

FEDERAL TRADE COMMISSION DECISIONS

**FINDINGS, OPINIONS, AND ORDERS
JULY 1, 2009, TO DECEMBER 31, 2009**

PUBLISHED BY THE COMMISSION

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**MEMBERS OF THE FEDERAL TRADE COMMISSION
DURING THE PERIOD
JULY 1, 2009 TO DECEMBER 31, 2009**

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Took oath of office January 4, 2006.

J. THOMAS ROSCH, *Commissioner*
Took oath of office January 5, 2006.

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FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS
JULY 1, 2009, TO DECEMBER 31, 2009

IN THE MATTER OF

ALTA BATES MEDICAL GROUP, INC.

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

*Docket No. C-4260; File No. 051 0260
Complaint, July 10, 2009 – Decision, July 10, 2009*

This consent order addresses Alta Bates Medical Group, Inc.'s fixing of prices charged to those offering coverage for health care services in the Berkeley and Oakland, California, areas and refusing to deal with such payors except on a collectively determined basis. Since at least 2001, ABMG, acting as a combination of its physician members, and in conspiracy with its members, has acted to restrain competition with respect to fee-for-service contracts by, among other things, facilitating, entering into, and implementing agreements, express or implied, to fix the prices and other terms at which they would contract with payors; to engage in collective negotiations over terms and conditions of dealing with payors; and to have ABMG members refrain from negotiating individually with payors or contracting on terms other than those approved by ABMG. The order prohibits ABMG from entering into or facilitating any agreement between or among any health care providers: (1) to negotiate on behalf of any physician with any payor; (2) to refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to price terms; or (4) not to deal individually with any payor, or not to deal with any payor other than through ABMG. The order also prohibits ABMG from facilitating exchanges of information between health care providers concerning whether, or on what terms, to contract with a payor. However, ABMG is not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate "qualified risk-sharing" or "qualified clinically-integrated" joint arrangements.

Participants

For the *Commission*: Linda Badger and Sylvia Kundig.

For the *Respondents*: Donald J. Bouey, Bouey & Black LLP.

Complaint

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.* (“FTC Act”), and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Alta Bates Medical Group, Inc. (“ABMG”), herein sometimes referred to as “Respondent,” has violated Section 5 of the FTC 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 horizontal agreements among competing physicians, acting through Respondent, to fix prices charged to health plans, other third-party payors, and third-party networks (“payors”), to refuse to deal with certain payors, and to refuse to deal with payors except on collectively agreed terms.

RESPONDENT

2. Alta Bates Medical Group, Inc., an independent practice association (“IPA”), is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 2000 Powell Street, Suite 830, Emeryville, CA 94608. ABMG consists of multiple, independent medical practices with a total of approximately 600 physician members, of which approximately 200 are devoted to primary care.

THE FTC HAS JURISDICTION OVER RESPONDENT

3. At all times relevant to this Complaint, Respondent has been engaged in the business of negotiating or attempting to negotiate contracts with payors for the provision of physician services on behalf, and for the pecuniary benefit, of its members.

4. Except to the extent that competition has been restrained as alleged herein, ABMG’s physician members have been, and are now, in competition with each other for the provision of physician services in and around Berkeley and Oakland, California.

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5. Respondent is a “person,” “partnership,” or “corporation” within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

6. The general business practices of Respondent, 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 PHYSICIAN CONTRACTING WITH PAYORS

7. Individual physicians and physician group practices contract with payors, including health maintenance organizations (HMOs), preferred provider organizations (PPOs), self-insured employers, and others, to establish the terms and conditions, including price terms, under which the physicians will render their professional medical services to the payors’ subscribers. Physicians and physician 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 subscribers. These contracts may reduce payors’ costs and enable them to lower the price of insurance or of providing health benefits, thereby resulting in lower medical costs for subscribers.

8. Physicians and physician group practices sometimes form or participate in financially integrated joint ventures to provide physician services under agreements with payors who seek such arrangements. Under such arrangements, the physicians and physician group practices may share financial risks and rewards in several ways. For example, the physicians may provide services at a “capitated” rate or share rewards/penalties based on their collective success in achieving pre-established targets or goals regarding aggregate utilization and costs of the services provided to covered individuals.

9. Physicians and physician group practices may also participate in joint ventures that do not involve financial integration, but involve clinical integration, by implementing an

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active and ongoing program to evaluate and modify practice patterns by the physician participants and create a high degree of interdependence and cooperation among the physicians to control costs and ensure quality.

10. Other than through their participation in integrated joint ventures, and absent anticompetitive agreements among them, otherwise competing physicians and physician group practices unilaterally decide whether to enter into contracts with payors to provide services to their subscribers, and what prices they will accept as payment for their services pursuant to such contracts.

RESPONDENT'S OPERATION

11. Since its formation, ABMG has entered into contracts with payors for and on behalf of its respective physician members, under which ABMG received capitated payments from the payors in exchange for the medical practices' agreement to provide their professional medical services to subscribers of the contracting payors. The capitated contracts provided to payors, in addition to the physician services, an insurance guarantee component that all covered physician services needed by subscribers of a payor's program would be provided by ABMG's physician members for the predetermined capitation charge, regardless of the actual quantity or type of services needed and provided.

12. The member physicians' participation in ABMG, and their offering of services through ABMG's capitated contracts, was not, however, the member physicians' exclusive method of selling their professional medical services. Rather, the member physicians also continued to sell their medical services individually, on a fee-for-service basis, outside of ABMG to individual patients and through contracts individually and directly entered into with payors.

ANTICOMPETITIVE CONDUCT

13. Since at least 2001, ABMG, acting as a combination of its physician members, and in conspiracy with its members, has acted to restrain competition with respect to fee-for-service contracts by, among other things, facilitating, entering into, and implementing agreements, express or implied, to fix the prices

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and other terms at which they would contract with payors; to engage in collective negotiations over terms and conditions of dealing with payors; and to have ABMG members refrain from negotiating individually with payors or contracting on terms other than those approved by ABMG.

Collective Negotiations with Payors

14. ABMG refers to its fee-for-service contracting system as a “messenger model.” Competing physicians sometimes use a “messenger” to facilitate their contracting with payors, in ways that do not constitute an unlawful agreement on prices and other competitively significant terms. Messenger arrangements can reduce contracting costs between payors and physicians. For example, a payor may submit a contract offer to the messenger, with the understanding that the messenger will transmit that offer to a group of physicians and inform the payor how many physicians across specialties accept the offer or have a counteroffer. Alternatively, the messenger may receive authority from the individual physicians to accept contract offers that meet certain criteria. A lawful messenger arrangement does not involve negotiation on prices or other competitively significant terms and does not facilitate coordination among physicians on their responses to contract offers. Additionally, a lawful messenger arrangement does not discourage physicians from dealing individually with a payor.

15. As part of its fee-for-service contracting system, approximately 95 percent of ABMG's physicians signed “powers of attorney” (“POA”) granting ABMG authority to contract with PPO health plans on their behalf. The POA states that the individual ABMG physician appoints ABMG:

- a. To facilitate, execute, revise, modify, or amend an agreement (“Agreement”) with PPO networks that is consistent with the financial and other language parameters identified by PHYSICIAN.
- b. To execute the Agreement on PHYSICIAN'S behalf without further consultation with or authority of PHYSICIAN, provided the Agreement meets the PHYSICIAN'S parameters.

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16. Despite the POA provisions, ABMG did not rely on financial and other language parameters identified by its individual physician members regarding what rates and/or terms they would unilaterally accept. Instead, ABMG decided, on behalf of the group, what rates and/or terms it used in its communications with the PPO health plans. Therefore, ABMG did not employ a lawful messenger arrangement as described in Paragraph 14.

17. Rather than employ a lawful messenger arrangement, ABMG, on behalf of its physician members, has orchestrated collective negotiations for fee-for-service contracts with some payors who do business in and around Berkeley and Oakland, California. Since at least 2001, ABMG negotiated with these payors on price, making proposals and counter-proposals, as well as accepting or rejecting offers, without consulting with its individual physician members regarding the prices they would accept, and without transmitting the payors' offers to its individual physician members until ABMG had approved the negotiated prices.

18. ABMG's conduct, which constituted unlawful agreements between its individual physician members on the prices and other terms, included, but was not limited to:

- a. Approaching payors and suggesting contract rates and/or terms that it represented the ABMG physician members would accept, without obtaining price and term criteria from its individual physician members;
- b. Expressing its opinion about whether or not the ABMG physicians would likely accept contract rates and/or terms proposed by a payor and suggesting that payors reconsider offers it deemed inadequate, without obtaining price and term criteria from its individual physician members;
- c. Failing to submit payor proposals or counter proposals to its individual physician members to determine if each physician member would unilaterally accept the rates and/or terms being offered;

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- d. Submitting to ABMG physician members, on an opt-out basis, only those payor proposals for which ABMG had accepted the rates and terms; and
- e. Periodically providing its member physicians with a list of payors with which ABMG had negotiated contracts, and cautioned them about dealing individually with payors, because the individual contracts may have less favorable contract rates and/or terms. For example, during one negotiation ABMG sent the following notice to its individual member physicians:

As a general rule of caution, please scrutinize all contract solicitations that are mailed to your office, as many of these contracts do not represent the best interests of physicians. In the event that you may have signed these documents and returned them to [the PPO], you may certainly contact [the PPO] and say that you did not mean to sign the agreement because you should already be participating through ABMG and therefore the Individual Contract is superfluous.

