral Rule,³ the Commission found that funeral-director-imposed “casket handling fees” excluded competition from third-party casket sellers, and the record evidence indicated that the fees “prevent[ed] potential price competition and reduce[d] consumer choice.”⁴ The Commission further found that “the long-term effect of [banning these fees] will be increased competition in the casket market such that prices will eventually go down and all consumers will pay less.”⁵

¹ 4 CSR 120-2.060(18).

² See Mo. Rev. Stat. § 333.251 (2005). The at-issue regulation was revised during the course of the investigation and published in 20 CSR 2120-2.060 (18)(C) effective September 2006.

³ The FTC’s Funeral Rule, which was promulgated by the Commission in 1982 and revised in 1994, requires providers of funeral goods and services to give consumers itemized lists of funeral goods and services that not only provide price and descriptions, but also contain specific disclosures. The Funeral Rule removed the primary industry restraint on consumer choice (package-only funeral goods and service pricing) and makes clear that consumers may select and purchase only the goods and services they want. See 59 Fed. Reg. 1592 (1994).

⁴ 59 Fed. Reg. at 1603-04.

⁵ *Pa. Funeral Directors Ass’n, Inc. v. FTC*, 41 F.3d 81, 91 (3d Cir. 1994). See also Memorandum of Law of Amicus Curiae The Federal Trade Commission,

Analysis to Aid Public Comment

The courts have likewise found that state laws prohibiting the sale of caskets by non-licensed persons harm competition. The Sixth Circuit concluded that a Tennessee state law forbidding anyone but state licensed funeral directors from selling caskets imposed “a significant barrier to competition in the casket market” and “harm[ed] consumers in their pocketbooks.”⁶ A district court in Oklahoma found that “[a]s long as independent sellers stay in the market, casket sales from independent sources ... place downward pressure on casket prices as a result of increased competition.”⁷ A district court reviewing a similar statute in Mississippi also concluded that such requirements result in less price competition and consumer choice in selecting a casket.⁸

The Missouri statute that created the Board and grants it the authority to act was not intended to displace competition in the sale of funeral merchandise with regulation. Indeed, it appears that Missouri intended to preserve price competition with respect to the retail sale of funeral caskets by excepting from application of the at-need funeral statute “*any person engaged simply in the furnishing of burial receptacles for the dead.*”⁹

III. Terms of the Proposed Consent Order

The Board has signed a consent agreement containing the proposed consent Order. The proposed Order would prevent the Board from prohibiting, restricting, impeding or discouraging any person from engaging in the sale or rental to the public of funeral

Powers v. Harris, Case No. CIV-01-445-F (W.D. Okla. Aug. 29, 2002).

⁶ *Craigmiles v. Giles*, 312 F.3d 220, 222, 228 (6th Cir. 2002).

⁷ *Powers v. Harris*, 2002 WL 32026155 at *6 (W.D. Okla. Dec. 12, 2002).

⁸ *Casket Royale, Inc. v. Mississippi*, 124 F.Supp. 2d 434, 440 (S.D. Miss. 2000).

⁹ Mo. Rev. Stat. § 333.251 (2005).

Analysis to Aid Public Comment

merchandise or burial receptacles for the dead, directly or indirectly, or through any rule, regulation, policy, or conduct.

The proposed Order requires the Board to publish in the Newsletter of the Board of Embalmers and Funeral Directors, the full text of Mo. Rev. Stat. § 333.251 (2005), the Order, and an accompanying statement that: “The Rules and Regulations of the Board of Embalmers and Funeral Directors do not prohibit persons not licensed as funeral directors or embalmers from selling caskets, burial receptacles or other funeral merchandise to the public in the State of Missouri.”

The proposed Order also requires the Board to display an advisory on its public website stating that it has settled FTC allegations regarding restrictions and prohibitions on the sale of funeral merchandise or caskets, and to provide a link to the Board’s website that contains the full text of Mo. Rev. Stat. § 333.251 (2005), a link to Mo. Code Regs. Ann. tit. 20, § 2120-2.060 (2006), and a link to this Order. The proposed Order further requires the Board to publish notice of the Order and settlement in three consecutive issues of Missouri Funeral Directors’ Association Magazine and in the Missouri State Board of Embalmers and Funeral Directors Rules and Regulations, Chapters 333, 436, 193, 194, which shall be provided to all licensees within one (1) year from the date the Order becomes final.

The proposed Order includes requirements that the Board notify the Commission at least thirty (30) days prior to any filing with the Missouri Secretary of State of any Proposed Order of Rulemaking concerning the Board’s rules or regulations, or prior to proposing any change in Respondent that may affect compliance obligations. The proposed Order contains standard provisions requiring the filing of regular written reports of the Board’s compliance with the terms of the Order for each of the next five years. The Order will expire in ten (10) years.

INTERLOCUTORY, MODIFYING,
VACATING, AND MISCELLANEOUS
ORDERS

IN THE MATTER OF

**EQUITABLE RESOURCES, INC.,
DOMINION RESOURCES, INC.,
CONSOLIDATED NATURAL GAS COMPANY,
and
THE PEOPLES NATURAL GAS COMPANY**

Docket No. 9322 - Order, January 31, 2008

ORDER DISMISSING COMPLAINT

On March 1, 2006, Respondent Equitable Resources, Inc. (“Equitable”) executed an agreement to acquire the capital stock (“Agreement”) of Respondent The Peoples Natural Gas Company (“Peoples”) from Respondent Consolidated Natural Gas Company, a subsidiary of Respondent Dominion Resources, Inc. On March 14, 2007, the Commission issued the Administrative Complaint in this matter, alleging that the March 1, 2006 Agreement violated Section 5 of the Federal Trade Commission Act, and that Equitable’s proposed acquisition of Peoples, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. On April 13, 2007, the Commission filed a complaint and motions for a temporary restraining order and a preliminary injunction against Respondents in the United States District Court for the Western District of Pennsylvania, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), seeking to prevent the merger, and thereby maintain the *status quo*, during the pendency of the administrative proceeding. On May 14, 2007, the District Court granted the Defendants-Respondents’ motion to dismiss the complaint on state action grounds. On May 16, 2007, the Commission filed an emergency motion for an injunction pending appeal in the District Court, which the Court denied on May 21, 2007. On May 18, 2007, the Commission filed a notice of appeal of

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the District Court judgment – and on May 21, 2007, filed an emergency motion for an injunction pending appeal – with the United States Court of Appeals for the Third Circuit, in *Federal Trade Commission v. Equitable Resources, Inc., No. 07-2499*. On June 1, 2007, the Court of Appeals issued an Order granting the Commission’s motion for an injunction pending appeal, and that Order remains in effect.

Complaint Counsel have now filed an Unopposed Motion To Dismiss Complaint (“Motion”) – which the Respondents do not oppose – due to a change in Respondents’ circumstances. The Motion recites that on January 15, 2008, Respondents Equitable and Dominion publicly announced that they had mutually terminated the March 1, 2006 Agreement, and that on January 17, 2008, Respondent Equitable filed a notice of the termination with the U.S. Securities and Exchange Commission. The Motion further recites that [redacted].

The Commission has determined to dismiss the Administrative Complaint, consistent with both Commission precedent and the current posture of this case. In *Swedish Match*,¹ for example, the Commission dismissed the administrative complaint without prejudice after the parties determined to abandon the transaction at issue and Swedish Match AB withdrew the applicable HSR Notification and Report Form. The Commission noted:

The withdrawal of the Notification and Report Form – and the parties’ abandonment of the February 10, 2000 Asset Purchase Agreement – ensure that the most important elements of the relief set out in the administrative complaint’s Notice of Contemplated Relief have been accomplished without the need for further litigation in this case. Therefore, the public

¹ *In the Matter of Swedish Match North America Inc., and National Tobacco Company, L.P., Docket No. 9296 (Swedish Match)*, Order Dismissing Complaint (January 4, 2001), available at <http://www.ftc.gov/os/2001/01/swedishdismisscmp.htm>.

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interest warrants dismissal of the administrative complaint. The Commission has determined to do so, however, without prejudice, because it is not reaching a decision on the merits.²

Similarly, in *H.J. Heinz*,³ the Commission dismissed the administrative complaint after the Respondents abandoned the transaction at issue.

In this matter, as in *Swedish Match*, the most important elements of the relief set out in the Notice of Contemplated Relief in the administrative complaint have been accomplished without the need for further administrative litigation. In particular, the acquisition Agreement at issue has now been terminated, and the proposed acquisition has been enjoined pending further order of the Court of Appeals. Moreover, Complaint Counsel maintain [redacted].

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

IT IS ORDERED that the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission.

² *Id.*, citing *R.J. Reynolds Tobacco Company*, Docket No. 9285, Order Dismissing Complaint (January 26, 1999), at 4.

³ *In the Matter of H.J. Heinz Company, Milnot Holding Corporation, and Madison Dearborn Capital Partners, L.P.*, Docket No. 9295 (*H.J. Heinz*), Order Dismissing Complaint (December 4, 2001), available at <http://www.ftc.gov/os/2001/12/heinzorder.pdf>.

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IN THE MATTER OF

REALCOMP II LTD.*Docket No. 9320 – Order, April 8, 2008***ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE ON ISSUES OF REMEDY**

On January 25, 2008, the American Homeowners Grassroots Alliance filed a timely Motion For Leave To File Responding Amicus Curiae Brief On Issues Of Remedy in this matter, and attached a copy of the brief that it proposed to file. The Alliance describes itself as a grassroots advocacy organization serving the nation's homeowners. Neither Counsel for the Respondent nor Complaint Counsel has filed an Answer objecting to the Alliance Motion.

The Commission has determined to grant the Motion because it satisfies the Commission's requirement that the public interest will benefit from the Commission's consideration of the attached brief.¹ The Commission takes no position on the substantive or procedural merit of any of the arguments presented in the brief. Accordingly,

IT IS ORDERED that the Alliance Motion For Leave To File Responding Amicus Curiae Brief On Issues Of Remedy be, and it hereby is, **GRANTED**.

By the Commission.

¹ See, e.g., *In the Matter of Evanston Northwestern Healthcare Corporation, et al.*, Docket No. 9315, Order Granting Motions For Leave to File Briefs *Amici Curiae* (January 24, 2006); *In the Matter of Telebrands Corp., et al.*, Docket No. 9313, Order Granting Motion for Leave to File Brief *Amicus Curiae* and Revising Briefing Schedule (Dec. 1, 2004); *In the Matter of Rambus Incorporated*, Docket No. 9302, Order Granting Motions for Leave to File Briefs *Amici Curiae* and Scheduling Oral Argument (April 30, 2004), and Order Granting Motions for Leave to File Briefs *Amici Curiae* (June 21, 2004).

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IN THE MATTER OF

**EVANSTON NORTHWESTERN HEALTHCARE
CORPORATION,
AND
ENH MEDICAL GROUP, INC.**

Docket No. 9315 – Order, April 29, 2008

**ORDER GRANTING MOTION FOR LEAVE TO FILE BRIEF
*AMICUS CURIAE***

On October 17, 2007, a number of Economics Professors filed a Motion for Leave to File Brief As *Amicus Curiae* In Support of Neither Party (“Motion”) in this matter, and attached to that motion a copy of the Brief they propose to file (“Proposed Brief”).¹ The Professors advise that they are professors at major universities who have researched and written extensively on health economics, industrial organization, and the economics of competition in health care, and that the Proposed Brief “describes what [they] believe are consensus views on some economic questions that arise in connection with the August 6, 2007 ruling by the . . . Commission in [this proceeding].” Motion at 2. They also state that they are

acting independently of the Commission and any interested parties [and] take no side in this matter, but believe that [their] brief may assist the Commission in addressing any appeals and future decisions.

¹ David Dranove, a Professor in the Department of Management and Strategy at the Kellogg School of Management at Northwestern University, has filed the Motion and the proposed Brief on behalf of himself and the other Economics Professors identified in the Motion.

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Id. On October 22, 2007, Respondents filed an Opposition To and Motion to Strike Motion of Economic Professors to File *Amicus Curiae* (“Opposition”). Respondents argue that the Motion is untimely because this matter is no longer pending on appeal, citing Commission Rule 3.52. Opposition at 2. Respondents also argue that the Motion is improper because it failed to disclose the Professors’ interest in the ENH merger. Opposition at 4. Finally, Respondents argue that the public interest will not benefit from consideration of the Proposed Brief, because it expresses views already advanced by parties to this litigation. Opposition at 5.

The Commission standard for determining whether to accept a particular proposed amicus brief rests on whether the public interest will benefit from Commission consideration of the brief.² The Commission has determined that the Proposed Brief satisfies that standard. Commission Rule 3.52(j) provides in relevant part:

Except as otherwise permitted by the Commission, an amicus curiae shall file its brief within the time allowed the parties whose position as to affirmance or reversal the amicus brief will support. The Commission shall grant leave for a later filing only for cause shown, in which event it shall specify within what period such brief must be filed.

16 C.F.R. § 3.52(j)(2008). Respondents argue that the Professors therefore were required to file the Proposed Brief while this matter was pending on appeal and cross-appeal from the Initial

² See, e.g., *In the Matter of Realcomp II Ltd.*, Docket No. 9320, Order Granting Motion for Leave to File Brief Amicus Curiae on Issues of Remedy (F.T.C. April 8, 2008); *In the Matter of Evanston Northwestern Healthcare Corporation, et al.*, Docket No. 9315, Order Granting Motions For Leave to File Briefs Amici Curiae (F.T.C. January 24, 2006); *In the Matter of Telebrands Corp., et al.*, Docket No. 9313, Order Granting Motion for Leave to File Brief Amicus Curiae and Revising Briefing Schedule (F.T.C. Dec. 1, 2004); *In the Matter of Rambus Incorporated*, Docket No. 9302, Order Granting Motions for Leave to File Briefs Amici Curiae and Scheduling Oral Argument (April 30, 2004), and Order Granting Motions for Leave to File Briefs Amici Curiae (F.T.C. June 21, 2004).