Concerted Refusal to Deal

19. ABMG physicians and the Permanente Medical Group compete in the sale of physician services to consumers in and around Berkeley and Oakland, California. Because the Permanente Medical Group exclusively sells its physicians' services to Kaiser Foundation Health Plans, this competition occurs when a consumer chooses either a Kaiser Foundation Health Plan HMO, which allows the subscriber to access only the Permanente Medical Group, or an open-panel payor.

20. In 2006, a payor, Kaiser Permanente Insurance Corporation ("KPIC"), co-owned by the Permanente Medical Group and Kaiser Foundation Health Plans, began actively marketing an open-panel PPO. KPIC's PPO subscribers would access physician services through a third-party network. With

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this development, the Kaiser system could offer one-stop shopping to employers who want to offer their employees a choice between an open-panel PPO product (one that would allow subscribers to access physicians who are not members of the Permanente Medical Group), and Kaiser's traditional closed-panel HMO. This would result in more competition between ABMG physicians and the Permanente Medical Group in the sale of physician services through employers.

21. Under a prior contract with the third-party network referenced in Paragraph 20, the ABMG physicians had agreed to sell their physician services at a discount to payors who contract to access that network. In response to KPIC's initiative, however, ABMG decided, on behalf of the group, that ABMG physicians would not be available to KPIC's subscribers through the third-party network.

22. In furtherance of this decision, ABMG provided notice to the third-party network that its prior contract "is hereby amended to state that the physicians who are participating physicians of [ABMG] shall not provide services to members of Kaiser Health Plans" Although ultimately unsuccessful, the sole purpose of this action was to impede competition in the provision of physician services in and around Berkeley and Oakland, California.

**RESPONDENT'S CONDUCT IS NOT LEGALLY
JUSTIFIED**

23. Respondent's negotiation of fees and other competitively significant terms and concerted refusal to deal on behalf of its competing member physicians, and the agreements, acts, and practices described above, have not been, and are not, reasonably related to any efficiency-enhancing integration among the physician members of ABMG.

**RESPONDENT'S ACTIONS HAVE HAD, OR COULD BE
EXPECTED TO HAVE, SUBSTANTIAL
ANTICOMPETITIVE EFFECTS**

24. Respondent's actions described in Paragraphs 12 through 20 of this Complaint have had, have tended to have, or if

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successful would have had, the effect of restraining trade unreasonably and hindering competition in the provision of physician services in and around Berkeley and Oakland, California, in the following ways, among others:

- a. unreasonably restraining price and other forms of competition among physicians who are members of ABMG;
- b. increasing prices for physician services;
- c. depriving payors, including insurers and employers, and individual consumers, of the benefits of competition among physicians; and
- d. depriving consumers of the benefits of competition among payors.

25. 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 tenth day of July, 2009, issues its Complaint against Respondent Alta Bates Medical Group, Inc.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Alta Bates Medical Group, Inc., herein sometimes referred to as “Respondent,” and Respondent having been furnished thereafter

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with a copy of the draft Complaint that counsel for the Commission proposed to present to the Commission for its consideration and which, if issued, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act (“Act”), as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondent has violated the 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 Alta Bates Medical Group, Inc. is a for-profit corporation, organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 2000 Powell Street, Suite 830, Emeryville, CA 94608.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and this proceeding is in the public interest.

Decision and Order

ORDER**I.**

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

- A. “Respondent” means Alta Bates Medical Group, Inc., its officers, directors, employees, agents, attorneys, representatives, successors, and assigns; and the subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Medical Group Practice” means a bona fide, integrated firm in which physicians practice medicine together as partners, shareholders, owners, members, or employees, or in which only one Physician practices medicine.
- C. “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 also applies to all tenses and forms of the word “participate,” including, but not limited to, “participating,” “participated,” and “participation.”
- D. “Payor” means any Person that pays, or arranges for the payment, for all or any part of any Physician services for itself or for any other Person, as well as any Person that develops, leases, or sells access to networks of Physicians.
- E. “Person” means both natural Persons and artificial Persons, including, but not limited to, corporations, unincorporated entities, and governments.
- F. “Physician” means a doctor of allopathic medicine (“M.D.”) or a doctor of osteopathic medicine (“D.O.”).

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- G. “Preexisting Contract” means a contract for the provision of Physician services that was in effect on the date of the receipt by a Payor that is a party to such contract of notice sent by Respondent Alta Bates Medical Group, Inc., pursuant to Paragraph VII.A.2 of this Order of such Payor’s right to terminate such contract.
- H. “Principal Address” means either (1) the primary business address, if there is a business address, or (2) the primary residential address, if there is no business address.
- I. “Qualified Clinically-Integrated Joint Arrangement” means an arrangement to provide Physician services in which:
1. all Physicians who Participate in the arrangement Participate in active and ongoing programs of the arrangement to evaluate and modify the practice patterns of, and create a high degree of interdependence and cooperation among, the Physicians who Participate in the arrangement, in order to control costs and ensure the quality of services provided through the arrangement; and
 2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies that result from such integration through the arrangement.
- J. “Qualified Risk-Sharing Joint Arrangement” means an arrangement to provide Physician services in which:
1. all Physicians who Participate in the arrangement share substantial financial risk through their Participation in the arrangement and thereby create incentives for the Physicians who Participate jointly to control costs and improve quality by managing the provision of Physician services such as risk-sharing involving:

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- a. the provision of Physician services at a capitated rate,
 - b. the provision of Physician services for a predetermined percentage of premium or revenue from Payors,
 - c. the use of significant financial incentives (e.g., substantial withholds) for Physicians who Participate to achieve, as a group, specified cost-containment goals, or
 - d. the provision of a complex or extended course of treatment that requires the substantial coordination of care by Physicians in different specialties offering a complementary mix of services, for a fixed, predetermined price, when the costs of that course of treatment for any individual patient can vary greatly due to the individual patient's condition, the choice, complexity, or length of treatment, or other factors; and
2. any agreement concerning price or other terms or conditions of dealing entered into by or within the arrangement is reasonably necessary to obtain significant efficiencies that result from such integration through the arrangement.
- K. "Qualified Arrangement" means a Qualified Clinically-Integrated Joint Arrangement or a Qualified Risk-Sharing Joint Arrangement.

II.

IT IS FURTHER ORDERED that Respondent, directly or indirectly, or through any corporate or other device, in connection with the provision of Physician services in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, cease and desist from:

Decision and Order

- A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Physicians with respect to their provision of Physician services:
1. To negotiate on behalf of any Physician with any Payor;
 2. To refuse to deal, or threaten to refuse to deal, with any Payor, in furtherance of any conduct or agreement that is prohibited by any other provision of Paragraph II of this Order;
 3. Regarding any term, condition, or requirement upon which any Physician deals, or is willing to deal, with any Payor, including, but not limited to, price terms; or
 4. Not to deal individually with any Payor, or not to deal with any Payor other than through Respondent;
- B. Exchanging or facilitating in any manner the exchange or transfer of information among Physicians concerning any Physician's willingness to deal with a Payor, or the terms or conditions, including price terms, on which the Physician is willing to deal with a Payor;
- C. Attempting to engage in any action prohibited by Paragraphs II.A or II.B above; and
- D. Encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any Person to engage in any action that would be prohibited by Paragraphs II.A through II.C above.

Provided, however, that nothing in this Paragraph II shall prohibit any agreement or conduct involving Respondent that, subject to the requirements of

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Paragraph IV of this Order, is reasonably necessary to form, Participate in, or take any action in furtherance of, a Qualified Arrangement.

III.

IT IS FURTHER ORDERED that, for three (3) years from the date this Order becomes final, for any arrangement under which Respondent would act as an agent, or as a messenger, on behalf of any Physician or any Medical Group Practice with any Payor regarding contracts, except for those contracts under which Respondent is, or will be, paid on a capitated (per member per month) rate by the Payor, Respondent shall notify the Commission in writing (“Paragraph III Notification”) at least sixty (60) days prior to entering into the arrangement for which Paragraph III Notification is required. The Paragraph III Notification shall include the number of proposed Physician Participants in the proposed arrangement; the proposed geographic area in which the proposed arrangement would operate; a copy of any proposed Physician Participation agreement; a description of the proposed arrangement’s purpose and function; a description of any resulting efficiencies expected to be obtained through the proposed arrangement; and a description of procedures to be implemented to limit possible anticompetitive effects of the proposed arrangement, such as those prohibited by this Order.

IV.

IT IS FURTHER ORDERED that:

- A. If, within sixty (60) days from the date of the Commission’s receipt of the Paragraph III Notification, a representative of the Commission makes a written request to the Respondent providing such notification for additional information, then that Respondent shall not participate in the proposed arrangement prior to the expiration of thirty (30) days after substantially complying with such request, or such shorter waiting period as may be granted in writing from the Bureau of Competition;

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- B. The expiration of any waiting period described herein without a request for additional information, or without the initiation of an enforcement proceeding, shall not be construed as a determination by the Commission, or its staff, that the proposed arrangement does or does not violate this Order or any law enforced by the Commission;
- C. The absence of notice that the proposed arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed arrangement has been approved;
- D. Receipt by the Commission of any Paragraph III Notification is not to be construed as a determination by the Commission, or its staff, that the proposed arrangement does or does not violate this Order or any law enforced by the Commission; and
- E. Paragraph III Notification shall not be required prior to participating in any arrangement for which Paragraph III Notification has previously been given.

V.

IT IS FURTHER ORDERED that for three (3) years from the date this Order becomes final, pursuant to each Qualified Arrangement in which Respondent is a Participant, except for those contracts under which Respondent is, or will be, paid on a capitated (per member per month) rate by the Payor, (“Paragraph V Arrangement”), Respondent shall notify the Commission in writing (“Paragraph V Notification”) at least sixty (60) days prior to:

- A. Participating in, organizing, or facilitating any discussion or understanding with or among any Physicians or Medical Group Practices in such Arrangement relating to price terms or conditions of dealing with any Payor; or

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- B. Contacting a payor, pursuant to an Arrangement to negotiate or enter into any agreement concerning price or other terms or conditions of dealing with any Payor, on behalf of any Physician or Medical Group Practice in such Arrangement.

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

- A. Paragraph V Notification shall include the following information regarding the Qualified Arrangement pursuant to which the Respondent intends to engage in the above identified conduct:
1. the total number of Physicians and the number of Physicians in each specialty participating in the Qualified Arrangement;
 2. a description of the Qualified Arrangement, including its purpose and geographic area of operation;
 3. a description of the nature and extent of the integration and the efficiencies resulting from the Qualified Arrangement;
 4. an explanation of the relationship of any agreement on prices, or contract terms related to price, to furthering the integration and achieving the efficiencies of the Qualified Arrangement;
 5. a description of any procedures proposed to be implemented to limit possible anticompetitive effects resulting from the Qualified Arrangement or its activities; and
 6. all studies, analyses, and reports that were prepared for the purpose of evaluating or analyzing competition for Physician services in any relevant market, including, but not limited to, the market share of Physician services in any relevant market.

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- B. If, within sixty (60) days from the Commission's receipt of the Paragraph V Notification, a representative of the Commission makes a written request to Respondent for additional information, then Respondent shall not participate in any arrangement described in Paragraph V.A or Paragraph V.B of this Order prior to the expiration of thirty (30) days after substantially complying with such request for additional information, or such shorter waiting period as may be granted in writing from the Bureau of Competition;
- C. The expiration of any waiting period described herein without a request for additional information, or without the initiation of an enforcement proceeding, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission;
- D. The absence of notice that the proposed Qualified Arrangement has been rejected, regardless of a request for additional information, shall not be construed as a determination by the Commission, or its staff, that the proposed Qualified Arrangement has been approved;
- E. Receipt by the Commission of any Paragraph V Notification regarding participation pursuant to a proposed Qualified Arrangement is not to be construed as a determination by the Commission that any such proposed Qualified Arrangement does or does not violate this Order or any law enforced by the Commission; and
- F. Paragraph V Notification shall not be required prior to participating in any Qualified Arrangement for which Paragraph V Notification has previously been given.

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VII.

IT IS FURTHER ORDERED that Respondent shall:

- A. Within thirty (30) days from the date on which this Order becomes final:
1. send by first-class mail with delivery confirmation or return receipt requested, or electronic mail with return confirmation, a copy of this Order and the Complaint to:
 - a. every Physician who Participates, or has Participated, in Respondent at any time since January 1, 2001; and
 - b. each current officer, director, manager, and employee of Respondent; and
 2. send by first-class mail, return receipt requested, a copy of this Order, the Complaint, and the letter attached as Appendix A to this Order to the chief executive officer of each Payor that has contracted with Respondent for the provision of Physician services at any time since January 1, 2001 regarding contracting for the provision of Physician services, except for those contracts under which Respondent is, or will be, paid a capitated (per member per month) rate by the Payor;
- B. Terminate, without penalty or charge, and in compliance with any applicable laws, any Preexisting Contract with any Payor who is sent the letter required by Paragraph VII.A.2 of this Order, at the earlier of: (1) receipt by Respondent Alta Bates Medical Group, Inc. of a written request to terminate such contract from any Payor that is a party to the contract, or (2) the earliest termination date, renewal date (including any automatic renewal date), or the anniversary date of such contract.

Decision and Order

Provided, however, a Preexisting Contract for Physician services may extend beyond any such termination or renewal date no later than one (1) year from the date that the Order becomes final if, prior to such termination or renewal date:

(a) the Payor submits to Respondent Alta Bates Medical Group, Inc. a written request to extend such contract to a specific date no later than one (1) year from the date that this Order becomes final, and

(b) Respondent Alta Bates Medical Group, Inc. has determined not to exercise any right to terminate.

Provided further, that any Payor making such request to extend a contract retains the right, pursuant to Paragraph VII.B of this Order, to terminate the Preexisting Contract at any time.

- C. Within ten (10) days of receiving a written request to terminate from a Payor, pursuant to Paragraph VII.B of this Order, distribute, by first-class mail, return receipt requested, or electronic mail with return confirmation, a copy of that request to each Physician Participating in such contract as of the date that Respondent Alta Bates Medical Group, Inc. receives such request to terminate.
- D. For three (3) years from the date this Order becomes final:
1. Distribute by first-class mail, return receipt requested, or electronic mail with return confirmation, a copy of this Order and the Complaint to:
 - a. each Physician who begins Participating in Respondent, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that such Participation begins;

Decision and Order

- b. each payor who contracts with Respondent for the provision of Physician services, except for those Payors who contract with Respondent solely for Physician services that are, or will be, paid on a capitated (per member per month) rate by the Payor, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that such Payor enters into such contract; and
 - c. Each Person who becomes an officer, director, manager, or employee of Respondent, and who did not previously receive a copy of this Order and the Complaint from Respondent, within thirty (30) days of the time that he or she assumes such position with Respondent; and
2. Annually publish in an official annual report or newsletter and/or on the physician-access portion of Respondent's website, a copy of this Order and the Complaint with such prominence as is given to regularly featured articles, and send the report or newsletter to, or notify by electronic mail that such report or newsletter is published on the website, all Physicians who participate in Respondent.
- E. File verified written reports within sixty (60) days from the date this Order becomes final, annually thereafter for three (3) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include:
1. a detailed description of the manner and form in which the Respondent has complied and is complying with this Order;
 2. the name, address, and telephone number of each Payor with which the Respondent has had any contact, during the one (1) year period preceding the date for filing such report, except for Payors

Decision and Order

whose sole contacts with Respondent relate to contracts under which Respondent is, or will be, paid a capitated (per member per month) rate by the Payor;

3. The identity of each Payor sent a copy of the letter attached as Appendix A, the response of each Payor to that letter, and the status of each contract to be terminated pursuant to that letter; and
4. copies of the delivery confirmations, signed return receipts, or electronic mail with return confirmations required by Paragraph VII.A.I, and copies of the signed return receipts required by Paragraphs VII.A.2, VII.C, and VII.D.

VIII.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

- A. of any change in its Principal Address within twenty (20) days of such change in address; and
- B. at least thirty (30) days prior to any proposed: (1) dissolution of Respondent; (2) acquisition, merger, or consolidation of Respondent; or (3) any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

IX.

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

Decision and Order

- A. Access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and
- B. To interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate on July 10, 2029.

By the Commission.

Decision and Order

Appendix A

[Respondent's letterhead]

[name of payor's CEO]

[address]

Dear _____:

Enclosed is a copy of a complaint and a consent order ("Order") issued by the Federal Trade Commission against Alta Bates Medical Group, Inc.

Pursuant to Paragraph V.B of the Order, Alta Bates Medical Group, Inc. must allow you to terminate, upon your written request without any penalty or charge, any contracts with Alta Bates Medical Group, Inc. for the provision of physician services that were in effect prior to your receipt of this letter.

Paragraph V.B of the Order also provides that, if you do not terminate your contract, the contract will terminate at the earlier of [date one year from the date the Order becomes final] or its earliest termination or renewal date (including any automatic renewal date). If the termination or renewal date occurs prior to [date one year from the date the Order becomes final], you may request Alta Bates Medical Group, Inc. to extend that date to a date no later than [date one year from the date the Order becomes final]. If you choose to extend the term of the contract, you may nevertheless still terminate the contract at any time.

Sincerely,

[Alta Bates Medical Group, Inc. to fill in information in brackets]

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed Consent Order with Alta Bates Medical Group, Inc., (“ABMG” or “Respondent”). The agreement settles charges that ABMG violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by fixing prices charged to those offering coverage for health care services (“payors”) in the Berkeley and Oakland, California, area and refusing to deal with payors except on a collectively determined basis. 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 Consent Order final.

The purpose of this analysis is to facilitate public comment on the proposed Consent Order. The analysis is not intended to constitute an official interpretation of the agreement and proposed Consent Order or to modify their terms in any way. Further, the proposed Consent Order has been entered into for settlement purposes only and does not constitute an admission by Respondent that it violated the law or that the facts alleged in the Complaint (other than jurisdictional facts) are true.

Alta Bates Medical Group, Inc.

ABMG is a multi-specialty independent practice association (“IPA”) comprised of multiple, independent medical practices serving the Berkeley and Oakland, California area. It has a total of approximately 600 physician members, of which approximately 200 are devoted to primary care. Since its formation, ABMG has negotiated group contracts with payors under which it receives capitated (per member per month) payments. These contracts shift the risk of patient illness to the IPA by specifying that the health plan will pay the IPA a flat monthly fee for each enrollee, with almost no regard for patient utilization. This type of contracting is a form of financial integration, so for antitrust purposes, the IPA is treated as a single

Analysis to Aid Public Comment

entity for purposes of these contract negotiations, and not as a group of competing physicians. The complaint does not challenge ABMG's activities concerning these contracts.

ABMG, however, also contracts on behalf of its member physicians with health plans to provide fee-for-service medical care. Under these arrangements, the payor compensates physicians or group practices for services actually rendered pursuant to agreed-upon fee schedules. In the absence of financial risk-sharing or clinical integration on the part of providers, the IPA members are competitors for purposes of antitrust analysis. It is ABMG's negotiation of fee-for-service contracts that is the subject of the allegations in the Commission's Complaint.