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Decision of the Administrative Law Judge; that is, between December 16, 2005, when Respondents filed their Appeal Brief, and February 3, 2006, when Complaint Counsel filed their Answering and Cross-Appeal Brief.³ However, the Commission has in the past permitted the filing of amicus briefs at later stages of administrative proceedings before the Commission.⁴ The crucial issue is not the stage of the proceedings at which a particular amicus brief may be filed, but rather whether its filing at that stage will assist the Commission in resolving the questions at issue at that stage. On August 2, 2007, the Commission issued an Opinion finding liability in this matter, and also issued an Order affirming the Initial Decision; vacating the Order issued as part of the Initial Decision; and directing Respondent Evanston Northwestern Healthcare Corporation (ENH) to file with the Commission a detailed proposal for implementing the type of injunctive relief that the Commission had selected, as prescribed in the Opinion of the Commission. In particular, the Order required Respondent Evanston Northwestern Healthcare Corporation to file a proposed order; required Complaint Counsel thereafter to file with the Commission any objections to or comments on that proposed order; and required Respondent thereafter to file any response it had to Complaint Counsel's filing.

The Proposed Brief was filed before Complaint Counsel filed their response to Respondent's detailed proposal for implementing the injunctive relief the Commission selected and expresses a number of concerns about the August 2, 2007 Order. The Proposed Brief was therefore relevant to the Commission's determination of how to implement the type of injunctive relief that the Commission

³ Opposition at 2-3. Respondents note that a number of independent parties filed amicus briefs during this period. *Id.*

⁴ For example, in *In the Matter of Rambus Inc.*, the Commission permitted the filing of amicus briefs after it issued its Opinion on Liability and Order -- but before it issued its Opinion on Remedy and Final Order. *In the Matter of Rambus Incorporated*, Docket No. 9302, Order Granting Motions For Leave to File Briefs *Amici Curiae*, (F.T.C. October 19, 2006). *See also* Order Denying Motion for Leave to File Brief *Amicus Curiae*, *In the Matter of North Texas Specialty Physicians*, Docket No. 9312 (F.T.C. June 7, 2005).

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ordered, and the Commission has determined that the Proposed Brief consequently satisfies the standard enunciated in Commission Rule 3.52(j). Accordingly,

IT IS ORDERED that the Motion of the Economics Professors for leave to file a brief *amicus curiae* be, and it hereby is, **GRANTED**.

By the Commission.

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IN THE MATTER OF

NINE WEST GROUP INC.

Docket No. C-3937 – Order, May 6, 2008

**ORDER GRANTING IN PART PETITION TO REOPEN AND
MODIFY ORDER ISSUED APRIL 11, 2000**

On October 30, 2007, Nine West Footwear Corporation, successor to Nine West Group Inc. (“Nine West”), filed a Petition to Reopen and Modify Order (“Petition”) in Docket No. C-3937, pursuant to section 5(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(b), and section 2.51 of the Federal Trade Commission’s Rules of Practice (“Rules”), 16 C.F.R. § 2.51. Nine West supplemented its Petition with a Supplemental Memorandum and Supplemental Declaration on February 8, 2008, and with additional information on December 5, 2007, February 29, 2008, and March 26, 2008. Nine West asks the Federal Trade Commission (“Commission”) to reopen and modify the consent order issued by the Commission on April 11, 2000 (“Order”), *Nine West Group Inc.*, 129 F.T.C. 818 (2000), 2000 FTC LEXIS 48 (2000). Nine West requests that the Commission set aside Paragraph II of the Order, which prohibits Nine West from entering into agreements to fix, control, or maintain resale prices (“resale price maintenance agreements” or “RPM”). Nine West argues that the Supreme Court’s decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* (“*Leegin*”),¹ changed the law governing resale price maintenance agreements so that agreements that were *per se* unlawful at the time the Order was issued must now be subject to a rule of reason analysis to determine their legality. Nine West asks that, in light of this change in the law, the Commission reopen the Order and set aside its prohibitions as no longer necessary or appropriate under the new law. Nine West also seeks reopening and modification under the public interest standard. Among other

¹ 551 U.S. ___, 127 S.Ct. 2705 (2007), 2007-1 Trade Cases ¶ 75,753, overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.* 220 U.S. 373 (1911).

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arguments, Nine West states that because of these changed conditions of law and the public interest, it should be allowed to engage in resale price maintenance agreements to maintain favorable brand equity, to counter free-riding, and to enter into agreements now available to its competitors.

Nine West's Petition was placed on the public record for comment for thirty days pursuant to Section 2.51 of the Commission's Rules. Two public comments were received, one from the American Antitrust Institute and one from a number of State Attorneys General. The commenters urge the Commission to deny the Petition. Pursuant to Rule 2.51, the Commission must act on the Petition no later than 120 days from the date the petition was filed. That 120 day period would have expired on February 27, 2008, but Nine West extended the period for Commission action until May 16, 2008, in part to allow the Commission to consider Nine West's supplemental materials.

For the reasons discussed below, the Commission has determined that Nine West has shown that changed conditions of law require reopening and modifying the Order to set aside Paragraph II of the Order. Consequently, the Commission has modified the Order in part to allow Nine West to engage in resale price maintenance agreements. However, the Commission is modifying the compliance report provision of the Order to require Nine West to file periodic reports describing its use, if any, of resale price maintenance agreements.

I.***THE COMPLAINT AND ORDER***

The Complaint in this case alleged that Nine West violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by engaging, in combination with its dealers, in a course of conduct to maintain the resale prices at which dealers sell Nine West branded products. The Complaint said the purpose and effect of this practice

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was to “restrain unreasonably and to hinder competition in the sale of footwear in the United States” and to deprive consumers of the benefits of competition.² The Complaint noted that “[p]rices to consumers of Nine West products [have] increased. . . . and [p]rice competition among retail dealers with respect to the sale of Nine West products has been restricted.”³

The Order, which was entered into with Nine West’s consent, prohibits Nine West, its successors and assigns, from engaging in any form of resale price maintenance. Specifically, the Order prohibits Nine West from fixing, controlling, or maintaining the resale price a dealer may advertise, promote, offer for sale any Nine West Products,⁴ or coercing, pressuring, or otherwise securing a commitment from any dealer to maintain a resale price for Nine West Products.⁵ The Order also imposed a ten-year ban on Nine West adopting, maintaining, enforcing or threatening any policy that: (1) the dealer is subject to warning or partial or temporary suspension or termination if it sells, promotes, or advertises Nine West Products below any resale price designated by Nine West, and (2) the dealer will be subject to a greater sanction if it continues or renews selling, offering for sale, promoting, or advertising any Nine West Products below any designated resale price.⁶ The Order

² *Nine West Group Inc.* Docket No. C-3937, 129 F.T.C. 818, (2000), Complaint at ¶ 8 (available online at <http://www.ftc.gov/os/caselist/c3937.shtm>).

³ *Id.* at ¶8.

⁴ Order Paragraph II.A. Nine West Products is defined as all women’s footwear sold under brand labels owned by Nine West. Order Paragraph I.C.

⁵ Order Paragraphs II.B and II.C.

⁶ Order Paragraph II.D. Nine West is not prohibited from unilaterally announcing its resale prices in advance and refusing to deal with those dealers who fail to comply, consistent with the Supreme Court’s decision in *United States v. Colgate & Co.*, 250 U.S. 300 (1919). Additionally, the Order does not prohibit Nine West from establishing and maintaining cooperative advertising programs as long as such programs are not a part of a resale price maintenance scheme. For a period that expired in 2005, Order Paragraph III required Nine West to include in any list advertising, book, catalogue, or promotional material where it suggested any resale price for any Nine West Products to dealers, a statement emphasizing that the retailers are free to determine their own prices for advertising and selling Nine West Products.

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expires by its terms, after twenty years.⁷

II.

NINE WEST'S PETITION

Nine West requests that the Commission set aside Paragraph II, which contains all of the prohibitions relating to minimum resale price maintenance agreements. Nine West argues that the relief it is seeking is required by changed conditions of law and the public interest. Nine West asserts that the Supreme Court's *Leegin* decision, which held that minimum resale price maintenance should no longer be treated as *per se* unlawful but should be analyzed under the rule of reason, constitutes a "dramatic change in antitrust law"⁸ and requires the Commission to reexamine the Order in this matter.⁸

Nine West also argues that "considerations of fairness and the public interest likewise necessitate that Paragraph II of the Order be modified."⁹ Nine West further claims that it is at a competitive disadvantage because other competitors may use RPM – in light of *Leegin*. For this reason, Nine West contends it is not in the public interest to deny it the ability to form resale price maintenance agreements and take advantage of the procompetitive effects described in the Supreme Court's decision.

III.

STANDARDS FOR REOPENING AND MODIFICATION OF COMMISSION ORDERS

Section 5(b) of the FTC Act, 15 U.S.C. § 45, 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" require such modification. A

⁷ Order Paragraph VII.

⁸ Petition at 2.

⁹ *Id.*

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satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 4, 1986), at 4; *See* S.Rep. No. 96-500, 96th Cong. 2d Sess. 9 (1979)(significant changes or changes causing unfair disadvantage); *Phillips Petroleum Co.*, Docket No. C-1088, 78 F.T.C. 1573, 1575 (1971)(no modifications for changes reasonably foreseeable at time of consent negotiations); *Union Carbide Corp.*, Docket No. C-2902, 108 F.T.C. 184, 186 (1986)(must show changes in statutory or decisional law that have the effect of bringing the provisions into conflict with existing law, citing, *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961)).¹⁰

The Commission also may modify an order pursuant to section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Thus, Section 2.51 of the Commission's Rules of Practice and Procedure, as amended, invites respondents in petitions to reopen to show how the public interest warrants the modification. In the case of a request for modification based on public interest grounds, a petitioner must make a *prima facie* "satisfactory showing" of a legitimate public interest reason or other reason justifying the requested modification.

The language of section 5(b) anticipates that the petitioner bears the burden to make the requisite satisfactory showing of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why changed circumstances require

¹⁰ In *Union Carbide*, the Commission refused to reopen and modify Union Carbide's Order prohibiting exclusive dealing arrangements on the basis of a change in law because exclusive dealing arrangements always were considered under the rule of reason and "Carbide's asserted changes in law, at most, reflect a shift in focus among the several factors traditionally considered under a rule of reason analysis as applied to exclusive dealing." 108 F.T.C. at 186.

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the Commission to modify the order.¹¹ If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 400-03 (1981)(strong public interest considerations support repose and finality).

IV.

NINE WEST HAS DEMONSTRATED CHANGED CONDITIONS OF LAW THAT REQUIRE REOPENING AND MODIFYING THE ORDER

Based on the information provided by Nine West and other available information, the Commission has determined that Nine West has made a satisfactory showing that changes in law require reopening the proceeding and modifying Paragraph II of the Order.

A. Analytical Framework

The Commission previously reopened and modified an order based on a change of law when the Supreme Court replaced a *per se* analysis with a rule of reason analysis for non-price vertical restraints. In 1989, the Commission set aside the order in *Sharp Electronics Corporation*, which prohibited Sharp Electronics from engaging in non-price vertical restraints, such as territorial

¹¹ The Commission properly may decline to reopen an order if a request is “merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order.” S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). *See also* Rule 2.51(b), which requires affidavits in support of petitions to reopen and modify.

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restrictions.¹² At the time the order was entered, all vertical restrictions – price and non-price – were *per se* unlawful under *U.S. v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967). The Commission vacated the *Sharp Electronics* order based upon the change of law enunciated in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (“*GTE Sylvania*”) and its progeny, which changed the test for non-price vertical restraints from *per se* condemnation to the rule of reason.

In 2000, when the Commission issued this Order, the rule of *Dr. Miles Medical Co. v. John D. Park & Sons, Co.*, 220 U.S. 373 (1911), forbade all minimum resale price maintenance agreements as unlawful *per se*.¹³ In *Leegin*, the Supreme Court overruled *Dr. Miles* in holding that minimum resale price maintenance agreements should be analyzed under the rule of reason.¹⁴ Citing cases such as *GTE Sylvania Inc., Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), and *State Oil Co. v. Khan*, 522 U.S. 3 (1997),¹⁵ the Court noted that the reasoning of its more recent jurisprudence rejected the rationales on which *Dr. Miles* was based.

As it abandoned the *per se* prohibition of *Dr. Miles*, the Court cautioned that it was not declaring RPM to be *per se* legal. *Leegin* summarized some of the possible procompetitive and anticompetitive consequences of resale price maintenance.¹⁶ The Court explained that RPM might stimulate interbrand competition

¹² *Sharp Electronics Corporation*, Docket No. C-2574, 84 F.T.C. 743 (1974), reopened and modified, 112 F.T.C. 303 (1989) (“*Sharp Electronics*”). The complaint in *Sharp Electronics* did not allege that the non-price vertical restraints had been used as part of an unlawful minimum resale price maintenance agreement.

¹³ On a number of occasions from the mid-1970s until *Leegin*, the Supreme Court had said that the *per se* rule of *Dr. Miles* remained good law. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 68-69 (1977); *Monsanto Co. v. Spray-Rite Service Corp.* 465 U.S. 752, 761, 769 (J. Brennan, concurring); and *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 724 (1988).

¹⁴ *See, generally, Leegin*, 127 S.Ct. 2705.

¹⁵ *Leegin*, 127 S.Ct. at 2712-25.

¹⁶ *See, id., generally.*

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and have a procompetitive effect on competition, so that RPM does not meet the *per se* illegality standard of a practice that “always or almost always tends to restrict competition and decrease output.”¹⁷ At the same time, after reviewing the potential anticompetitive effects of RPM, the Court said: “[a]s should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.”¹⁸ In light of these potential adverse effects, the Court further observed that “[i]f the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market.”¹⁹

The Court’s comments about the possible competitive harms of RPM, and its caution to lower courts “to be diligent in eliminating their anticompetitive uses from the market,” can usefully be understood in the context of the debate between the *Leegin* majority and the dissent about the wisdom of abandoning the *per se* ban of *Dr. Miles*. The dissent argued that the majority had slighted the potential anticompetitive consequences of RPM.²⁰ The majority’s recitation of examples of some of the possible competitive harms and its call for “diligent” efforts by the lower courts to be attentive to these harms can be seen as an attempt to provide assurances that the Court foresaw a useful role for continued antitrust scrutiny of RPM.²¹

These passages provide important guidance for the Commission’s review of the Nine West Petition. They correctly can be taken as an admonition, not only to the lower courts, but also to enforcement agencies, to take careful account of possible anticompetitive harms in the treatment of RPM matters under a rule

¹⁷ *Id.* at 2717 (citing to *Business Electronics Corp.*, 485 U.S. at 723).