The Complaint

Since at least 2001, ABMG, acting as a combination of its physician members, and in conspiracy with its members, has acted to restrain competition with respect to fee-for-service contracts by, among other things, facilitating, entering into, and implementing agreements, express or implied, to fix the prices and other terms at which they would contract with payors; to engage in collective negotiations over terms and conditions of dealing with payors; and to have ABMG members refrain from negotiating individually with payors or contracting on terms other than those approved by ABMG. This type of collective conduct by competitors is inherently suspect under the antitrust laws.

At times, however, IPAs will act as a conduit between physician members and health plans regarding fee-for-service contracts to facilitate the contracting process. Under this model, the IPA merely acts as a messenger and does not negotiate the terms of the contract.

Although claiming to employ a lawful messenger arrangement, ABMG, on behalf of its physician members, instead orchestrated collective negotiations for fee-for-service contracts. Specific acts by ABMG that are alleged in the complaint are: making proposals and counter-proposals, as well as accepting or rejecting offers, without consulting with its individual physician members regarding the prices they unilaterally would accept, and

Analysis to Aid Public Comment

without transmitting the payors' offers to its individual physician members until ABMG had approved the negotiated prices.

The complaint also alleged a concerted refusal to deal intended to impede competition by one of ABMG's major competitors, the Permanente Medical Group, which provides physician services exclusively to Kaiser Foundation Health Plan, Inc. In 2006, Kaiser¹ was expanding a fee-for-service product, under which covered individuals could access physician services through a national third-party network that included ABMG physicians. This expansion by Kaiser threatened ultimately to reduce ABMG's business under its capitated contracts, by giving Kaiser the ability to offer employers both a capitated and fee-for-service health plan option. To impede this expansion, ABMG attempted a concerted refusal to serve Kaiser fee-for-service enrollees. Although ABMG's refusal to deal was ultimately unsuccessful, the sole purpose of this action was to impede competition in the provision of physician services in and around Berkeley and Oakland, California.

ABMG did not engage in any activity that might justify collective agreements on the prices its members would accept for their services. For example, the physicians in ABMG have not clinically or financially integrated their practices to create efficiencies sufficient to justify their acts and practices. As a consequence, the Respondent's actions have restrained price and other forms of competition among physicians in the Berkeley and Oakland, California, area and thereby harmed consumers (including health plans, employers, and individual consumers) by increasing the prices for physician services.

The Proposed Consent Order

The proposed Consent Order is designed to prevent the continuance and recurrence of the illegal conduct alleged in the complaint while it allows ABMG to engage in legitimate, joint conduct. The proposed Consent Order does not affect ABMG's activities in contracting with the payors on a capitated basis.

¹ Kaiser is a trade name for an association of three entities: Kaiser Foundation Health Plan, Inc.; Kaiser Foundation Hospitals; and the Permanente Medical Groups.

Analysis to Aid Public Comment

Paragraph II.A prohibits Respondent from entering into or facilitating any agreement between or among any health care providers: (1) to negotiate on behalf of any physician with any payor; (2) to refuse to deal, or threaten to refuse to deal with any payor; (3) regarding any term, condition, or requirement upon which any physician deals, or is willing to deal, with any payor, including, but not limited to price terms; or (4) not to deal individually with any payor, or not to deal with any payor other than through ABMG.

The other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Respondent from facilitating exchanges of information between health care providers concerning whether, or on what terms, to contract with a payor. Paragraph II.C bars attempts to engage in any action prohibited by Paragraph II.A or II.B, and Paragraph II.D proscribes encouraging, suggesting, advising, pressuring, inducing, or attempting to induce any person to engage in any action that would be prohibited by Paragraphs II.A through II.C.

As in other Commission orders addressing health care providers' collective bargaining with health care payors, certain kinds of agreements are excluded from the general bar on joint negotiations. Paragraph II does not preclude ABMG from engaging in conduct that is reasonably necessary to form or participate in legitimate "qualified risk-sharing" or "qualified clinically-integrated" joint arrangements, as defined in the proposed Consent Order. Also, Paragraph II would not bar agreements that only involve physicians who are part of the same medical group practice, defined in Paragraph I.B, because it is intended to reach agreements between and among independent competitors.

Paragraphs III through VI require ABMG to notify the Commission before it initiates certain contacts regarding contracts with payors. Paragraphs III and IV apply to arrangements under which ABMG would be acting as a messenger on behalf of its member physicians. Paragraphs V and VI discuss arrangements under which ABMG plans to achieve financial or clinical integration.

Analysis to Aid Public Comment

Paragraph VII.A requires ABMG to send a copy of the Complaint and Consent Order to its physician members, its management and staff, and any payors who communicated with ABMG, or with whom ABMG communicated, with regard to any interest in contracting for physician services, at any time since January 1, 2001.

Paragraph VII.B requires ABMG to terminate, without penalty, pre-existing payer contracts that it had entered into since 2001, at the earlier of (1) receipt by ABMG of a written request for termination by the payer; or (2) the termination date, renewal date, or anniversary date of the contract. This provision is intended to eliminate the effects of ABMG's illegal collective behavior. The payer can delay the termination for up to one year by making a written request to ABMG.

Paragraph VII.D contains three-year notification provisions relating to future contact with physicians, payors, management and staff. This provision requires ABMG to distribute a copy of the Complaint and Consent Order to each physician who begins participating in ABMG; each payor who contacts ABMG regarding the provision of physician services; and each person who becomes an officer, director, manager, or employee for five years after the date on which the Consent Order becomes final. In addition, Paragraph VII.D requires ABMG to publish a copy of the Complaint and Consent Order, annually, in any official publication that it sends to its participating physicians.

Paragraphs VII.E and VIII-IX impose various obligations on ABMG to report or to provide access to information to the Commission to facilitate monitoring its compliance with the Consent Order.

Pursuant to Paragraph X, the proposed Consent Order will expire in 20 years from the date it is issued.

Complaint

IN THE MATTER OF

TENDER CORPORATIONCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4261; File No. 082 3188*
Complaint, July 13, 2009 - Decision, July 13, 2009

This consent order addresses Tender Corporation's marketing and sale of "Fresh Bath" brand moist hand and body wipes. The complaint alleges that respondent violated Section 5 of the FTC Act by making false and misleading representations that its products and packaging were "biodegradable," when in fact, customary disposal methods do not allow for respondent's products or packaging to break down completely and return to nature. The complaint further alleges that respondent failed to substantiate its "biodegradable" claim. The consent order prohibits respondent from engaging in similar acts and practices by prohibiting respondent from making representations its products are biodegradable or environmentally beneficial unless substantiated by competent and reliable scientific evidence. Additionally, the order requires respondent to specify whether its biodegradability claim applies to the product, package, or components and to keep copies of relevant advertisements and their materials substantiating the claim.

Participants

For the *Commission*: Michael J. Davis and Laura Schneider.

For the *Respondents*: Rebecca Dandeker and Lawrence Lanpher, K&L Gates.

COMPLAINT

The Federal Trade Commission, having reason to believe that Tender Corporation ("respondent"), has violated provisions of 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 Tender Corporation is a Delaware corporation with its principal office or place of business at 106 Burndy Road, Littleton, New Hampshire 03561.

Complaint

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 Federal Trade Commission Act.

3. Respondent advertises, labels, offers for sale, sells, and/or distributes goods under the brand name Fresh Bath to the public throughout the United States, including Fresh Bath Wipes and Fresh Bath Travel Wipes. Respondent advertises and offers these goods for sale through its Internet site www.adventuremedicalkits.com and through its catalog. Respondent also advertises, offers for sale, sells, or distributes these goods to retailers throughout the United States.

4. To induce consumers and retailers to purchase Fresh Bath Wipes and Fresh Bath Travel Wipes, respondent disseminates, has disseminated, or has caused to be disseminated advertisements, including product labeling and other promotional materials, including but not limited to the attached Exhibit A. In these advertisements, respondent prominently states or has stated that Fresh Bath Wipes and Fresh Bath Travel Wipes and/or the packaging for Fresh Bath Wipes and Fresh Bath Travel Wipes are “bio-degradable.” Respondent does not define, describe, or qualify such biodegradability, and placement of the term “bio-degradable” on the packaging does not make clear whether this purported benefit refers to the product, its packaging, or a portion or component of the product or packaging.

5. Approximately 91 percent of total municipal solid waste in the United States is disposed of in either landfills, incinerators, or recycling facilities. These disposal methods do not present conditions that would allow for either Fresh Bath Wipes or Fresh Bath Travel Wipes or their packaging to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

VIOLATIONS OF SECTION 5 OF THE FTC ACT**FALSE OR MISLEADING REPRESENTATIONS**

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that:

Complaint

- a. Fresh Bath Wipes and Fresh Bath Travel Wipes will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal; and
 - b. The packaging of Fresh Bath Wipes and Fresh Bath Travel Wipes will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal.
7. In truth and in fact:
- a. Fresh Bath Wipes and Fresh Bath Travel Wipes will not completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal because a substantial majority of total municipal solid waste is disposed of by methods that do not present conditions that would allow for Fresh Bath Wipes and Fresh Bath Travel Wipes to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time; and
 - b. The packaging of Fresh Bath Wipes and Fresh Bath Travel Wipes will not completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal because a substantial majority of total municipal solid waste is disposed of by methods that do not present conditions that would allow for the packaging of Fresh Bath Wipes and Fresh Bath Travel Wipes to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.
8. Therefore, the representations set forth in Paragraph 6 were, and are, false or misleading.

Complaint

UNSUBSTANTIATED REPRESENTATIONS

9. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 6, at the time the representations were made.

10. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 6 at the time the representations were made.

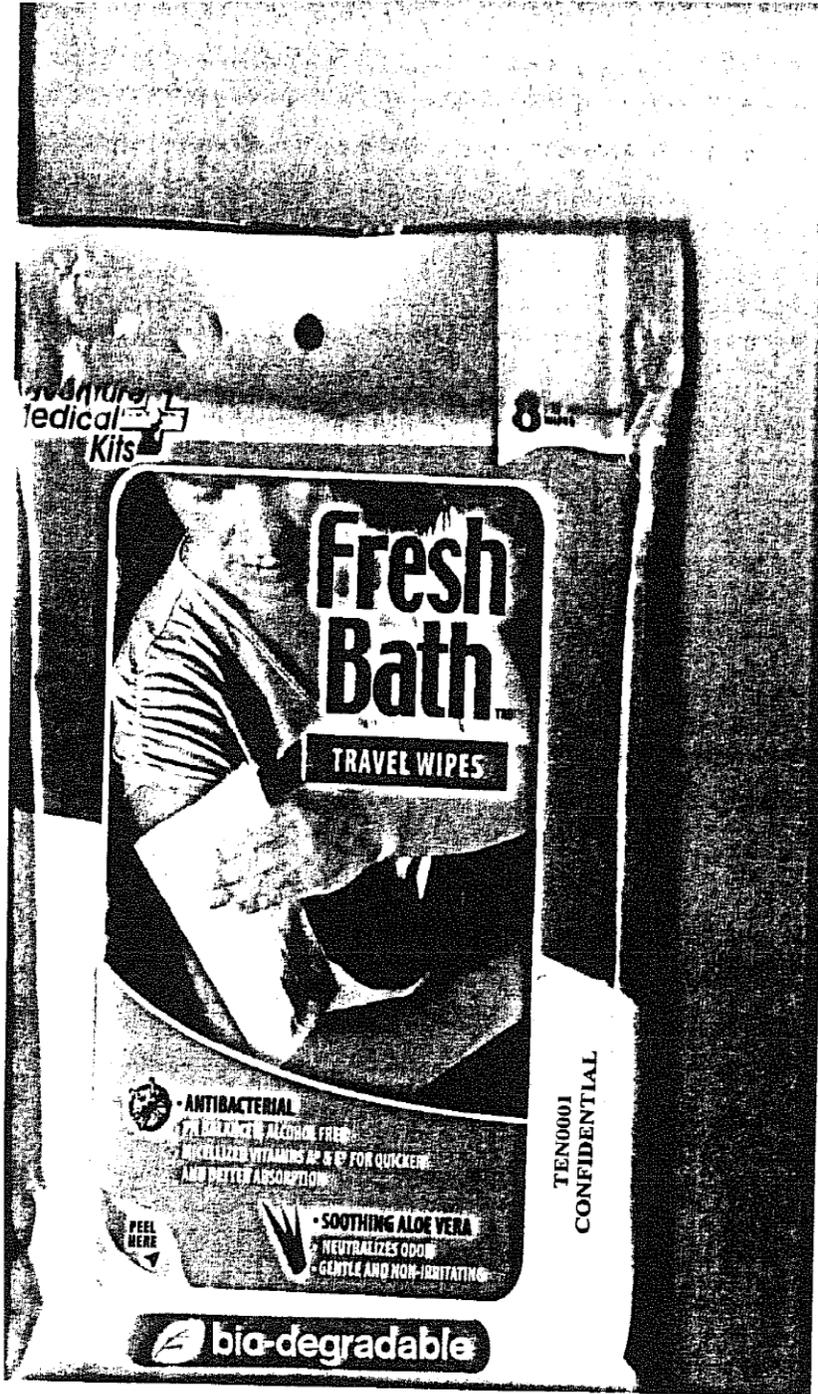
11. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission, on this thirteenth day of July, 2009, has issued this complaint against respondent.

By the Commission.

Complaint



Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; and

The Respondent and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said consent agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in the 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 has reason to believe that the Respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure 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 Tender Corporation is a Delaware corporation with its principal office or place of business at 106 Burndy Road, Littleton, New Hampshire 03561.
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.

Decision and Order

ORDER**DEFINITIONS**

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

- A. Unless otherwise specified, “Respondent” shall mean Tender Corporation and its successors and assigns and its officers, agents, representatives, and employees.
- B. “Clearly and prominently” shall mean as follows:
 - 1. 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 video portions of the advertisement. *Provided, however,* that in any advertisement presented solely through video 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 video 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. In addition to the foregoing, in interactive media the disclosure shall also be unavoidable and shall be presented prior to the consumer incurring any financial obligation;
 - 2. In a print advertisement, promotional material, or instructional manual, the disclosure shall be in a type size and location sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears. In a catalog, the disclosure shall appear on the same page as each representation;

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3. On a product label, the disclosure shall be in a type size and location on the principal display panel sufficiently noticeable for an ordinary consumer to read and comprehend it, in print that contrasts with the background against which it appears; and
 4. Regardless of the medium, 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, promotional material, instructional manual, package, or label.
- C. For any representation, a disclosure elsewhere shall be deemed to be “in close proximity” to such representation if there is a clear and conspicuous cross-reference to the disclosure. The use of an asterisk or other symbol shall not constitute a clear and conspicuous cross-reference. A cross-reference shall be deemed clear and conspicuous if it is of sufficient prominence to be readily noticeable and readable by an ordinary consumer when examining the part of the advertisement, promotional material, instructional manual, package, or label on which the representation appears.
- D. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- E. “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.
- F. “Is degradable, biodegradable, or photodegradable” shall mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.

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- G. “Product or package” means any towel or wipe, including but not limited to antibacterial, cleaning, lotion, sunblock, or repellent wipe, or any similar product, or any package containing such product, that is (a) offered for sale, sold, or distributed by respondent, under the brand name Fresh Bath, Tender, Adventure Medical Kits, or any other brand name of respondent; or (b) sold or distributed by third parties under private labeling agreements with respondent.

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package, in or affecting commerce, shall not represent, in any manner, expressly or by implication:

- A. That any such product or package is degradable, biodegradable, or photodegradable, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; or
- B. That any such product or package offers any other environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product or package, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication

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concerning whether such product or package is degradable, biodegradable, or photodegradable, unless:

- A. The representation applies to the entire product and entire package; or
- B. Respondent discloses clearly, prominently, and in close proximity to such representation, whether such representation refers to the entire product, the entire package, or a portion or component of the product or package.

III.

IT IS FURTHER ORDERED that respondent Tender Corporation, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Commission for inspection and copying:

- A. All advertisements, labeling, packaging and promotional materials containing the representation;
- B. All materials that were relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
- D. All acknowledgments of receipt of this order, obtained pursuant to Part IV.

IV.

IT IS FURTHER ORDERED that for a period of five (5) years after the date of issuance of this order, respondent Tender Corporation, and its successors and assigns, shall deliver a copy

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of this order to: (1) all current and future principals, officers, and directors; and (2) all current and future managers who have responsibilities with respect to the subject matter of this order. Respondent shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* Respondent shall deliver this order to such 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.

V.

IT IS FURTHER ORDERED that respondent Tender Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change with regard to Tender Corporation or any business entity that 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 formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. *Provided, however,* that, with respect to any proposed change about which 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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VI.

IT IS FURTHER ORDERED that respondent Tender Corporation, and its successors and assigns, shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied

Decision and Order

with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

VII.

This order will terminate on July 13, 2029, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- 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 to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Tender Corporation, a corporation (“respondent”).

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 Tender’s marketing and sale of Fresh Bath brand moist hand and body wipes, packaged in plastic that prominently states “bio-degradable” without qualification on the front of the package. Tender’s website and promotional materials also made the claim. According to the FTC complaint, respondent represented that Fresh Bath Wipes and Fresh Bath Travel Wipes and their packages will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal. The complaint alleges respondent’s biodegradable claim is false because a substantial majority of total household waste is disposed of either in landfills, incinerators, or recycling facilities and these customary disposal methods do not present conditions that would allow for the wipes and their packaging to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time. The complaint further alleges that respondent failed to have substantiation for the biodegradable claim. The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future.

Part I.A of the proposed order prohibits respondent from making a representation that certain of its products are degradable unless the representation is true, not misleading, and substantiated by competent and reliable scientific evidence. Part I.B prohibits respondent from making any other environmental benefit claim

Analysis to Aid Public Comment

about such products, unless at the time the representation is made, it is truthful and not misleading, and substantiated by competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence.

Part II of the proposed order requires respondent to specify whether its degradability claim applies to the product, package, or components of either.

Parts III through VI require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission and respond to other requests from FTC staff. Part VII 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

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

Docket No. C-4263; File No. 082 3186
Complaint, July 15, 2009 - Decision, July 15, 2009

This consent order addresses Kmart Corporation's marketing and sale of American Fare paper plates. The complaint alleges that respondent violated Section 5 of the FTC Act by making false and misleading representations that its products and packaging were "biodegradable," when in fact, customary disposal methods do not allow for respondents products or packaging to break down completely and return to nature. The complaint further alleges that respondent failed to substantiate its "biodegradable" claim. The consent order prohibits respondent from engaging in similar acts and practices by prohibiting respondent from making representations its products are biodegradable or environmentally beneficial unless substantiated by competent and reliable scientific evidence. Additionally, the order requires respondent to specify whether its biodegradability claim applies to the product, package, or components and to keep copies of relevant advertisements and their materials substantiating the claim

Participants

For the *Commission: Michael J. Davis and Laura Schneider.*

For the *Respondents: Charulata Pagar, Manatt, Phelps & Philips.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Kmart Corporation ("respondent"), has violated provisions of 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 Kmart Corporation is a Michigan corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, Illinois 60179.

Complaint

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 Federal Trade Commission Act.