¹⁸ *Id.*

¹⁹ *Id.* at 2719.

²⁰ *Id.* at 2725-2737 (J. Breyer, dissenting).

²¹ After reviewing the potential anticompetitive effects of RPM, the *Leegin* majority said: “As should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.” *Id.* at 2717.

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of reason framework. To inform the future analysis of RPM and, perhaps, to respond to the dissent's argument that a rule of reason inquiry would prove in practice to be unmanageable, the *Leegin* Court described some factors that might be used to identify conditions in which RPM posed greater anticompetitive potential.

One factor is the source of the resale price maintenance program: if retailers were the impetus for the adoption of RPM, that could indicate the existence of a retailer cartel or support for a dominant, inefficient retailer.²² A second factor is whether RPM programs were ubiquitous in an industry.²³ In that regard, the Court said “[re]sale price maintenance should be subject to more careful scrutiny, . . . if many competing manufacturers adopt the practice.”²⁴ A third factor is whether the practice is likely to increase prices because a manufacturer or retailer is a dominant player in the market in which it competes. The Court explained that these were relevant factors to an inquiry into the anticompetitive effect of RPM.²⁵

These considerations lead us to conclude that the change in the rule for RPM from *per se* condemnation to a rule of reason analysis does not by itself dictate that we vacate the minimum RPM prohibitions in the *Nine West* order. In the *Sharp Electronics* order modification, the Commission addressed the question of whether Sharp Electronics showed that the changes in the law eliminated the need for the order or made continued application of the order inequitable or harmful to competition. We said:

However, this showing [of change from *per se* to rule of reason analysis] alone, without further showing that the order's prohibitions cannot be justified under current law, would be insufficient to require reopening. This is because the challenged vertical restrictions, although not *per se* unlawful, may

²² *Id.* at 2719.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

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nonetheless be unreasonable. If so, the order's prohibitions would be consistent with existing law.²⁶

Our obligation is to ask whether a modification is appropriate in light of *Leegin's* cautions about the circumstances in which the establishment of an RPM program could be anticompetitive and subject to prohibition under the rule of reason.

Leegin did not spell out which variation of the rule of reason should be applied to RPM going forward. The analytical options would include the elaborate, comprehensive inquiry suggested in decisions such as *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918), or a truncated rule of reason analysis, such as the type applied by the Supreme Court²⁷ and the U.S. Court of Appeals for the District of Columbia Circuit in *Polygram Holdings, Inc. v. Fed. Trade Comm'n*, 416 F.3d 29 (D.C. Cir. 2005), or some other truncated inquiry into the likely effects of the practice.²⁸ The *Leegin* decision may be read to suggest a truncated analysis, such as the one applied in *Polygram Holdings*, might be suitable for analyzing minimum resale price maintenance agreements, at least under some circumstances. The *Leegin* Court observed:

²⁶ *Sharp Electronics*, 112 F.T.C. at 306.

²⁷ See, generally, *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986); *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85 (1984); and, *National Soc'y of Prof'l Engineers v. U.S.*, 435 U.S. 679 (1978).

²⁸ The D.C. Circuit in *Polygram Holdings* explained its reasoning for adopting a truncated analysis:

Since *Professional Engineers* the Supreme Court has steadily moved away from the dichotomous approach – under which every restraint of trade is either unlawful per se, and hence not susceptible to a procompetitive justification, or subject to a full-blown rule-of-reason analysis – toward one in which the extent of the inquiry is tailored to the suspect conduct in each particular case.

Polygram Holdings, 416 F.3d at 34.

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As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote competitive ones.²⁹

In this and related passages, the Court has invited efforts by the lower courts, and this Commission, after *Leegin* to devise rules “for offering proof, or even presumptions where justified,” to assess the reasonableness of RPM. The elaboration of such evidentiary rules and substantive presumptions resembles the analytical approach that the D.C. Circuit endorsed in *Polygram Holdings*. Under *Polygram Holdings*, if a practice is “inherently suspect” a defendant using it must then “either identify some reason the restraint is unlikely to harm consumers, or identify some competitive benefit that plausibly offsets the apparent or anticipated harm.”³⁰ What renders a practice “inherently suspect” is “not necessarily from anything ‘inherent’ in a business practice but from the close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare.”³¹

The question is whether, post-*Leegin*, RPM can be considered in some circumstances as “inherently suspect,” and thus a worthy object for the scrutiny under the presumptions and phased inquiries that the D.C. Circuit approved in *Polygram Holdings* for certain horizontal restraints. On the one hand, manufacturers use RPM to ensure that retailers sell their products at prices fixed by the manufacturer. In this case, for example, Nine West states that the purpose of its Petition is to enable it to “maintain resale prices.”

²⁹ *Leegin*, 127 S.Ct. at 2720.

³⁰ *Polygram Holdings*, 416 F. 3d at 36.

³¹ *Id.* at 37.

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One might say that there is a “close family resemblance” between Nine West's use of resale price maintenance and “another practice that already stands convicted in the court of consumer welfare” – horizontal price fixing. At the same time, in deciding to overrule the *per se* ban of *Dr. Miles*, the *Leegin* Court relied heavily upon commentary that said RPM can serve benign or competitive purposes.³² The Court also explicitly noted that evidence of price effects would only be the beginning point for further analysis of competitive harm. This seems to indicate the Court's view that the price setting associated with an RPM agreement ordinarily is less intrinsically dangerous than agreements among direct rivals to set prices or other terms of trade.

RPM agreements ordinarily might be seen by the Court as less intrinsically dangerous than horizontal price-setting arrangements, but not invariably so. The Court's elaboration of these relevant factors provides an approach for identifying when RPM might be subjected to closer analytical scrutiny, such as that anticipated by *Polygram Holdings* or other truncated rule of reason analyses. For example, the *Leegin* Court said with respect to RPM that “unlawful price fixing, designed solely to obtain monopoly profits, is an ever present temptation” and explained that “a manufacturer with market power . . . might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants” or “could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers.”³³

At this early stage of the application of the teaching of *Leegin* by the lower courts and the Commission, the *Leegin* factors can serve as helpful guides to begin an assessment of when RPM deserves closer scrutiny. Through the Commission's own enforcement work, research, and external consultations such as workshops, we anticipate further refinements to this analysis, including the further

³² *Leegin*, 127 S.Ct. at 2714-16.

³³ *Id.* at 2716-17.

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specification of scenarios in which RPM poses potential hazards and those in which it does not.

B. Application to Nine West's Petition

It is within this framework that we consider Nine West's arguments that, post-*Leegin*, its practices will not harm competition and that procompetitive justifications warrant approval of its order modification request.³⁴ Consistent with the framework outlined above, two ways that Nine West can demonstrate that its use of RPM will not harm competition is to show that it lacks market power, and that the impetus for the resale price maintenance is from Nine West itself and not retailers (*i.e.*, the result of a retailer cartel or pressure from a dominant, inefficient retailer). If market power does not exist, the forces of interbrand competition will discipline any supra-competitive pricing.³⁵ But, if market power does exist and those forces therefore will not discipline Nine West's resale prices, then it could be profitable for Nine West to impose higher resale prices than would otherwise prevail over a substantial period of time. That is harmful to both competition and consumers. That is the fundamental teaching of Sections 0.1 and 1.0 of the Merger Guidelines.³⁶

On the record before us, it appears that Nine West has only a modest market share in any putative relevant product market in which it competes. This suggests *prima facie* that it lacks market power, and there is no reason to believe that there is collective market power in any putative market. There is also no evidence of a dominant, inefficient retailer in this market, and Nine West states that Nine West itself is responsible for its desire to engage in resale price maintenance; it is based on its wish to increase the services offered by retailers that sell Nine West products. We therefore grant

³⁴ *Polygram Holdings*, 416 F.3d at 36.

³⁵ *GTE Sylvania*, 433 U.S. at 52, n.19 (1976).

³⁶ United States Department of Justice and Federal Trade Commission, 1992 HORIZONTAL MERGER GUIDELINES (rev. April 8, 1997) (available at <http://www.ftc.gov/bc/docs/horizmer.shtm>).

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Nine West's Petition on the basis that Nine West's use of resale price maintenance is not likely to harm consumers.

If we were to conclude that Nine West runs afoul of the *Leegin* factors and raises competitive concern, Nine West could also meet its burden by demonstrating that its use of resale price maintenance is procompetitive. For example, firms engaging in minimum resale price maintenance may be able to show a justification for the practice by presenting evidence that while the practice might increase resale prices for its products over what they would otherwise be, it enhances output. That might suggest that consumers place a higher value on non-price factors (such as service) than they do on price, so that the practice may be viewed as efficiency-enhancing.

Nine West asserts that implementation of minimum resale price maintenance agreements will increase consumer demand for its products and thereby enhance competition. However, Nine West has not provided evidence of procompetitive effects that would result from its use of resale price maintenance agreements beyond its conclusory assertion. Nine West asserts that it cannot provide any specific, empirical examples of procompetitive effects because it is prohibited from engaging in resale price maintenance agreements, except for unilateral termination under *Colgate*.³⁷ Nine West also asserts that it is at a disadvantage compared to its competitors that are engaging in resale price maintenance agreements because if those competitors' programs are challenged, those competitors have the ability to "demonstrate their programs' validity with a showing of their procompetitive effects."³⁸ The former protestation has merit. The latter assertion does not.

³⁷ Supplemental Petition at 9.

³⁸ *Id.* at 9-10.

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V.

***THE COMMISSION GRANTS IN PART NINE WEST'S
REQUEST FOR MODIFICATION***

Although at this time we have determined that Nine West's potential use of resale price maintenance is not likely to harm consumers at this time, and we are setting aside that portion of the Commission's Order, the circumstances in the market could change. We have therefore concluded there is a basis to monitor the effects of Nine West's use of resale price maintenance. Depending on the circumstances, it may become necessary to determine if Nine West's use of resale price maintenance is procompetitive, as it claims in its Petition (but has not proved). Part of Nine West's rationale, if not its only rationale, for its desire to engage in resale price maintenance is unproven procompetitive efficiencies. Therefore, to aid the Commission in monitoring Nine West's use of resale price maintenance, we require Nine West to file a report with the Commission one, three, and five years after the Order has been modified that provides information describing Nine West's use of RPM and its effect on its prices and output.

We find that Nine West has met its burden under the analysis suggested in *Leegin* with respect to scenarios in which RPM may endanger competition. Nine West's potential use of RPM is currently not captured by the factors that *Leegin* identified as possible criteria for condemning RPM. In particular, Nine West has demonstrated that it lacks market power and that the Nine West itself is the source of the resale price maintenance. We grant Nine West's Petition on that basis. However, the Commission will continue to monitor the effects of Nine West's use of resale price maintenance should it choose to adopt a resale price maintenance program. The reporting obligations we impose on Nine West will aid in that process. The Commission may challenge its use of such a program should it appear to be illegal. Accordingly,

IT IS ORDERED that this matter be reopened and that the Commission's order in Docket No. C-3937, issued on April 11,

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2000, be, and it hereby is, modified to set aside Paragraph II of the Order and to add the following proviso to Paragraph VII of the Order, as of the date of service of this order:

IT IS FURTHER ORDERED that on the first, third, and fifth anniversary of the date this Order Modifying Order becomes final, and at such other times as the Commission or its staff shall request, Nine West shall file with the Commission a verified written report stating whether Nine West has engaged in resale price maintenance agreements (other than announcing resale prices in advance and unilaterally refusing to deal with those who fail to comply), and if so, setting forth in detail the manner and form in which Nine West has engaged in such resale price maintenance agreements including, but not limited to a discussion of, with supporting documents and communications, the planning, implementation, reasons for, terms, and results of any resale price maintenance agreements, who prompted or initiated the use of the resale price maintenance agreements, the brands and markets where the resale price maintenance agreements were implemented, Nine West's market or segment shares, and the projected or actual benefits to consumers and Nine West from the resale price maintenance agreements.

By the Commission.

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IN THE MATTER OF

**INOVA HEALTH SYSTEM FOUNDATION
AND
PRINCE WILLIAM HEALTH SYSTEM, INC.**

Docket No. 9326 – Order, June 17, 2008

ORDER DISMISSING COMPLAINT

On May 8, 2008, the Federal Trade Commission issued the Administrative Complaint in this matter, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b), having reason to believe that Respondents Inova Health System Foundation (“Inova”) and Prince William Health System, Inc. (“PWHS”) had entered into a merger agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. Complaint Counsel and the Respondents have now filed a Joint Motion to Dismiss Complaint, on the grounds that the Respondents have abandoned the transaction and have withdrawn their Hart-Scott-Rodino Notification and Report Forms.¹ By Order dated June 13, 2008, Commissioner J. Thomas Rosch, serving by designation as the Administrative Law Judge in this matter, has certified the Joint Motion to the Commission.

The Commission has determined to dismiss the Administrative Complaint without prejudice, consistent with both Commission precedent and the current posture of this case. In *Equitable*,² for example, the Commission dismissed the administrative complaint without prejudice after the Respondents publicly announced that they had mutually terminated the acquisition agreement at issue in

¹ *Joint Motion to Dismiss Complaint* (June 11, 2008) (“Joint Motion”), available at <http://www.ftc.gov/os/adjpro/d9326/080611jointmodismisscmplt.pdf>.