3. Respondent advertises, labels, offers for sale, sells, and/or distributes goods under the brand name American Fare to the public throughout the United States, including American Fare paper plates. Respondent advertises and offers these goods for sale through print ads and in its Kmart retail outlets throughout the United States.

4. To induce consumers to purchase American Fare paper plates, respondent disseminates, has disseminated, or has caused to be disseminated advertisements, including product labeling and other promotional materials, including but not limited to the attached Exhibit A. In these advertisements, respondent prominently states or has stated that American Fare plates are “biodegradable.” Respondent does not define, describe, or qualify such biodegradability.

5. Approximately 91 percent of total municipal solid waste in the United States is disposed of in either landfills, incinerators, or recycling facilities. These disposal methods do not present conditions that would allow for American Fare paper plates to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

VIOLATIONS OF SECTION 5 OF THE FTC ACT**FALSE OR MISLEADING REPRESENTATIONS**

6. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that American Fare paper plates will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal.

7. In truth and in fact, American Fare paper plates will not completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal because a substantial majority of total

Complaint

municipal solid waste is disposed of by methods that do not present conditions that would allow for American Fare paper plates to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time.

8. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

UNSUBSTANTIATED REPRESENTATIONS

9. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 6, at the time the representation was made.

10. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 6 at the time the representation was made.

11. Therefore, the representation set forth in Paragraph 9 was, and is, false or misleading.

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

THEREFORE, the Federal Trade Commission, on this fifteenth day of July, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A



Complaint



Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said consent agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in the complaint, or that any of the facts as alleged in such complaint, other than jurisdictional facts, are true, and waives and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the Respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, 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 Kmart Corporation is a Michigan corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, Illinois 60179.
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.

Decision and Order

ORDER**DEFINITIONS**

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

- A. Unless otherwise specified, “Respondent” shall mean Kmart Corporation, a corporation, and its successors and assigns, and its officers, agents, representatives, and employees.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- C. “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.
- D. “Is degradable, biodegradable, or photodegradable” shall mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.
- E. “Product or package” means any paper product or disposable tableware product, or package containing such product, that is (a) offered for sale, sold, or distributed by respondent, under the American Fare brand name or any other brand name of respondent; or (b) sold or distributed by third parties under private labeling agreements with respondent.

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising,

Decision and Order

promotion, offering for sale, sale, or distribution of any product or package, in or affecting commerce, shall not represent, in any manner, expressly or by implication:

- A. That any such product or package is degradable, biodegradable, or photodegradable, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; or
- B. That any such product or package offers any other environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

IT IS FURTHER ORDERED that respondent Kmart Corporation, and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Commission for inspection and copying:

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

Decision and Order

- D. All acknowledgments of receipt of this order, obtained pursuant to Part III.

III.

IT IS FURTHER ORDERED that respondent Kmart Corporation, and its successors and assigns, shall deliver a copy of this order to: (1) all current and future principals, officers, and directors; and (2) all current and future managers who have responsibilities with respect to the subject matter of this order. Respondent shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* 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 Kmart Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in respondent or any business entity that 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 formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. *Provided, however,* that, with respect to any proposed change about which 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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Decision and Order

V.

IT IS FURTHER ORDERED that respondent Kmart Corporation, and its successors and assigns, shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

VI.

This order will terminate on July 15, 2029, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This orders 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 to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Kmart Corporation, a corporation (“respondent”).

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 agreements proposed order.

This matter involves Kmart's marketing and sale of American Fare paper plates with shrink-wrap packaging that prominently states “biodegradable” without qualification on the front of the wrapper. According to the FTC complaint, respondent represented that American Fare paper plates will completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time after customary disposal. The complaint alleges respondent's biodegradable claim is false because a substantial majority of total household waste is disposed of either in landfills, incinerators, or recycling facilities and these customary disposal methods do not present conditions that would allow for the paper plates to completely break down and return to nature, *i.e.*, decompose into elements found in nature, within a reasonably short period of time. The complaint further alleges that respondent failed to have substantiation for its biodegradable claim. The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future.

Part I.A of the proposed order prohibits respondent from making a representation that certain of its products are degradable unless the representation is true, not misleading, and substantiated by competent and reliable scientific evidence. Part I.B prohibits respondent from making any other environmental benefit claim about such products, unless at the time the representation is made, it is truthful and not misleading, and substantiated by competent

Analysis to Aid Public Comment

and reliable evidence, which when appropriate must be competent and reliable scientific evidence.

Parts II through V require respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission and respond to other requests from FTC staff. Part VI 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

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

*Docket No. C-4262; File No. 082 3145
Complaint, July 27, 2009 - Decision, July 27, 2009*

This consent order addresses respondent's, Kellogg Company, product called "Frosted Mini-Wheats." According to the complaint, the respondent, a producer of cereal and convenience foods, violated Section 5 of the FTC Act by making false and misleading representations that eating a bowl of Kellogg's Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%. The complaint alleges that this claim is false or misleading because the clinical study referred to in respondent's advertisements showed roughly only half the kids who ate Frosted Mini-Wheats cereal showed any improvement after three hours as compared to their pre-breakfast baseline. And, only one in seven kids who ate the cereal improved their attentiveness by 18% or more. The consent order prevents respondent from engaging in similar acts and practices in the future by prohibiting representation, unless the representation is true and non-misleading. In addition to filing compliance reports to the FTC, the Respondent must possess and maintain competent and reliable scientific evidence for its claims.

Participants

For the *Commission: Kial S. Young*

For the *Respondents: Richard J. Leighton and Richard F. Mann, Keller and Heckman LLP*

COMPLAINT

The Federal Trade Commission, having reason to believe that Kellogg Company, a corporation ("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 Kellogg Company is a Delaware corporation with its principal office or place of business at One Kellogg Square, P.O. Box 3599, Battle Creek, Michigan, 49016.

Complaint

2. Respondent has labeled, advertised, promoted, offered for sale, sold, and distributed Kellogg's® Frosted Mini-Wheats® cereal to consumers.

3. Kellogg's® Frosted Mini-Wheats® cereal is a "food" within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

4. The acts and practices of respondent, as alleged herein, have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

5. Respondent has disseminated or caused to be disseminated advertisements for Kellogg's® Frosted Mini-Wheats® cereal, including but not limited to the attached Exhibits A through H. These advertisements contain the following statements:

- a. **Television Advertisement:** "Where Were We?"
(Exhibit A - CDROM and storyboard)

Teacher: "Okay. Where were we?"

School Boy: "We were on the third paragraph of page 57 and you were explaining that the stone structures made by Ancient Romans were called aqueducts. And as you were writing that up on the board, your chalk broke. Into three pieces."

Teacher: "Right."

Mini-Wheat: "I've never been so proud."

Female Announcer: "A clinical study showed kids who had a filling breakfast of Frosted Mini-Wheats cereal improved their attentiveness by nearly 20 percent."

On screen: [appears in small, white font, for five seconds, against two different backgrounds, the first of which is in motion]

Complaint

“Based upon independent clinical research, kids who ate Frosted Mini-Wheats cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit www.frostedminiwheats.com.”

On screen: “20%”

Mini: “Nearly twenty percent? Okay, even I’m impressed by me.”

Female Announcer: “Keeps ‘em full. Keeps ‘em focused.”

b. **Television Advertisement:** “Crossing Guard”
(Exhibit B- CDRom and storyboard)

Mini-Wheat 1: “Ah, the first day of school. New pencils, new books.”

Mini-Wheat 2: “New backpack. Looks good.”

Mini-Wheat 1: “Just trying to look our best.”

Mini-Wheat 2: “It’s going to take more than looks. From what I hear, Ms. Haskins is a toughie.”

Mini-Wheat 1: “Oh, we had a good breakfast, so we’re ready.”

Mini-Wheat 3: “Gonna be another great year, huh guys?”

Mini-Wheat 1: “You bet your eight layers.”

Mini-Wheat 2: “Oh, yeah, long distance high five.”

Mini-Wheat 3: “Whoa.”

Complaint

Female Announcer: “A clinical study showed kids who had a filling breakfast of Frosted Mini-Wheats cereal improved their attentiveness by nearly 20 percent when compared to kids who missed out on breakfast.”

On Screen: [appears in small, white font, for approximately five seconds, against three different backgrounds, the first of which is in motion]

“Based upon independent clinical research, kids who ate Frosted Mini-Wheats cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit www.frostedminiwheats.com.”

On Screen: “Nearly 20%”

Mini-Wheat 3: “Look, a new kid.”

Female Announcer: “Now available in blueberry muffin. Keeps ‘em full, keeps ‘em focused.”

c. **Product Packaging** (Exhibit C)

Appearing at the top of the front and back panels of Frosted Mini-Wheats cereal boxes:



Appearing at the bottom of the back panel of Frosted Mini-Wheats boxes, in small type:

Complaint

“Based upon independent clinical research, kids who ate Kellogg’s® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit www.frostedminiwheats.com.”

- d. **Internet Website** www.mini-wheats.com (excerpts)
(Exhibit D) From the homepage:

“A breakfast of Frosted Mini-Wheats® cereal is clinically shown to improve kids’ attentiveness by nearly 20%.*

* Based upon independent clinical research, kids who ate Kellogg’s® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast.”

From the “News” page:

“The Daily Wheat: Attentiveness Put to the Test:

This is Mini™, reporting from an event that has captured our attention. A team of kids are attempting to show that a breakfast of Kellogg’s® Frosted Mini-Wheats® cereal can help keep them attentive all morning long.

It was apparent from the first test that the Frosted Mini-Wheats® team’s attentiveness was strong. And as the morning progressed, it didn’t waiver.

In the end, a round of enthusiastic cheers could be heard coming from the moms’ viewing section as the 8-layers of whole grain fiber in Frosted Mini-Wheats® cereal proved to improve kids’ attentiveness by nearly 20%*!

* Based upon independent clinical research, kids who ate Kellogg’s® Frosted Mini-Wheats® cereal

Complaint

for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast.”

e. **Other Internet Advertising** (Exhibit E)

Sponsored Link on Google.com - results of search for “frosted mini-wheats”:

“Frosted Mini Wheats®
www.mini-wheats.com Frosted Mini-Wheats® has clinically improved kids’ attentiveness by 20%”

f. **Milk Carton Labels** (Exhibit F)

**Clinically Shown
to Improve Kids'
Attentiveness
By Nearly ...
20%***

* Based upon independent clinical research, kids who ate *Kellogg's®* Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit www.frostedminiwheats.com.

g. **Print Advertising** (Exhibit G)**“3 Strategies to Start Their Day Off Right**

Does your child need to pay more attention in school? Use the following tips to help keep your little ones ahead of the class:

Complaint

* * *

Start the Day with Breakfast.

Kids need an energy boost after a long night's sleep. A recent clinical study showed that a whole grain and fiber-filled breakfast of Frosted Mini-Wheats helps improve children's attentiveness by nearly 20%.*

* * *

* Based upon independent clinical research, kids who ate Kellogg's® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast.

For more information, visit www.frostedminiwheats.com.”

h. **Press Release** (Exhibit H)**“HELP YOUR KIDS EARN AN “A” FOR ATTENTIVENESS WITH A BOWL OF FROSTED MINI-WHEATS® CEREAL FOR BREAKFAST**

Eating a Bowl May Increase Attentiveness by Nearly 20 Percent

Battle Creek, Mich., March 12, 2008—Today's parents are going to great lengths to help their kids do their best in school. They sign them up for tutoring services, buy special learning software and pack their schedules with enrichment activities. While all of these things are great, it's important that parents not neglect one of the simplest ways to help ensure their kids do their best - a healthy breakfast.

A recent study commissioned by Kellogg helps demonstrate how eating a healthy, nutritious breakfast can help kids stay full and avoid the distraction of mid-morning hunger to help them do their best in school. The study, conducted by an independent research group, shows that eating a

Complaint

breakfast of *Frosted Mini-Wheats*® cereal helped improve kids' attentiveness by nearly 20 percent.*

* * *

Keeping 'Em Full and Focused

Kellogg recently commissioned research to measure the effect on kids of eating a breakfast of *Frosted Mini-Wheats*® cereal. An independent research group conducted a series of standardized, cognitive tests on children ages 8 to 12 who ate either a breakfast of *Frosted Mini-Wheats*® cereal or water. The result? The children who ate a breakfast of *Frosted Mini-Wheats*® cereal had a nearly 20% improvement in attentiveness.

* * *

* Based upon independent clinical research, kids who ate Kellogg's® Frosted Mini-Wheats® cereal for breakfast had up to 18% better attentiveness three hours after breakfast than kids who ate no breakfast. For more information, visit www.frostedminiwheats.com.”

6. Through the means described in Paragraph 5, including the statements contained in the advertisements attached as Exhibits A and C through H, among others, respondent has represented, expressly or by implication, that eating a bowl of Kellogg's® Frosted Mini- Wheats® cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%.

7. In truth and in fact, eating a bowl of Kellogg's® Frosted Mini-Wheats® cereal for breakfast is not clinically shown to improve kids' attentiveness by nearly 20%. In the clinical study referred to in respondent's advertisements, for example, only about half the kids who ate Frosted Mini-Wheats® cereal showed any improvement after three hours as compared to their pre-breakfast baseline. In addition, overall, only one in seven kids who ate the cereal improved their attentiveness by 18% or more, and only about one in nine improved by 20% or more. Therefore, the representation set forth in Paragraph 6 was, and is, false or misleading.

Complaint

8. Through the means described in Paragraph 5, including the statements contained in the advertisement attached as Exhibit B, among others, respondent has represented, expressly or by implication, that eating a bowl of Kellogg's® Frosted Mini-Wheats® cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20% compared to kids who ate no breakfast.

9. In truth and in fact, eating a bowl of Kellogg's® Frosted Mini-Wheats® cereal for breakfast is not clinically shown to improve kids' attentiveness by nearly 20% compared to kids who ate no breakfast. In the clinical study referred to in respondent's advertisements, for example, kids who ate Frosted Mini-Wheats® had an average of 10.6% better attentiveness three hours later than kids who had skipped breakfast; relatively few kids experienced better attentiveness near the 20% level. Therefore, the representation set forth in Paragraph 8 was, and is, false or misleading.

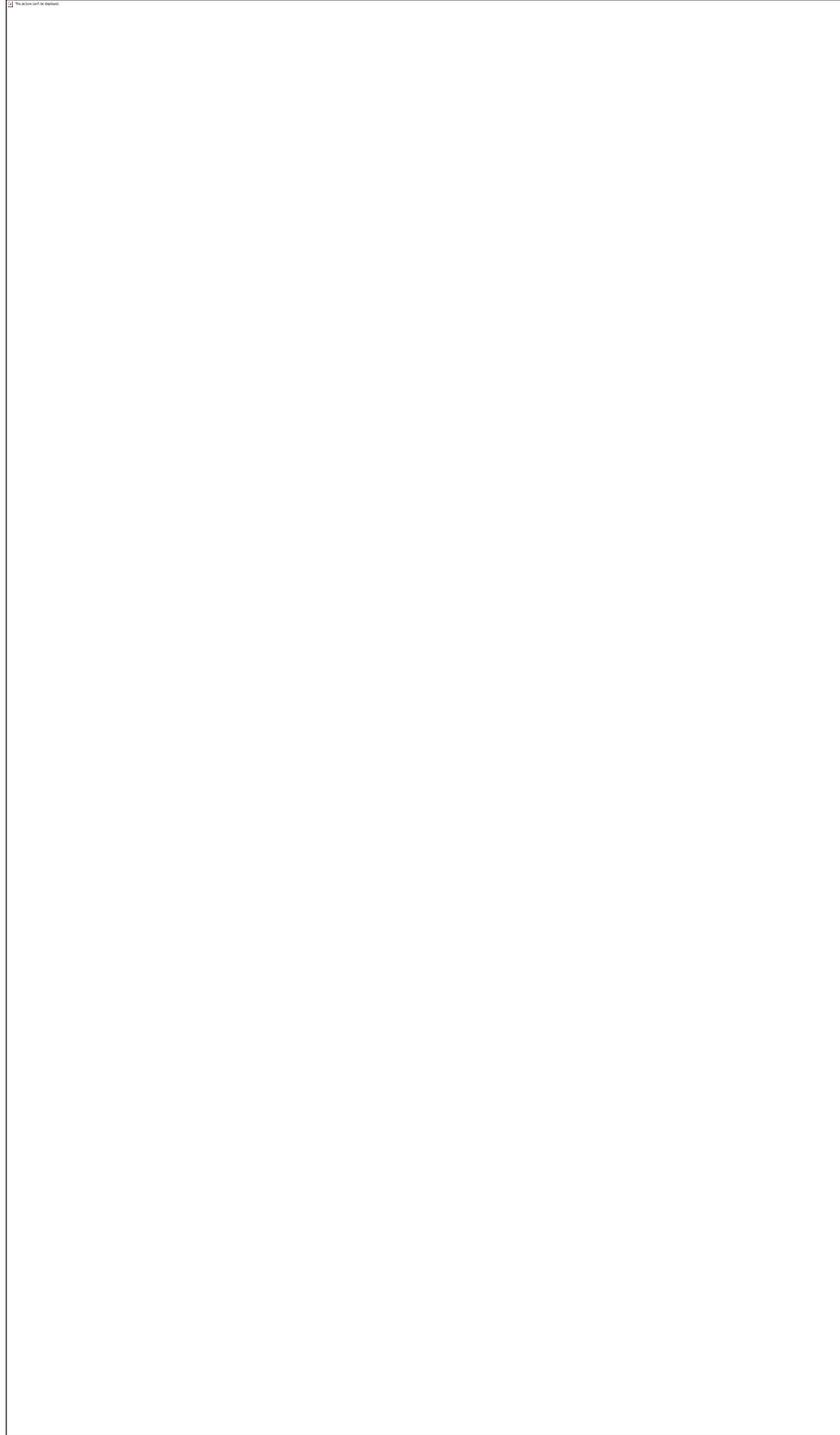
10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission, this twenty-seventh day of July, 2009, has issued this complaint against respondent.

By the Commission.