² *In the Matter of Equitable Resources, Inc., Dominion Resources, Inc., Consolidated Natural Gas Company, and The Peoples Natural Gas Company*, Docket No. 9322, Order Dismissing Complaint (January 31, 2008) (Public Version), at 2, available at <http://www.ftc.gov/os/adjpro/d9322/080204complaint.pdf>.

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the matter, and one of the Respondents filed a notice of that termination with the U.S. Securities and Exchange Commission. Similarly, in *Swedish Match*,³ the Commission dismissed the administrative complaint without prejudice after the parties determined to abandon the transaction at issue and Swedish Match AB withdrew the applicable Hart-Scott-Rodino Notification and Report Form. The Commission noted:

The withdrawal of the Notification and Report Form – and the parties’ abandonment of the February 10, 2000 Asset Purchase Agreement – ensure that the most important elements of the relief set out in the administrative complaint’s Notice of Contemplated Relief have been accomplished without the need for further litigation in this case. Therefore, the public interest warrants dismissal of the administrative complaint. The Commission has determined to do so, however, without prejudice, because it is not reaching a decision on the merits.⁴

For similar reasons, the Commission dismissed the administrative complaint in *H.J. Heinz*⁵ after the Respondents abandoned the transaction at issue.

In this matter, as in the foregoing cases, the most important elements of the relief set out in the Notice of Contemplated Relief in the Administrative Complaint have been accomplished without the need for further administrative litigation. In particular, the

³ *In the Matter of Swedish Match North America Inc., and National Tobacco Company, L.P.*, Docket No. 9296 (*Swedish Match*), Order Dismissing Complaint (January 4, 2001), available at <http://www.ftc.gov/os/2001/01/swedishdismisscmp.htm>.

⁴ *Id.*, citing *R.J. Reynolds Tobacco Company*, Docket No. 9285, Order Dismissing Complaint (January 26, 1999), at 4.

⁵ *In the Matter of H.J. Heinz Company, Milnot Holding Corporation, and Madison Dearborn Capital Partners, L.P.*, Docket No. 9295 (*H.J. Heinz*), Order Dismissing Complaint (December 4, 2001), available at <http://www.ftc.gov/os/2001/12/heinzorder.pdf>.

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Respondents have publicly announced that they have abandoned the proposed merger at issue. Moreover, the Respondents have withdrawn the Hart-Scott-Rodino Notification and Report Forms they filed for the proposed transaction. As a consequence, the Respondents would not be able to effect the proposed transaction without filing new Hart-Scott-Rodino Notification and Report Forms.

For the foregoing reasons, the Commission has determined that the public interest warrants dismissal of the Administrative Complaint in this matter. The Commission has determined to do so without prejudice, however, because it is not reaching a decision on the merits. Accordingly,

IT IS ORDERED that the Administrative Complaint in this matter be, and it hereby is, dismissed without prejudice.

By the Commission, Commissioner Rosch not participating.

RESPONSES TO PETITIONS TO QUASH OR
LIMIT COMPULSORY PROCESS

**SOLVAY PHARMACEUTICALS, INC.,
BESINS HEALTHCARE, INC.,
WATSON PHARMACEUTICALS, INC.,
WATSON PHARMA, INC.,
PAR PHARMACEUTICAL COMPANIES, INC.,
AND
PADDOCK LABORATORIES, INC.**

FTC File No. 071 0060 – Decision, March 14, 2008

RESPONSE TO PAR PHARMACEUTICAL COMPANIES, INC.'S AND
PADDOCK LABORATORIES, INC.'S PETITION TO QUASH OR LIMIT
SUBPOENAS DATED FEBRUARY 13, 2008

Dear Mr. Gidley:

The challenged subpoenas were issued in the Commission's investigation to determine whether there is reason to believe that patent settlements between a manufacturer of branded pharmaceuticals and Petitioners (Par Pharmaceutical Co., Inc. and Paddock Laboratories, Inc.) violate § 5 of the Federal Trade Commission Act. 15 U.S.C. § 45. This letter advises you of the Commission's disposition of the Petition to Quash or Limit Subpoenas Dated February 13, 2008 ("Petition to Quash") issued to Messrs. Paul Campanelli, Ed Maloney, and Scott Tarriff for oral testimony at investigational hearings to be conducted in accordance with the provisions of Commission Rules 2.8 and 2.9, 16 C.F.R. §§ 2.8, 2.9, on various dates, compliance with which is stayed pending disposition of this motion. 16 C.F.R. § 2.7(d)(4). Commissioner Pamela Jones Harbour, acting as the Commission's delegate, in her sole discretion, has referred this Petition to the full Commission for determination. *See Id.*

Responses to Petitions to Quash

The Petition to Quash does not challenge the Commission's right to take these investigational hearings or argue that the hearings themselves constitute some undue burden; rather, it argues that video recording of investigational hearings is prohibited by the Commission's Rules, and would deprive Petitioners of due process of law. The Petition to Quash is denied for the reasons stated herein. Unless modified in accordance with 16 C.F.R. § 2.7(c), Messrs. Campanelli, Maloney, and Tarriff must comply with the Subpoenas *Ad Testificandum* on the following dates: Campanelli, March 28, 2008; Maloney, April 4, 2008; and Tarriff, April 10, 2008.

I. Background and Summary

The Federal Trade Commission issued subpoenas *ad testificandum* on February 13, 2008, to Messrs. Campanelli, Maloney, and Tarriff for oral testimony at investigational hearings. Petitioners' counsel accepted service of process on their behalf. In relevant part, each subpoena provides that: "The investigational hearing of [person directed to appear] will be recorded by sound-and-visual means in addition to stenographic means." Exhibits A, B, and C to Petition to Quash. Petitioners timely filed the Petition to Quash on February 20, 2008.¹

II. Investigative Authority of the Federal Trade Commission.

The investigational powers of the Commission are derived from Sections 6, 9, 10 and 20 of the Federal Trade Commission Act, 15 U.S.C. §§ 46, 49, 50, 57b-1, and are exercised in accordance with the procedures set out in Part 2A of the Commission's Rules. 16

¹ In ruling on the Petition to Quash, the Commission expressly does not reach the issue of whether Petitioners have standing to file the Petition to Quash subpoenas served on Messrs. Campanelli, Maloney, and Tarriff – who are either current or former employees of Petitioners – without joining them as parties to this Petition to Quash. While the Commission has reason to believe that counsel for Petitioners also represent Messrs. Campanelli, Maloney, and Tarriff, no representation to that effect appears in the Petition to Quash. The Commission assumes that the individuals subpoenaed are aware of the instant Petition to Quash and have elected not to raise any objections particular to themselves regarding compliance with the subpoenas.

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C.F.R. §§ 2.1-2.16. Congress vested the Federal Trade Commission with broad independent authority to enact rules and regulations to carry out its mission. The Commission has properly implemented those rules of practice for non-adjudicative Part 2 proceedings, including investigational hearings, through proper rule making procedures. *See id.* The Commission's Rules do not forbid videotaping investigational hearings. The Petition to Quash, however, claims that the *absence* of express reference to videotaping in the Rules bars the Commission from videotaping investigational hearings.

Congress intended the Commission to “have ample power of subpoena” which it “expressly made broad enough to permit a full exercise of that power in connection with any kind of investigation which may be undertaken.” H.R. Rep. No. 63-533, pt. 1, at 7 (1914). The courts have confirmed the “[C]ongressional purpose to endow the Commission with broad powers of investigation. . . .” *Fed. Trade Comm’n v. Browning*, 435 F.2d 96, 99 (D.C. Cir. 1970). This is the context in which the Commission must interpret whether the Commission's Rules allow videotaping of investigational hearings.

III. The Rules Permit Videotaping of Investigational Hearings.

Investigational hearings are conducted pursuant to Commission Rules 2.8 and 2.9. Rule 2.8(b) reads in part that investigational hearings “shall be stenographically reported and a transcript thereof shall be made a part of the record of the investigation.” 16 C.F.R. § 2.8(b). Petitioners interpret this language as foreclosing all other means of recording investigational hearings.² In doing so,

² Petitioners' reliance on an analogy to the 1993 amendments to the Federal Rules of Civil Procedure allowing videotaped depositions, Petition to Quash at 5, to argue that a negative implication is appropriate here is unpersuasive. The important feature of the 1993 amendment was not that it referred to videotaping, but that it allowed the noticing party to decide to videotape without prior leave of court. Fed. R. Civ. P. 30(b)(2) and (3) advisory committee notes (1993). Further, the Federal Rules of Civil Procedure provide no authority regarding the Commission's own Part 2 – Nonadjudicative Procedures.

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Petitioners read the Rule narrowly and ask the Commission to find a negative implication in the Rule's reference to stenographic recording and transcription.³

The Commission finds that the requirement that such hearings be “stenographically reported” and transcribed establishes a *minimum* standard of recordation, and, further, that this minimum standard does not foreclose any, much less all, other means of recording. Were we to accept Petitioners' narrow reading of the rule, it would forbid court reporters from using steno masks, audiotapes, and digital back-up systems to enhance the accuracy of transcription. It would also seem to prohibit both Commission staff and counsel for the witness from taking longhand notes during the course of investigational hearings.⁴ The Commission sees no merit in denying either itself or the witness the protections afforded by an accurate record, and therefore does not draw any negative or preclusive inference from the Rule's stenographic reporting requirement. Instead, we find that the FTC Act and our Rules permit video recording of investigational hearings.

³ Although not stated by Petitioners, they in effect ask the Commission to invoke the old Latin maxim of construction *expressio unius est exclusio alterius* in their favor. Reed Dickerson refers to this maxim as, “Several Latin maxims masquerade as rules of interpretation while doing nothing more than describing results reached by other means. . . . Accordingly, the maxim is at best a description, after the fact, of what the court has discovered from context.” REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 234-35 (1975). Likewise, Richard Posner observed that the Supreme Court's usage of this maxim “confirms that judicial use of canons of construction is opportunistic.” RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 282 (1985). The Commission's rules concern themselves with insuring the fairness and reliability of its investigations; accordingly, we decline the opportunity to use this maxim to construe Rule 2.8 in a manner that would preclude using technology to enhance the accuracy of the records of investigational hearings without enhancing fairness in anyway.

⁴ The Petition to Quash, page 4, relies on a narrow definition of stenography: “1: the art or process of writing in shorthand[] 2: shorthand esp. written from dictation or oral discourse[] 3: the making of shorthand notes and subsequent transcription of them – stenographic. . . *adj* – stenographically. . . *adv*' . . .” (citation omitted).

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Rule 2.8(b), 16 C.F.R. § 2.8(b) states that “[i]nvestigational hearings shall be conducted. . . for the purpose of hearing the testimony of witnesses and receiving documents and other data relating to any subject under investigation.”⁵ Witness testimony includes both verbal and nonverbal evidence, sometimes referred to as the witness’s demeanor, or demeanor evidence. Petitioners’ interpretation of Rule 2.8(b) would require the Commission to hold that the Rule was intended to yield records of investigational hearings devoid of witness demeanor evidence. Videotaping captures the witness’s nonverbal testimony which, at a minimum, relates to a subject which is always relevant in an investigation: the credibility of each witness.⁶

Finally, the Petition to Quash relies on various cases at pages 5 and 6 for the general proposition that the Commission cannot violate its own rules, especially when doing so would be prejudicial to others. However, the Petitioners concede that the rules do not explicitly forbid the use of videotaping. Moreover, Petitioners have not identified how supplementing the stenographic record of these

⁵ “Data” is neither a narrow nor technical term. It includes “factual information. . . used as a basis for reasoning, discussion, or calculation” . . . as well as “information output by a sensing device or organ that includes both useful and irrelevant or redundant information and must be processed to be meaningful.” MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 293 (10th ed. 2002).

⁶ In appropriate cases, 16 C.F.R. § 2.9(b)(6) provides additional authority for videotaping investigational hearings. The person conducting the hearing is vested with broad discretion to “take all necessary action to regulate the course of the hearing” in order to “avoid delay” and to “prevent or restrain disorderly, dilatory, obstructionist, or contumacious conduct. . . .” *Id.* “Conduct that a stenographic transcript could not adequately convey – such as aggressive examination, abusive treatment of opposing counsel or the witness, and witness coaching – may be preserved in full detail on video. Therefore, the video deposition is a powerful means of curbing discovery abuse.” Michael J. Henke and Craig D. Margolis, *The Taking and Use of Video Depositions: An Update*, 17 REV. LITIG. 1, 20 (1998). Videotaping provides the person conducting the hearing with an important tool to protect the integrity of the investigation and the subjects being investigated. Videotaping a hearing, especially one not directly supervised by an independent adjudicative officer, can be a “necessary action to regulate the course of the hearing” within the meaning of Rule 2.9(b)(6).

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hearings with videotape could unfairly prejudice the witnesses. Accordingly, the cases cited by Petitioners are inapposite and the Commission finds that Petitioners have not provided sufficient law or facts to warrant granting this Petition to Quash.⁷

IV. Videotaping These Investigational Hearings Will Not Infringe Any of Petitioners' Due Process Rights.

Petitioners do not claim that the Commission's procedures for these investigational hearings, other than videotaping, deprive them or Messrs. Campanelli, Maloney, and Tarriff of any due process rights. Rather, Petitioners argue that "videotaping an investigational hearing would erode the constitutional distinction between an investigational hearing and an adjudicative hearing. . ." because it "would over-dignify the former and imperil the sanctity of the latter." Petition to Quash at 9. Petitioners further argue that "there is no genuine reason to seek to [videotape] other than to attempt to invade a subsequent adjudicative proceeding with the videotaped testimony from the investigational hearing." *Id.* at 10.

Petitioners also do not identify which attribute of videotaping makes that recording medium more capable of turning investigational hearings into adjudicative hearings than the attributes of any other recording medium – be it stenography, audio tape recording, or trial testimony regarding the investigational hearing. Thus, Petitioners have advanced no cognizable claim that videotaping, by itself, could ever abridge their due process rights, in these or any other hearings.

Finally, Petitioners assert that testimony taken during an investigational hearing can never be admissible in evidence at the time of trial. Petition to Quash at 9-10. Petitioners have not shown how differences between stenographic recording and video

⁷ See *Fed. Trade Comm'n v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) ("The burden of showing that the request is unreasonable is on the subpoenaed party. Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to the purpose.").

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recording would ever determine whether that testimony should be received in evidence at trial. Petitioners also have not demonstrated, and we reject any implication, that it would *always* be impermissible as a matter of due process to offer testimony from our investigational hearings into evidence at the time of trial. Indeed, Petitioners themselves cite a case which is contrary to that proposition.⁸ The means used to memorialize investigational hearing testimony does not control whether or when that testimony can be used at trial. Whether particular testimony from an investigational hearing will be admissible at the time of trial depends on facts particular to the evidence being offered, the circumstances prevailing at the time of the offer, and the purpose for which it is offered.

Because the Commission cannot anticipate every fact that might arise at the time of trial bearing on the admissibility of any given testimony that might be taken during these investigational hearings, it would be premature and speculative for the Commission to rule on

⁸ *Universal Church of Jesus Christ, Inc. v. Comm'r of Internal Revenue*, 55 T.C.M. (CCH) 144 (1988), cited by Petition to Quash at 12, is such a case. In that matter a witness was confronted with his prior contradictory testimony from an investigational hearing conducted by the FTC during a subsequent IRS adjudicative proceeding testing the validity of a claimed tax exemption. See also *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1, 4; *FTC v. Foster*, No. Civ. 07-352, 2007 WL 1793441, at *9, *38 (D.N.M. May 29, 2007); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 117 n.4, 141, 152 (D.D.C. 2004). Indeed, the Supreme Court has even allowed illegally seized evidence which could not be used as evidence in the prosecutor's case-in-chief in a criminal trial to be used to impeach a defendant's testimony. *Walder v. United States*, 347 U.S. 62, 65 (1954) ("It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment."). Petitioners' reliance on *Hanna v. Larche*, 363 U.S. 420 (1960), is unavailing. Petition to Quash at 1, 7-9. Nothing in that case questions the reliability of the Commission's investigational hearings or limits the subsequent use of testimony from such hearings in adjudicative proceedings under appropriate circumstances.

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such issues at this time. There will be time enough for the trial judge to review any due process implications arising from such evidence. Accordingly, we find that this Petition to Quash does not raise any due process issues we can resolve at this time regarding subsequent uses of testimony from these investigational hearings, regardless of how they might be recorded.

V. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED** that the Petition to Quash be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e), Messrs. Campanelli, Maloney, and Tarriff must appear and testify on the following dates: Mr. Campanelli, March 28, 2008; Mr. Maloney, April 4, 2008; and Mr. Tarriff, April 10, 2008.

By direction of the Commission.

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WEST ASSET MANAGEMENT, INC.*FTC File No. 072 3006 – Decision April 18, 2008*RESPONSE TO WEST ASSET MANAGEMENT, INC.'S PETITION TO
LIMIT CIVIL INVESTIGATIVE DEMAND

Dear Mr. Berg:

This letter advises you of the disposition of the Petition to Limit Civil Investigative Demand (“Petition”) served on West Asset Management, Inc. (“Petitioner” or “WAM”) in conjunction with an investigation of WAM’s conduct by the Federal Trade Commission (“FTC” or “Commission”). The Petition is denied for the reasons hereinafter stated. The new date for Petitioner to comply with the Civil Investigative Demand (“CID”) is May 8, 2008.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission’s delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹

I. Background and Summary

Discussions between Petitioner and Commission Staff concerning the need for WAM’s business records began months before this CID was served on WAM on August 14, 2007. Petition at 1, 9. Frequent discussions with WAM regarding the scope of the CID, record storage and retention practices, confidential and sensitive information in business records relating to consumers and WAM’s clients, data sampling possibilities, and the burden of producing information responsive to various specifications of the

¹ This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail.

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CID continued until the Petition was timely filed on November 5, 2007. Petition at 10-13. It should be noted that WAM claims to have provided some material responsive to the CID; however, Staff and WAM have divergent opinions on the extent to which these materials substantially comply with the CID as a whole.²

The CID was issued as part of the Commission's investigation to determine whether WAM, a debt collection firm, may have violated either the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.* or the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.* WAM has requested that the CID be limited "because: (1) the requests are unduly burdensome and can be reasonably limited without adversely impacting the FTC's investigation; and (2) the requests require the disclosure of confidential and personally identifiable consumer and client information³ that is not relevant in any manner to the FTC's investigation." Petition at 2. WAM seeks to withhold production of confidential and sensitive information on the grounds of relevance;⁴ however, the relevance of information

² Compare Petition at 11 n.2 ("This conference call is but one example of the extraordinary efforts WAM made to assist the FTC.") with Petition at 13 n.3 ("In this letter [Petition, Exhibit S, Letter from Bradley Elbein to Andrew Berg dated Oct. 26, 2007], Mr. Elbein stated his belief that WAM had not retained audio recordings pursuant to its obligations under the CID. . . .") and Petition, Exhibit O (Letter from Robin Rock to Andrew Berg dated Oct. 19, 2007) at 2 ("Although no qualification or objection was raised in response to Document Request No. 21, it now appears that WAM made a significantly less than complete production of its business records.").

³ Except where context might otherwise require, this opinion will use the phrase "confidential information" to refer collectively to the types of information WAM seeks to withhold from its responses to the CID, including confidential business information, client identity information, personally identifiable consumer information, and protected health information.

⁴ The Petition's actual claim is not that information identifying potential witnesses would be irrelevant to this investigation; rather, it is that WAM should be permitted to redact such identifying information because a mere theoretical risk of disclosure should outweigh the Commission's need for witness information. Petition at 27-28. With respect to client identity information, WAM proposes to insert a unique identifier into the records being produced, and the identifying information would be produced, if necessary, in response to a subsequent request from the Commission. *Id.* WAM notes that Staff had previously agreed to this procedure, *id.* at 27, but fails to note that "WAM has made it patently obvious that

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regarding the identity and location of consumers and clients, each of whom may, in turn, have information regarding WAM's business practices, is beyond legitimate question.⁵

WAM notes that the Regional Director for the Commission's Southeast Region offered to modify the CIDs in several respects on October 26, 2007.⁶ Petition at 2-3. WAM, however, claims those proposed modifications "make no meaningful difference." *Id.* at 3. Accordingly, the Commission will review and, for the reasons set out below, enforce the CID as issued.⁷

WAM's arguments against enforcement of the CID intertwine the issues of burden and the handling of confidential information.

redacting its clients' identities is time consuming and costly, and negatively impacts its ability to comply with the CID. Therefore, although we have thoroughly considered WAM's suggestion that it replace client information with another identifier, we cannot accommodate this request without significantly undermining our investigation. We, therefore, decline to acquiesce to this request." Petition, Exhibit A at 3, Letter from Dama Brown to Andrew Berg dated Oct. 26, 2007.

⁵ This is especially so in this case where we do not know whether WAM is primarily engaging in debt collection for its own account or as the agent of its client, including, for example, a client who may have directed, audited, or ratified practices of WAM for which the Commission might seek legal redress from both WAM and its client. As a result, such redaction could mask the identity of witnesses, as well as that of potential respondents or defendants in an enforcement action, clearly information which is relevant in a Commission investigation.

⁶ WAM indicates this was the first and only time the Regional Director offered to modify the CID to address its burden concerns. *But see* Petition, Exhibit E (Letter from Brad Elbein to Andrew Berg dated August 31, 2007). Even if the claim were literally correct, it still fails to note that the Commission Staff offered several concessions to accommodate WAM's burden concerns during the investigation prior to issuance of the CID. Petition, Exhibit D (Letter from Robin Rock to Andrew Berg, dated March 23, 2007).

⁷ Commission Staff and WAM each have an incentive to insure that WAM's burden of responding to the CID is no greater than necessary. The Commission's Rules are sufficiently flexible to permit reasonable adjustments in the scope, scale, and timing of WAM's responses to the CID. *See, e.g.*, 16 C.F.R. § 2.7(c). This Letter Ruling will deal with the thorny issues regarding confidential information. Thereafter, well-motivated counsel for both sides can and should apply themselves to the task of insuring that WAM's burden is no greater than necessary.

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But, these issues actually are not inseparable. For instance, if the burden of production for a particular class of records lies almost exclusively in the time and costs necessary to redact particular information within those records, it would be illogical to attempt resolution of the burden issue before addressing the information confidentiality issues.

Before turning to those issues, however, it is necessary to emphasize the fact that the party who moves to limit the enforcement of a CID bears the burden of demonstrating that a particular CID specification is unreasonable – the Commission does *not* need to demonstrate that a specification is reasonable. “[T]he burden of showing that an agency subpoena is unreasonable remains with the respondent, . . . and where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met. (Citations omitted).” *Fed. Trade Comm’n v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979), quoting *Sec. and Exchange Comm’n v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2nd Cir. 1973), *cert. denied*, 415 U.S. 915 (1974). Petitioner repeatedly and inappropriately structures its arguments for relief by contending that the Commission failed to show that a specification is necessary or reasonable. *See, e.g.*, Petition at 27 (“The FTC has not shown that the disclosure of creditor identifying information. . . is needed for its investigation.”). Thus, the Petitioner inappropriately attempts to shift the burden regarding the reasonableness of the CID’s specifications from WAM to the Commission.

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II. WAM Is Not Entitled to Withhold Confidential Information.⁸

WAM has not asserted a legally cognizable claim of privilege as to any portion of its records. It instead relies on statutory confidentiality provisions of federal law, e.g., the Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191 (Aug. 21, 1996) *as amended by* Pub. L. 105-33 (Aug. 5, 1997) *and* Pub. L. 105-34 (Aug. 5, 1997) (“HIPAA”), and on the confidentiality and data security provisions of contracts with its clients. As a general matter, confidentiality or privacy concerns do not provide a ground for exclusion, in the absence of a claim of privilege, unless “compliance threatens to unduly disrupt or seriously hinder normal business operations.” *Fed. Trade Comm’n v. Texaco, Inc.*, 555 F.2d 862, 882 (DC Cir. 1976). The DC Circuit in *Invention Submission Corp.* did not lighten or change this standard just because disclosing the identity of potential witnesses to the FTC might place the respondent under a “cloud of suspicion and speculation.” If the mere creation of a cloud of suspicion were sufficient to stay enforcement, then every CID in every investigation would be suspect. *Fed. Trade Comm’n v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (DC Cir. 1992). WAM has not shown that disclosure of confidential

⁸ WAM has made no showing that the confidentiality provisions of 15 U.S.C. § 57b-2 are inadequate to protect WAM’s legitimate interests in avoiding public disclosure of confidential information. Contrary to WAM’s assertion that the “FTC offers no guarantee the information will be kept confidential,” Petition at 25, the FTC is not required to do so. It is, rather, WAM’s burden to show that production of confidential information to the Commission is highly likely to result in the public disclosure of that information. *Exxon Corp. v. Fed. Trade Comm’n*, 589 F.2d 582, 589 n.14 (DC Cir. 1978) (“[J]udicial intervention to prevent potential injury from prospective governmental misconduct is only justified when such misconduct is imminent, not merely hypothetical”). WAM correctly notes that two FTC laptops with confidential information were once stolen. *See* Petition at 26. It is, however, entirely inappropriate to extrapolate from that a high likelihood that WAM’s confidential information is or will ever be publicly disclosed to anybody. Petitioner offers no basis to support even *speculation* that the Commission’s privacy and data security procedures, either before or after the laptop thefts, are or would be inadequate to protect WAM’s legitimate data privacy and protection needs.

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information to the FTC threatens to unduly disrupt or hinder its business operations.

A. HIPAA Does Not Support WAM's Right to Withhold Confidential Information.

Regulations adopted by the Department of Health and Human Services govern when otherwise protected health information may be disclosed to law enforcement officials. Those regulations do not support WAM's confidentiality claims in this matter. In pertinent part, 45 C.F.R. § 164.512(f) permits a covered entity⁹ to disclose protected health information¹⁰ to a law enforcement official under certain circumstances. In this particular case, the protected health information sought by the CID is relevant and material to a legitimate law enforcement inquiry under the FDCPA, the requests are specific and limited in scope to the extent practicable in light of the circumstances, and de-identified information would not permit the FTC to identify potential witnesses within the meaning of 45 C.F.R. § 164.512(f)(1)(ii)(C)(1 - 3).¹¹ HIPAA provides no basis for WAM to withhold protected health information from its responses to the CID.

⁹ WAM effectively claims to be a covered entity by reason of client contract provisions making its operations subject to HIPAA when it provides collection services to medical services providers. Petition at 23-24.

¹⁰ The Commission assumes without deciding that all of the confidential information WAM seeks to withhold by reason of the data security provisions of HIPAA is protected health information within the meaning of HIPAA.

¹¹ A police officer *without a subpoena* can obtain more protected health information under 45 C.F.R. § 164.512(f)(2)(i)(A - H) than WAM's interpretation would have provided to the FTC with a CID under 45 C.F.R. § 164.512(f)(1). Rule 164.512(f)(2) permits an officer without subpoena to obtain name and address, date and place of birth, social security number, ABO blood type and rh factor, type of injury, date and time of treatment, and date and time of death (if applicable), as well as distinguishing physical characteristics, in order to identify or locate a suspect, fugitive, material witness, or missing person.

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B. WAM's Client Contracts Do Not Support Withholding Confidential Information.

WAM cites no legal authority for the proposition that a person can shield its business records from all law enforcement scrutiny simply by signing a contract with a business partner which so provides. This is not surprising. It makes no sense for parties to a private contract to be able to trump the Commission's Congressionally-mandated investigative authority through such a simple business expedient. Thus, unless WAM can show that disclosing the identity of its clients would as a practical matter destroy its business, *Invention Submission Corp.* precludes any relief here for WAM.¹²

WAM's Petition at page 25 makes an unsubstantiated claim that disclosure of consumer information, or seeking client authorizations to disclose confidential information, to the FTC would cause it significant commercial harm. The nature of this harm appears to be that disclosure to its clients of "the pendency of the FTC's investigation would unduly punish WAM and cause significant business harm. . . ." Petition at 28. WAM's argument ignores the fact that the Commission Rules expressly provide that "[a]ll petitions to limit or quash investigational subpoenas or civil investigative demands and the responses thereto" are part of the public records of the Commission, except for certain information that is exempt from disclosure in certain circumstances. 16 C.F.R. §§ 2.7(g), 4.9(b)(4)(i)(2008). Thus, while the Rules may permit confidential treatment of certain information contained within a given petition – provided that such information satisfies the criteria

¹² 965 F.2d at 1090. The District Court in that case expressly rejected a CID respondent's claim that the terms of private contracts could exempt it from compliance with compulsory process issued by the FTC. *Fed. Trade Comm'n v. Invention Submission Corp.*, 1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,353 (D.D.C. 1991) ("Congress, in authorizing the Commission's investigatory power, did not condition the right to subpoena information on the sensitivity of the information sought[;] . . . any other state of affairs would undermine the Commission's mandate to investigate unfair business practices. . . simply by protecting all information under confidentiality agreements.").

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prescribed by Commission Rule 4.10(a), 16 C.F.R. § 4.10(a) – the Rules do not authorize the filing of “*In re John Doe*” petitions, and thereby prevent public disclosure of the existence of a petition or the identity of the petitioner.

Petitioner provided three redacted exemplars of client contracts as Exhibits V, X, and Y to the Petition. A review of the provisions of WAM’s client contracts, however, does not support WAM’s argument that its provision of confidential information to the FTC in response to the CID would violate such contracts. The express provisions of Paragraph II.C. of Exhibit Y require WAM to promptly notify its clients whenever it is served with a CID for confidential information. The contract also requires WAM to permit its clients to participate in any challenge to “the legal validity of such subpoena or other legal process.” Petition, Exhibit Y, ¶ II.C.¹³ This provision obligated WAM to provide prompt notice to its clients of the pendency of the CID after its service on WAM. Given that, it would be inappropriate for the Commission to take cognizance of a harm to WAM (continued client ignorance of the pendency of this investigation) that can only occur through a breach of WAM’s contractual obligations to its clients.¹⁴

¹³ WAM’s reliance on language quoted out of context from Paragraph II.E. of Exhibit Y is not helpful to its argument. Petition at 27. The first sentence of Paragraph II.E. quoted by WAM, indeed requires prior written approval from the client before WAM can disclose “the business relationship between” client and WAM. The remaining provisions of the paragraph, however, clearly show that the intent of this paragraph is to preclude WAM from using the fact of its relationship with the client to promote or sell WAM’s collection services to others. WAM cites no authority which would compel, or even permit, the Commission to allow a general prohibition of advertising to void the specific contract provisions defining the obligations of the parties regarding receipt of compulsory process for confidential information. WAM’s construction of Exhibit Y, therefore, is unreasonable.

¹⁴ The other two contract exemplars fare no better when read properly. Exhibit V, for instance, prohibits any uses of “Protected Health Information. . . other than as permitted by HIPAA.” Petition, Exhibit V ¶ 14 at 9. HIPAA permits disclosure of confidential information to the FTC in this matter. Point II.A., *supra*. The Force Majeure provision in Exhibit X provides, “In the event that either party is unable to perform any of its obligations under this Agreement. . . because of. . . action or decrees of governmental bodies. . . the party who has been so effected shall

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Petitioner has not shown that the Commission should excuse it from providing confidential information in its CID responses either as a matter of fact, law, or discretion.

III. WAM Has Not Shown That Compliance with the CID Is Unreasonably Burdensome.

Allegations of burden must be supported with specificity.¹⁵ *In re National Claims Service, Inc., Petition to Limit Civil Investigative Demand*, 125 F.T.C. 1325, 1328-29, 1998 FTC LEXIS 192, *8 (1998). *National Claims* teaches that “At a minimum, a petitioner alleging burden must (i) identify the particular requests that impose an undue burden; (ii) describe the records that would need to be searched to meet that burden; and (iii) provide evidence in the form of testimony or documents establishing the burden (e.g., the person-hours and cost of meeting the particular specifications at issue).” *Id.* WAM’s Petition fails to meet this burden.

WAM supports its Petition with a Declaration by Nancy Van Hoven which was included as an attachment to the Petition. WAM claims that it would take over two hundred days and cost more than \$300,000.00 to comply with CID Requests 23-27.¹⁶ Petition at 16,

immediately give written notice to the other party and shall do everything possible to resume performance.” Petition, Exhibit X ¶ 22 at 7. The CID is clearly an action or decree of a governmental body within the meaning of this paragraph. Further, reading this provision in that manner is consistent with other provisions of paragraph 3 of Exhibit X. Those provisions, for instance, require WAM to conduct its business in accordance with the provisions of FDCPA, which is enforceable by the FTC. *Id.* ¶ 3 at 1.

¹⁵ WAM has challenged the burdensomeness of CID Requests 23-27, and the inclusion of confidential information in Interrogatories 8, 22, and 26, and in Document Requests 21- 27. Petition at 13-14.

¹⁶ These statements of time and cost estimates are not factually supported. Even if each time and cost estimate were both accurate and verifiable, it still is not clear how much time it would take WAM to comply with the CID. For instance, to say a particular task takes 80 person/hours; does that mean it will be accomplished by ten people in one day or by one person in 10 days? If a project has five discrete steps or stages, each of which has a separately stated duration, will the accomplishment of those steps or stages be sequential or parallel, and will the time

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Decl. of Van Hoven ¶¶ 10-32, and Exhibit T. A substantial portion of those costs, however, appears to be costs associated with data reformatting and data deletion that do not appear to be necessary. For instance, it is not clear why electronic records of telephone conversations required under Document Request 25 have to be converted from “Voice Track” to “WAV” files in order to make them accessible to the Commission. Petition at 16. Paragraph 24 of the Van Hoven Declaration includes a conclusory statement to that effect, but it is unsupported by any fact. The Commission is not told whether this data conversion is required for any reason other than to permit the unnecessary redaction of confidential (but not privileged) information. There is no evidence in the record that WAM would incur substantial costs by producing the unredacted data to the FTC that is requested by the CID.

Even assuming that there were some merit to the cost estimates in the Van Hoven Declaration, these costs would only be the beginning of the analysis. In considering a petition to limit a CID the Commission must look at burden to the Petitioner in the context of the size and scope of the investigation and of the Petitioner in order to determine whether responding to the CID is likely to “pose a threat to the normal operation of [WAM’s business] considering [its] size.” *Fed. Trade Comm’n v. Rockefeller*, 591 F.2d 182, 190 (DC Cir. 1979).¹⁷ Here, given the scope and scale of WAM’s business, compliance with the CID will not likely pose such a threat to WAM. WAM is a wholly-owned subsidiary of West Corp. (a closely-held, multibillion dollar company) which generates nearly \$300 million in gross revenue per year, and the magnitude of its collection business is quite large both in number of collection efforts and dollar magnitude.¹⁸ As a result, the Commission finds that, even assuming

periods follow seriatim or overlap? Thus, the Petition’s claim that it will take in excess of 200 days for WAM to comply with the CID is largely unsupported.

¹⁷ See also *Federal Trade Comm. v. Standard American, Inc.*, 306 F.2d 231, 235 (3rd Cir. 1962) (finding petitioner had not provided sufficient evidence that compliance would lead to the “virtual destruction” of a business).

¹⁸ *West Reports Increase in Revenue for Collection Unit*, INSIDE ARM, Oct. 18, 2007, available at <http://www.insidearm.com/go/arm-news/west-reports-increase-in-revenue-for-collection-unit>.

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the accuracy of the Van Hoven Declaration, the record does not support a finding that WAM's burden of complying with the CID is likely to pose a sufficient threat to WAM's business operations to warrant limiting the CID.

V. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED** that WAM's Petition be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e), Petitioner must comply with the CID by May 8, 2008.

By direction of the Commission.

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WELLNESS SUPPORT NETWORK, INC.

FTC File No. 072 3179 – Decision, April 24, 2008

RESPONSE TO WELLNESS SUPPORT NETWORK'S REQUEST FOR FULL COMMISSION REVIEW OF DENIAL OF PETITION TO QUASH CID

Dear Mr. Fuerst:

This letter advises you of the Commission's disposition of Wellness Support Network's ("WSN") Request for Full Commission Review of Denial of Petition to Quash CID ("Request for Review") issued in conjunction with an investigation of WSN by the Federal Trade Commission (hereinafter "FTC" or "Commission"). The Request for Review is dismissed for the reasons stated below.

I. Background and Summary

On July 27, 2007, the Commission issued a CID to WSN in connection with the Commission's investigation into advertising claims made by WSN regarding WSN[®] Diabetic Pack and WSN[®] Nerve Support Formula (hereinafter "WSN's products"). The CID was issued pursuant to the Commission's Resolution of May 12, 2006. On August 27, 2007, WSN timely filed its Petition to Quash.

WSN's Petition to Quash claimed that the CID should be quashed for three reasons: (1) the FTC "has neither the authority nor the expertise to make a determination as to whether a product is a drug, medical food or a dietary supplement;" Petition at 4; (2) "the CID was not properly tailored to yield information that is relevant and material to this request for information;" *id.* at 9; and (3) the "CID is unreasonably overbroad and unduly burdensome," *id.*

Commissioner Harbour, acting as the Commission's delegate, *see* 16 C.F.R. § 2.7(d)(4), directed the issuance of a Letter Ruling on October 25, 2007 denying WSN's Petition to Quash finding that the Commission had jurisdiction to investigate WSN's advertising

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claims, that the information being sought was within the scope of the investigation, and that WSN had failed to establish that compliance with the CID would be unduly burdensome. The Order further directed WSN to comply with the CID by November 5, 2007.¹

WSN filed its Notice of Appeal on November 1, 2007 and submitted its Memorandum in Support of Request for Review (“Mem. in Support”) on the following day. On this appeal, WSN seeks review of the denial of its Petition to Quash, Mem. in Support at 1, and supplements its Petition to Quash with additional claims for relief not previously raised. WSN now claims for the first time that the CID must also be quashed because: (1) the FTC should defer to the Food and Drug Administration’s (“FDA”) consideration of WSN’s pending request for an advisory opinion on whether WSN’s products should be classified as medical foods, Mem. in Support at 2; (2) *res judicata* and collateral estoppel doctrines bar further investigation of WSN’s advertising claims because of the pendency of the FDA’s consideration of WSN’s request for an advisory opinion, *id.* at 7; (3) the FTC has no authority to regulate the practice of medicine, *id.*; and (4) compliance with the CID is unduly burdensome during the pendency of the FDA’s consideration of WSN’s request for an advisory opinion. *Id.* at 10. Neither WSN’s Petition to Quash nor its Mem. in Support provide any substantial legal or factual support for any of WSN’s claims for relief, including those first raised in this appeal.

II. WSN Waived Its Supplemental Grounds for Relief By Failing to Include Them In Its Petition to Quash.

¹ In its Mem. in Support at 1, WSN requested a stay of the requirement to comply with the CID by November 5 pending disposition of its appeal. The Commission, however, has reason to believe that WSN mooted its application for a stay pending appeal when it requested and received an extension of time from staff within which to comply with the CID until November 14, 2007. The Commission further has reason to believe that WSN substantially complied with the CID on that date. At a minimum, WSN’s substantial compliance with the CID also moots any claim that compliance with the CID would be unduly burdensome.

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The Commission's rules expressly provide that a Petition to Quash "shall set forth all assertions of privilege or other factual or legal objections to the subpoena or civil investigative demand, including all appropriate arguments, affidavits and other supporting materials." 16 C.F.R. § 2.7(d)(1). The rule is clear on its face that all grounds for challenging a CID shall be joined in the initial application, absent some extraordinary circumstances. To construe the rule in any other fashion would serve no purpose other than inviting piecemeal challenges to CIDs and a parade of dilatory motions seeking seriatim deconstruction of each CID. WSN has made no showing that extraordinary circumstances should excuse it for not having included its supplemental arguments in its Petition to Quash. Accordingly, the Commission deems that WSN has waived any entitlement to relief on those supplemental grounds, and will not consider them on this appeal.²

² Consideration of the merits of WSN's supplemental claims would not change the outcome of this appeal. First, WSN concedes that the FTC and the FDA have concurrent jurisdiction over its advertising claims. Mem. in Support at 5. Neither the FDA warning letter nor WSN's request for an advisory opinion are in any way duplicative of the FTC's investigation of false advertising claims under the Federal Trade Commission Act, 15 U.S.C. §§ 41-58. Concurrent investigation and litigation of claims by the FTC and FDA, each seeking different remedies under different federal laws, is not uncommon. For example, the FTC and FDA both filed complaints against Seasilver USA, Inc. in federal district court. *See* Press Release, Fed. Trade Comm'n, Marketers of Seasilver Agree to Pay \$4.5 Million to Settle FTC Charges, *available at* www.ftc.gov/opa/2004/03/seasilver.shtm. Second, WSN has not identified any final judgment which could be capable of supporting its claims of *res judicata* or collateral estoppel. Indeed, the fact that the FDA sent a warning letter to WSN does not mean that the FDA has opened an investigation of WSN, much less reached a final judgment. An advisory opinion from the FDA addressing the classification of WSN's products for FDA purposes has no relevance to whether WSN's advertising claims are false or deceptive in violation of Section 5 of the FTC Act. Third, WSN's claim that the FTC lacks the authority to regulate the practice of medicine is inapposite. WSN, in its Petition to Quash, does not assert that WSN, its principals, or its employees practice medicine. Even if they did, the FTC, pursuant to the powers granted to it by Congress, has the authority to investigate whether WSN's advertising claims for its products are false or unsubstantiated. Finally, WSN mooted its burden of production arguments by substantially complying with the CID.

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III. WSN's Substantial Compliance with the CID Moots This Appeal from the Denial of the Petition to Quash

WSN's Petition to Quash in effect claimed that the Commission lacked jurisdiction to investigate its advertising activities. The Commission's "investigations should not be bogged down by premature challenges to its regulatory jurisdiction." *Federal Trade Comm'n v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987) (then-Judge Breyer) (quoting *Federal Trade Comm'n v. Swanson*, 560 F.2d 1, 2 (1st Cir. 1977)). Resolution of the jurisdictional issue with respect to whether the Commission has jurisdiction to investigate does not compromise any jurisdictional claim WSN might later raise as a defense to an FTC enforcement action or suit. *See Monahan*, 832 F.2d at 689. WSN's Petition to Quash also claimed that the CID sought material outside of the scope of the investigation, and that compliance would be unduly burdensome on WSN. Substantial compliance with the CID moots each of these claims that WSN should be granted relief by being excused from CID compliance that has already occurred.³

IV. Order

For the reasons set forth herein, the WSN's Request for Review should be, and it hereby is, **DISMISSED**.

By Direction of the Commission.

³ Had the Commission reached the merits of WSN's appeal from the denial of its Petition to Quash, the Letter Ruling of October 25, 2007 would have been affirmed for substantially the reasons stated therein.

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BANNER HEALTH

FTC File No. 081 0054 – Decision, May 15, 2008

RESPONSE TO BLUE CROSS BLUE SHIELD OF ARIZONA, INC.’S PETITION TO QUASH OR LIMIT SUBPOENA DUCES TECUM

Dear Ms. Peck:

This letter advises you of the disposition of the Petition to Quash or Limit Subpoena Duces Tecum (“Petition”) filed by Blue Cross Blue Shield of Arizona, Inc. (“Petitioner” or “BCBSAZ”). The subpoena duces tecum (“subpoena”) was served on BCBSAZ in conjunction with the Federal Trade Commission’s (“FTC” or “Commission”) investigation of a proposed merger between two hospital services providers located in Arizona. The Petition is denied for the reasons hereinafter stated. The new date for Petitioner to comply with the subpoena is May 27, 2008.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission’s delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹

I. Background and Summary

Petitioner is a health insurer that provides a variety of “health insurance products, services and networks to more than 1 million Arizonans[, including] . . . various health plans for individuals, families, and small and large businesses.” Petition at 1-2. The Commission is conducting an investigation to determine whether the proposed merger of two hospital services providers in Arizona is likely to violate § 7 of the Clayton Act, 15 U.S.C. § 18, or § 5 of the

¹ This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail.

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Federal Trade Commission Act, 15 U.S.C. § 45. The Petition does not question the fact that the information sought by the subpoena is relevant to the Commission's investigation or that the act of producing the records and information sought by the subpoena would impose an undue hardship or burden on Petitioner. Petitioner has, however, requested particular guarantees from Commission Staff to protect the confidentiality of certain sensitive business information in the event the Commission seeks to enjoin the merger it is investigating. Petitioner is particularly concerned about the continued confidentiality of its "contracts with member hospitals in Maricopa and/or Pinal County, as well as documents relating to the negotiations of those contracts (the 'Confidential Contract Information')." Petition at 3. In effect, the Petitioner wants the Commission to guarantee that any use of such Confidential Contract Information, during a subsequent judicial proceeding brought by the FTC to enjoin the merger being investigated, will occur only if the court shall have imposed a protective order deemed adequate by Petitioner. *Id.*

Petitioner conditions its compliance with the subpoena on the Commission's agreement to one of BCBSAZ's two alternative proposals for assuring confidentiality of its sensitive information. The Commission's first option would be to enter into an agreement "that should a satisfactory protective order not be entered into in any subsequent litigation with [the merging parties], that the FTC would agree to return any unredacted copies of BCBSAZ's Confidential Contract Information back to BCBSAZ." *Id.* (intending to cite Goodwin Aff. ¶ 8). "BCBSAZ's second proposal recommended that, in lieu of producing unredacted copies, that BCBSAZ could provide access to FTC counsel to review unredacted copies of BCBSAZ's hospital documentation. . . . During this review, FTC counsel would be permitted to review the documents at length, and make notes of any review, so long as the FTC agreed that it would assert work product protection over any such notes should the Investigation proceed to litigation." *Id.* (intending to cite Goodwin Aff. ¶¶ 9-10). Commission Staff advised Petitioner that these alternatives are "not workable." *Id.* at 4 (intending to cite Goodwin Aff. ¶ 12).

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Petitioner claims that the disclosure of its Confidential Contract Information to the merging parties through discovery² “would jeopardize BCBSAZ’s ability to compete in the marketplace, and unnecessarily risk disrupting its business relationships. The information would be deemed valuable not only by BCBSAZ’s negotiating partners, but also by BCBSAZ’s competitors and the marketplace generally.” Petition at 5. Petitioner further claims that disclosure of such information to a merging party would permit such party,

in subsequent negotiations with BCBSAZ, to demand that it receive the highest reimbursement rates of all the hospitals with which BCBSAZ contracts. . . . Allowing large hospital entities . . . to dictate the terms of reimbursement would impact not only BCBSAZ, but its many thousands of insureds in the event BCBSAZ is no longer able to pay the inflated amounts that [such entities] might demand. . . . BCBSAZ may no longer be able to provide its insureds with covered access to [such entities], or might be forced to eliminate or reduce other coverages, in other areas, just to pay the amounts [such entities] might demand. . . . It is also possible that. . . [such entities] might. . . obtain a competitive advantage as against other hospitals in the relevant areas, affecting the number of hospitals available for consumers in a manner that would eclipse any competitive effect of the proposed merger that is the subject of the instant Investigation.

² “BCBSAZ is aware that it will have the opportunity to challenge any disclosure of its confidential contract information to [the merging party] in an adjudicative proceeding. The FTC, however, has refused to agree that should BCBSAZ *lose* such a challenge, and a protective order not be entered by the court, that the FTC will not produce such documentation to [the merging party]. Simply put, the FTC is unwilling to bear that risk, however remote the FTC believes it to be.” Petition at 5 n. 2 (emphasis in original).

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Id. at 6 (citing Hannon Aff. ¶¶ 15-17). The Commission disputes neither the commercial significance of Petitioner’s Confidential Contract Information nor the importance of maintaining it in confidence, or, at least, out of the hands of competitors and other market participants; that, however, provides no sufficient basis for limiting or quashing this subpoena.

II. Petitioner Has Provided No Factual Or Legal Basis for Relief

It is necessary at the outset to emphasize the fact that the party who petitions the Commission to quash or limit an investigative subpoena bears the burden of demonstrating that a particular subpoena specification is unreasonable – the Commission does *not* need to demonstrate that a specification is reasonable. “[T]he burden of showing that an agency subpoena is unreasonable remains with the respondent, . . . and where, as here, the agency inquiry is authorized by law and the materials sought are relevant to the inquiry, that burden is not easily met. (Citations omitted).” *Fed. Trade Comm’n v. Rockefeller*, 591 F.2d 182, 190 (2nd Cir. 1979), quoting *Sec. and Exchange Comm’n v. Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1056 (2nd Cir. 1973), *cert. denied*, 415 U.S. 915 (1974). Petitioner has mistakenly argued that the Commission “has not offered any factual or legal justifications for why BCBSAZ’s proposals are unworkable.”³ Petition at 7. The Commission has no such burden to provide a factual or legal justification for rejecting BCBSAZ’s proposals.

³ The unworkability of Petitioner’s alternative proposals is virtually self-evident. The first proposal could effectively obligate the Commission either to put itself in contempt of court or engage in some other form of litigation misconduct. If the court denied BCBSAZ’s application for a protective order, or entered an order not deemed acceptable to BCBSAZ, and at the same time ordered the Commission to produce Petitioner’s Confidential Contract Information to the merging parties, a response from the Commission that it had, pursuant to its agreement, returned the evidence to BCBSAZ would quite likely be viewed as contumacious or some other form of litigation misconduct subject to sanction, and either finding could result in the dismissal of the Commission’s complaint. *See e.g.* Fed. R. Civ. P. 37(b)(2)(A)(v). Alternatively, obtaining the contracting data under

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Petitioner has offered no legal support for its claim that this subpoena should be quashed or limited through the imposition of one of its two conditions on the Commission. The factual predicates for the harms that Petitioner alleges might occur are too speculative and uncertain to justify limiting or quashing the subpoena. *See Exxon Corp. v. Fed. Trade Comm'n*, 589 F.2d 582, 589 n.14 (DC Cir. 1978) (“[J]udicial intervention to prevent potential injury from prospective governmental misconduct [improper disclosure of confidential information] is only justified when such misconduct is imminent, not merely hypothetical.”). Petitioner has failed to meet its burden.

The Commission also finds that BCBSAZ’s legitimate concerns with the confidentiality of its sensitive business information are adequately protected by 15 U.S.C. § 57b-2 and, in the event the Commission’s investigation leads to federal court litigation, by the Federal Rules of Civil Procedure, *see* Fed. R. Civ. P. 26(c)(1) (“A party or any person from whom discovery is sought may move for a protective order. . . (g) requiring that. . . confidential research, development, or commercial information not be revealed or be revealed only in a specified way. . .”). Accordingly, Petitioner has

the second proposal would mean that the Commission would get the data it requires for the sophisticated economic analyses and modeling utilized in modern merger litigation by way of notes taken from complex contract documents. Those notes would also be subject to work product protections. The Commission’s trial evidence would, thus, be based on data collection practices lacking in the rigor and reliability necessary to support expert economic testimony. Further, withholding our “notes” on the basis of work product claims would be totally at odds with the FTC’s discovery obligation to provide the data upon which its expert analyses depended. *See* Fed. R. Evid. 705. The resulting evidence would rightly be excluded from the trial because it was both unreliable (suspect data collection practices) and because the data supporting the evidence had not been produced in discovery. Based on its experience in the enforcement of the antitrust laws against mergers, the Commission, like Staff, finds these options unworkable and inconsistent with its responsibility to enforce the antitrust laws of the United States. Indeed, Petitioner’s conditions for access to the evidence necessary to enforce this nation’s antitrust laws would hold public law enforcement hostage to each subpoena recipient’s perceived data security needs. The Commission cannot countenance such a vision of the public good.

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failed to demonstrate that the Commission should grant BCBSAZ's Petition as a matter of discretion.

III. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED** that the Petition be, and it hereby is, **DENIED**. Pursuant to Rule 2.7(e), Petitioner must comply with the CID by May 27, 2008.

By direction of the Commission.

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NUTRACEUTICALS INTERNATIONAL, LLC

FTC File No. 082 3130 – Decision, June 25, 2008

RESPONSE TO NUTRACEUTICALS INTERNATIONAL, LLC'S PETITION TO QUASH OR LIMIT CIVIL INVESTIGATIVE DEMAND

Dear Mr. Klivinyi:

This letter advises you of the disposition of the Petition to Quash or Limit Civil Investigative Demand (“Petition”) filed by Nutraceuticals International, LLC (“NI” or “Petitioner”). NI’s Petition claims that the Civil Investigative Demand (“CID”) seeks information that is “clearly beyond the scope of the investigation as defined by the Commission.” Petition at 1. The Petition is denied because it is procedurally defective and substantively without merit. Pursuant to 16 C.F.R. § 2.7(e), Petitioner is ordered to comply with the CID on or before July 7, 2008 at 5:00 p.m. E.S.T.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission’s delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹

I. Background and Summary

This Petition deals with the second of two CIDs that have been served on NI during the course of this investigation. “The first civil investigative demand served upon the Company was fully answered and submitted in the time agreed. The interrogatories requested the number of employees and the identification of employees involved

¹ This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail. In accordance with the provisions of 16 C.F.R. § 2.7(f), the timely filing of a request for review of this matter by the full Commission shall not stay the return date established by this decision.

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in the marketing of hoodia gordonii material. The instant CID seeks the names, addresses, email addresses and job description of all employees, whether or not they have been involved in the marketing of hoodia gordonii material. The CID also demands bank account information and the identities of signatory authorities for any such accounts.” Petition at 1.² The Petition claims that all the information sought by this second CID is “clearly beyond the nature and scope of the investigation as defined by the Commission.” *Id.* The CID was issued on May 16, 2008, returnable on June 6, 2008. The Petition, dated June 3, 2008, was received by the Secretary on June 6, 2008.

The Petition consists of a single page letter addressed to the Commission’s Secretary that was written on plain, non-letterhead, paper, and a two-page clerical employee’s affidavit dealing with investigatory events which are ancillary to, but not a part of, the merits of this Petition. The letter is signed by Zoltan Klivinyi, Managing Director. The Petition indicates that NI is not represented by counsel. Additionally, the Petition does not include the statement required by Commission Rule 2.7(d)(2), 16 C.F.R. § 2.7(d)(2), stating that it had conferred with staff in advance of filing its Petition in an attempt to resolve issues raised in the Petition. NI indicates it has included no such statement because: (1) NI was not represented by counsel who could have engaged in such discussions with counsel for the Commission; and (2) NI “believes that any such attempt would [have been] fruitless given the misconduct of the Commission counsel in this matter as detailed below.” Petition at 1.

The Petition also seeks relief on the grounds of the allegedly “appalling, abusive and abhorrent conduct of two members of [the Commission’s] staff.” *Id.* The Petition describes this conduct as follows,

² Petitioner’s description of the specifications of CID provide an accurate, but incomplete, summary of the CID specifications.

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A person who only identified herself as “Deb” called the Company’s office on May 13, 2008, and threatened the young female receptionists who answered the phone with “obstruction of justice”, crimes and arrest by the Constable for not giving the unidentified caller the private cell phone numbers of certain managers of the Company. The caller from the FTC so upset the young lady that she had to leave the office early and was ill for several days with worry that she had committed a crime and was subject to arrest. . . . This is a clear case of abuse of power and authority of a federal employee and attorney over an office clerical worker acting in good faith.

Id. In addition to requesting that the CID be limited or quashed because of this alleged misconduct, the Petition requests an investigation of this conduct by the Commission’s Inspector General, and states that a copy of the Petition would be forwarded to the Inspector General under separate cover. *Id.* Finally, the Petition requests that this investigation be reassigned to other attorneys. *Id.*³

II. The Petition Is Procedurally Defective

Commission Rule 4.1(a)(2) provides in relevant part that a “corporation or association may be represented by a bone fide officer thereof *upon a showing of adequate authorization.*” 16 C.F.R. § 4.1(a)(2) (emphasis supplied). The Petition provides no evidence to satisfy the requirements of our rule other than an indecipherable signature accompanied by a signature block that includes the name “Zoltan Klivinyi” and the title “Managing

³ The Commission is vigilant in insuring that its employees conduct the Commission’s business at all times in a professional manner. However, since NI indicated that it was separately requesting the Inspector General to investigate this episode, it would be premature for the Bureau of Consumer Protection to consider any staffing adjustments or other disciplinary responses prior to receiving a report on this matter from the Inspector General.

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Director.” That signature by itself, however, fails to satisfy our Rule in that it does not factually demonstrate that:

1. Zoltan Klivinyi is the signatory of the letter; or
2. Zoltan Klivinyi is a bone fide officer of NI, a Delaware limited liability corporation; or
3. Zoltan Klivinyi has been authorized by corporate resolution or otherwise to represent the corporation before the Commission in this matter.

Further, the managing director title is not, insofar as the Commission is aware, a term of art under the laws of Delaware with respect to corporate governance such that it would inherently connote authorization to speak on behalf of a Delaware corporation. At a minimum, our Rule requires that a corporate officer seeking to represent a corporation before the Commission must submit a sworn statement or other proofs setting forth the officer’s status as a corporate officer and the source of his or her authority to appear before the Commission on behalf of the corporation. NI has provided no such evidence supporting its Petition.

Commission Rule 2.7(d)(2) requires that every petition to quash or limit a CID must be accompanied by a statement showing that the petitioner has attempted to resolve the issues raised by the petition with Commission counsel in advance of filing the petition. 16 C.F.R. § 2.7(d)(2). The purpose for this rule to avoid unnecessary challenges to investigatory process. The Commission generally lacks advanced knowledge of the records of a particular company. As a result, the specifications of process might, inadvertently, create avoidable compliance problems that might not have arisen if staff had possessed better knowledge of the recipient’s actual information storage and retrieval procedures. To address such problems and burdens, Rule 2.7(c), 16 C.F.R. § 2.7(c), grants particular staff managers authority to modify the terms of compliance with investigatory CIDs during such discussions. Neither the use of the word “counsel” in Rule 2.7(d)(2) nor an earlier episode of allegedly

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abusive behavior by one or more Commission attorneys excused NI from its obligation to confer with Commission staff to resolve, if possible, its problems with the CID in advance of the filing of its Petition.⁴

III. The Petition Is Otherwise Without Merit

Even if NI had filed a procedurally sufficient Petition, its Petition is otherwise without merit. The information sought by the CID is not outside the scope of the investigation. The CID was issued pursuant to the Resolution adopted by the Commission on May 12, 2006.⁵ NI's claim that the CID demands information "clearly beyond the nature and scope of investigation as defined by the Commission," Petition at 1, is wholly lacking in merit. The resolution, not a prior CID issued to NI, defines the scope of the investigation.

The *Morton Salt and Invention Submission Corp.* cases state the broad scope of the Commission's investigatory reach. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (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."), and *Federal Trade Comm'n v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) ("It is well established that a district court must enforce a federal agency's investigative subpoena if the

⁴ The Rule reads, "Each petition shall 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. If some of the matters in controversy have been resolved by agreement, the statement shall specify the matters so resolved and the matters remaining unresolved. The statement shall recite the date, time, and place of each such conference between counsel, and the names of all parties participating in each such conference." *Id.* The fact that NI is represented here by one of its officers, rather than counsel, does not excuse its non-compliance with the Rule.

⁵ Resolution Directing the Use of Compulsory Process in a Non-Public Investigation of Unnamed Persons Engaged Directly or Indirectly in the Advertising or Marketing of Drugs, Devices, Dietary Supplements or Any Other Product or Service Intended to Provide A Health Benefit or to Affect the Structure or Function of the Body (May 12, 2006).

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information is reasonably relevant . . . – or, put differently, not plainly incompetent or irrelevant to any lawful purpose of the [agency] . . . – and not unduly burdensome to produce.”) (citations and internal quotation marks omitted).

Apparently in reliance on the scope of an earlier CID, NI is construing the scope of the investigation in a manner that would artificially limit the investigation to include only NI’s marketing and sales of “*hoodia gordonii*.”⁶ See Petition at 1. The scope of the investigation is determined by the terms of the resolution authorizing the CID. *Invention Submission Corp.*, 965 F.2d at 1091-92 (“The Commission’s compulsory process resolution did not restrict the investigation to possible oral misrepresentations, however, and we have previously made clear that ‘the validity of Commission subpoenas is to be measured against the purposes stated in the resolution, and not by reference to extraneous evidence.’”) (citations omitted). The scope of the investigation includes, therefore, all of the goods and services described in the resolution; it is not limited to a single product, such as *hoodia gordonii*. A review of the specifications of the CID shows that the information requested is relevant to the subject of the Commission’s investigation as defined by the resolution. Accordingly, we find that the information sought by the CID is reasonably relevant to the investigation.

With regard to the allegations of staff misconduct, even assuming the Petition and Affidavit accurately describe events that transpired between Commission attorney(s) and an NI employee on May 13, 2008, the Commission has no reason to believe that such conduct affected in any way the issuance of the CID or its contents. In the absence of any evidence that the CID was itself the product of FTC misconduct, this episode provides no grounds for quashing or limiting the CID.

⁶ The Petition offers no explanation for its claim that the identities of its employees and the details of its banking arrangements are “clearly beyond the nature and scope of the investigation as defined by the Commission.” *Id.* NI’s claim has been construed in the light most favorable to it, based on inferences drawn from what little information NI has provided regarding this claim.

Responses to Petitions to Quash

IV. Order

For the reasons set forth herein, **IT IS ORDERED** that NI's Petition should be, and it hereby is, **DENIED**. NI shall respond to the CID on or before July 7, 2008 at 5:00 p.m. E.S.T.

By direction of the Commission.

ADVISORY OPINION

IN THE MATTER OF

U.S. FORECLOSURE NETWORK

FTC File No. P084801 Opinion, March 19, 2008

Re: Whether the Fair Debt Collection Practices Act (“FDCPA”) prohibits a debt collector from notifying a consumer of settlement options that may be available to avoid foreclosure.

Dear Ms. Sinsley and Mr. Newburger:

This is in response to the request from the USFN, formerly known as the U.S. Foreclosure Network, for a Commission advisory opinion (“Request”) regarding whether the Fair Debt Collection Practices Act (“FDCPA”)¹ prohibits a debt collector in the foreclosure context from discussing settlement options in the collector’s initial or subsequent communications with the consumer. The Request asserts that the receipt of information about settlement options could enable the consumer to save his or her home from foreclosure. As explained more fully below, the Commission concludes that debt collectors do not commit a *per se* violation of the FDCPA when they provide such information to consumers. Moreover, the Commission believes that it is in the public interest for consumers who may be subject to foreclosure to receive truthful, non-misleading information about settlement options, especially in light of the recent prevalence of mortgage borrowers who are delinquent or in foreclosure.²

¹ 15 U.S.C. §§ 1692- 1692p.

² According to press reports, in 2007, there were an estimated 2.2 million foreclosure filings in the United States, a 75% increase from 2006. The number of foreclosure filings increased late in 2007- in December there were 215,749 foreclosure filings, a 97% increase from the number of filings in December 2006. December was the fifth consecutive month in which foreclosure filings topped 200,000. Associated Press, *Home Foreclosure Rate Soars in 2007*, N.Y. TIMES,

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USFN submitted the Request pursuant to Sections 1.1-1.4 of the Commission's Rules of Practice, 16 C.P.R. §§ 1.1-1.4. The Request focuses on two sections of the FDCPA, Sections 807 and 809, 15 U.S.C. §§ 1692e, 1692g,³ and presents three specific questions for consideration:

(1) Does a debt collector violate the FDCPA when he, in conjunction with the sending of a "validation notice" pursuant to Section 809(a) of the FDCPA, notifies a consumer of settlement options that may be available to avoid foreclosure?

(2) Does a debt collector violate the FDCPA when he, subsequent to sending the validation notice pursuant to Section 809(a) of the FDCPA, notifies a consumer of settlement options that might be available to avoid foreclosure?

(3) Does a debt collector commit a false, misleading or deceptive act or practice in violation of Section 807 of the FDCPA when he presents to a consumer settlement options that are available to the consumer to avoid foreclosure?

Jan. 29, 2008, available at www.nytimes.com/aponline/us/AP-Foreclosure-Rates.html. Mortgage delinquency is also escalating. The number of borrowers falling behind on first-lien mortgage payments for residences during 2007 was the highest it has been since 1986-2.64 million borrowers fell behind on payments. Michael M. Phillips, Serena Ng & John D. McKinnon, *Battle Lines Form Over Mortgage Plan*, WALL ST. J., Dec. 7, 2007, at A1.

³ The Commission has considered only these sections in rendering this opinion and it should not be construed to pertain to any other section of the FDCPA, to any other law, or to any issue of legal ethics.

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The Request states that there is no case law addressing these specific questions. We address the questions *seriatim*.

USFN's first two questions specifically reference Section 809(a) of the FDCPA, 15 U.S.C. § 1692g(a). Section 809(a) provides, in pertinent part, that a debt collector must, within the first five days after the initial communication with the debtor, provide a written notice containing specific information including the amount of the debt, the debtor's right to dispute the validity of the debt in writing within 30 days, and the collector's obligation to obtain verification of the debt in response to the consumer's dispute document. Congress enacted Section 809 to "eliminate the recurring problem of debt collectors dunning the wrong person or attempting to collect debts which the consumer has already paid."⁴

Section 809(a) does not expressly prohibit debt collectors from adding language to the written validation notice with the mandatory disclosures. The statute also does not expressly prohibit debt collectors from presenting information to consumers about settlement options in subsequent communications. The Commission therefore concludes that there is no *per se* violation of Section 809(a) of the FDCPA if a debt collector includes information regarding foreclosure settlement options along with a validation notice or in subsequent communications after that notice is delivered.

Nevertheless, collectors must take care that communicating information about settlement options does not undermine the consumer protections in Section 809(a). The touchstones of Section 809(a) are the consumer's rights to dispute his or her debt in writing within 30 days and to obtain verification of that debt from the collector. To protect these rights, in 2006 Congress amended Section 809(b) to expressly state that "[a]ny collection activities and

⁴ S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698.

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communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt. ..."⁵ This statutory amendment ratified court decisions holding that debt collectors that provide consumers with information in addition to the mandatory disclosures violate Section 809(a) if the additional information effectively obscures the consumer's right to dispute his or her debt and obtain verification from the collector.⁶

Specifically, these cases concluded that providing additional information is unlawful if it overshadows or contradicts required disclosures or creates confusion regarding the basic right to dispute the debt and obtain verification from the collector.⁷ In making these determinations, courts considered the communication from the perspective of an unsophisticated consumer.⁸

In sum, with respect to USFN's first two questions presented in its Request, the Commission concludes that there is no *per se* violation of Section 809(a) if a debt collector in the foreclosure context discusses settlement options in the collector's initial or subsequent communications with the consumer. This conclusion, however, does not prevent a fact-based finding that a specific communication violates the Act if it overshadows or is inconsistent with the disclosures of the consumer's right to dispute the debt within 30 days.

⁵ 15 U.S.C. § 1692g(b).

⁶ See, e.g., *Swanson v. Oregon Credit Servs.*, 869 F.2d 1222 (9th Cir. 1988).

⁷ *Id.*; See, e.g., *Durkin v. Equifax Check Servs.*, 406 F.3d 410 (7th Cir. 2005); *Shapiro v. Riddle & Assocs.*, 351 F.3d 63 (2d Cir. 2003); *Renick v. Dun & Bradstreet Receivable Mgmt. Servs.*, 290 F.3d 1055 (9th Cir. 2002).

⁸ See, e.g., *Sims v. G.C. Servs.*, 445 F.3d 959 (7th Cir. 2006) ("unsophisticated consumer"); *Smith v. Transworld Sys.*, 953 F.2d 1025 (6th Cir. 1992) ("least sophisticated consumer").

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USFN's third question asks whether a debt collector commits a false, misleading or deceptive act or practice in violation of Section 807 of the FDCPA when he presents to a consumer settlement options that are available to the consumer to avoid foreclosure. Section 807 of the FDCPA establishes a general prohibition against the use of any "false, deceptive or misleading representation or means in connection with the collection of any debt" and provides a list of 16 specific practices that are *per se* false, deceptive or misleading under the Act. In enacting Section 807, Congress noted that this general prohibition on deceptive collection practices would "enable the courts, where appropriate, to proscribe other improper conduct which is not specifically addressed."⁹

As a general matter, the Commission concludes that a debt collector's communication with a consumer regarding his or her options to resolve mortgage debts and to potentially avoid foreclosure would not necessarily violate either the general or specific prohibitions of Section 807. However, we also stress that a particular communication with settlement option information could be deceptive in violation of Section 807 if it contains a false or misleading representation or omission of material fact. Determining whether a specific communication is false or misleading is a fact-based inquiry that considers all the facts and circumstances surrounding the particular communication at issue.¹⁰

After reviewing the language of the FDCPA, its legislative history, and relevant case law, as well as the information contained in the Request, the Commission concludes that a debt collector in the foreclosure context does not commit a *per se* violation of

⁹ S. Rep. No. 95-382, at 4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1698.

¹⁰ *See Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985) (noting that FDCPA expands pre-existing FTC deception authority); *see also FTC Policy Statement on Deception, appended to In re Cliffdale Associates, Inc.*, 103 F.T.C. 110, 174-84 (1984) (setting forth deception test).

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Sections 807 or 809 of the FDCPA when he or she addresses settlement options in the collector's initial or subsequent communications with the consumer.

By direction of the Commission.

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