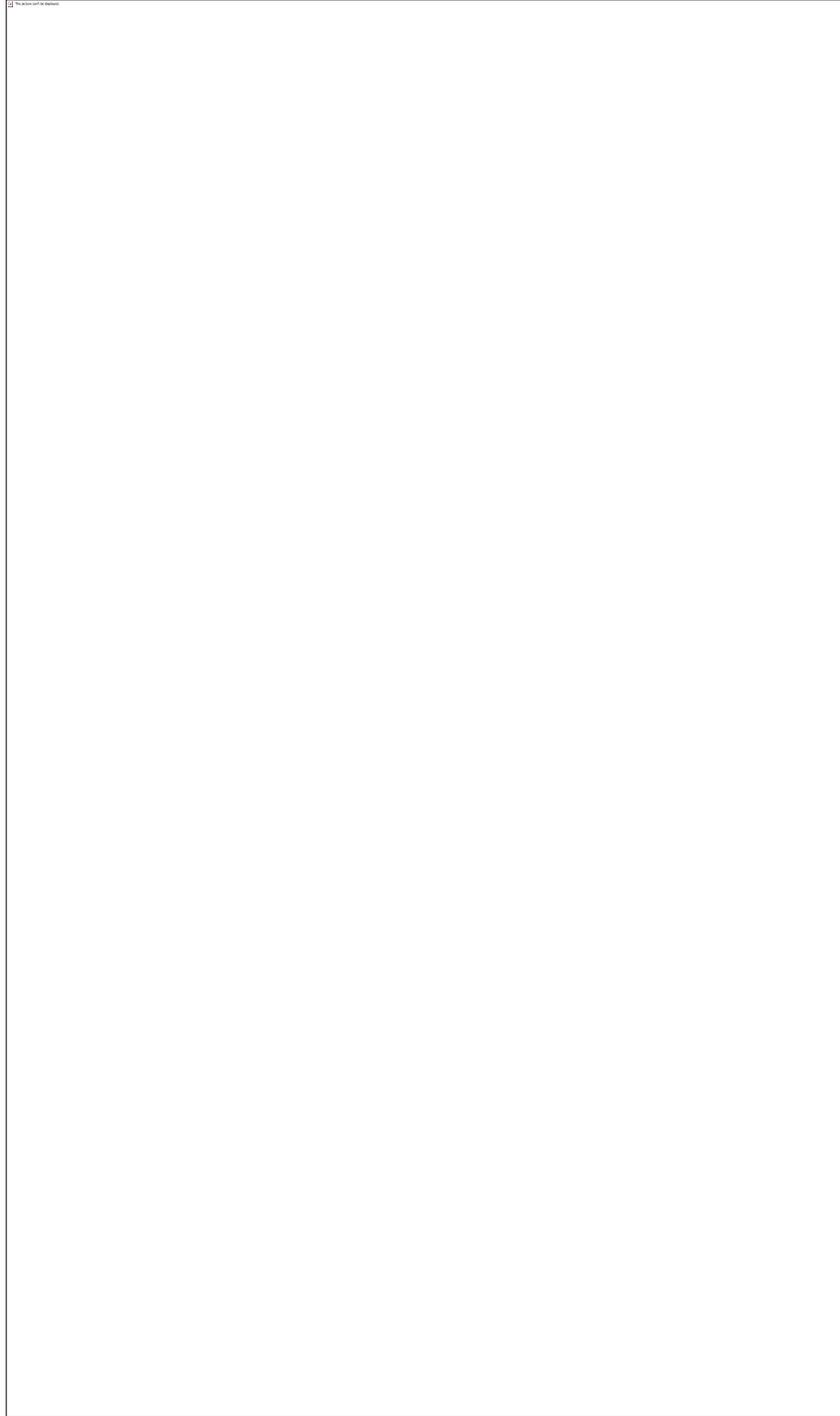
Complaint

Exhibit A



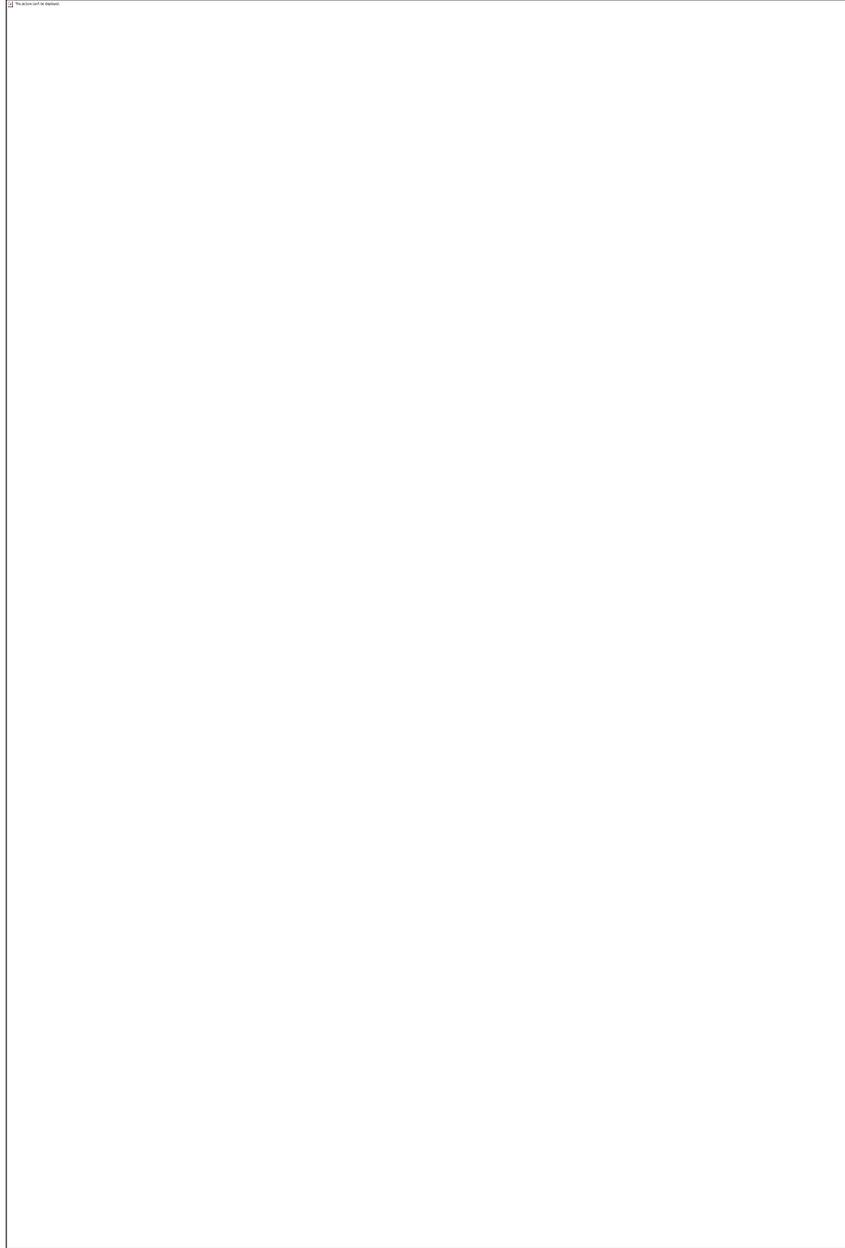
Complaint

Exhibit B



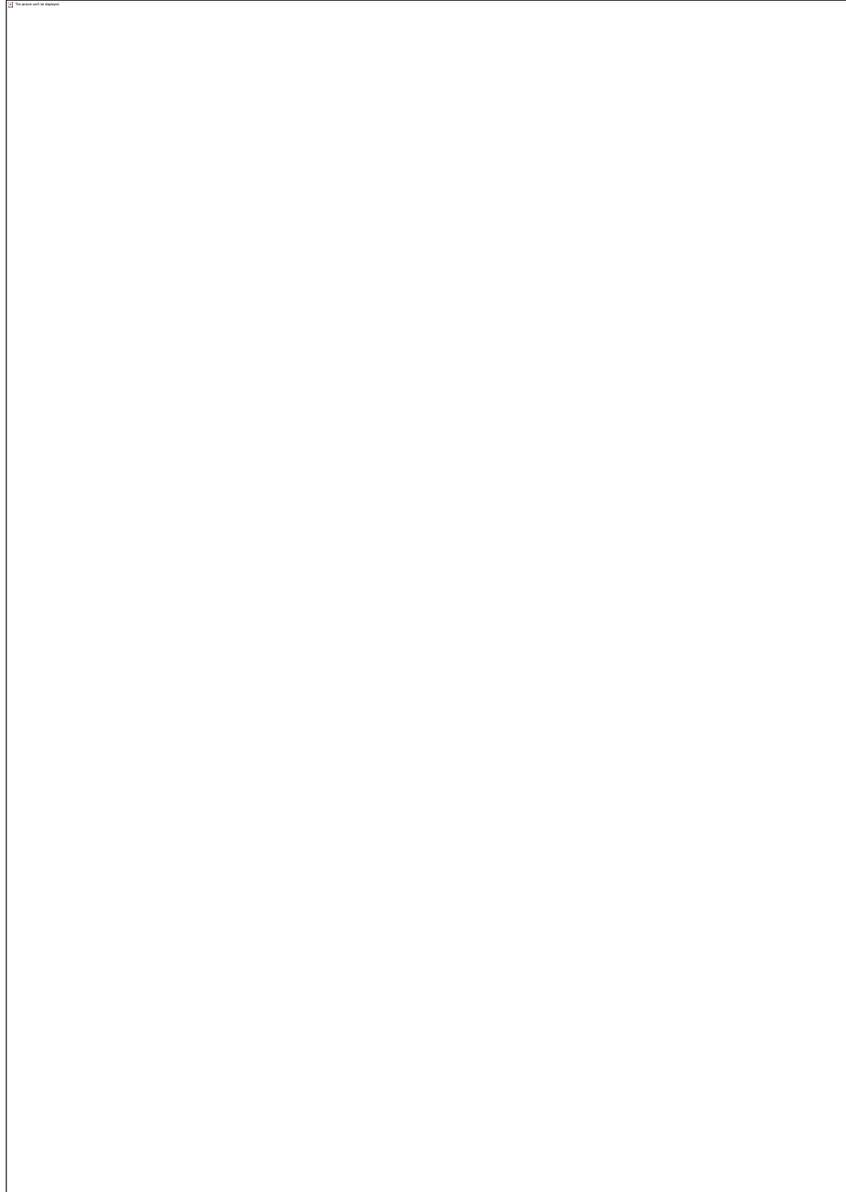
Complaint

Exhibit C



Complaint

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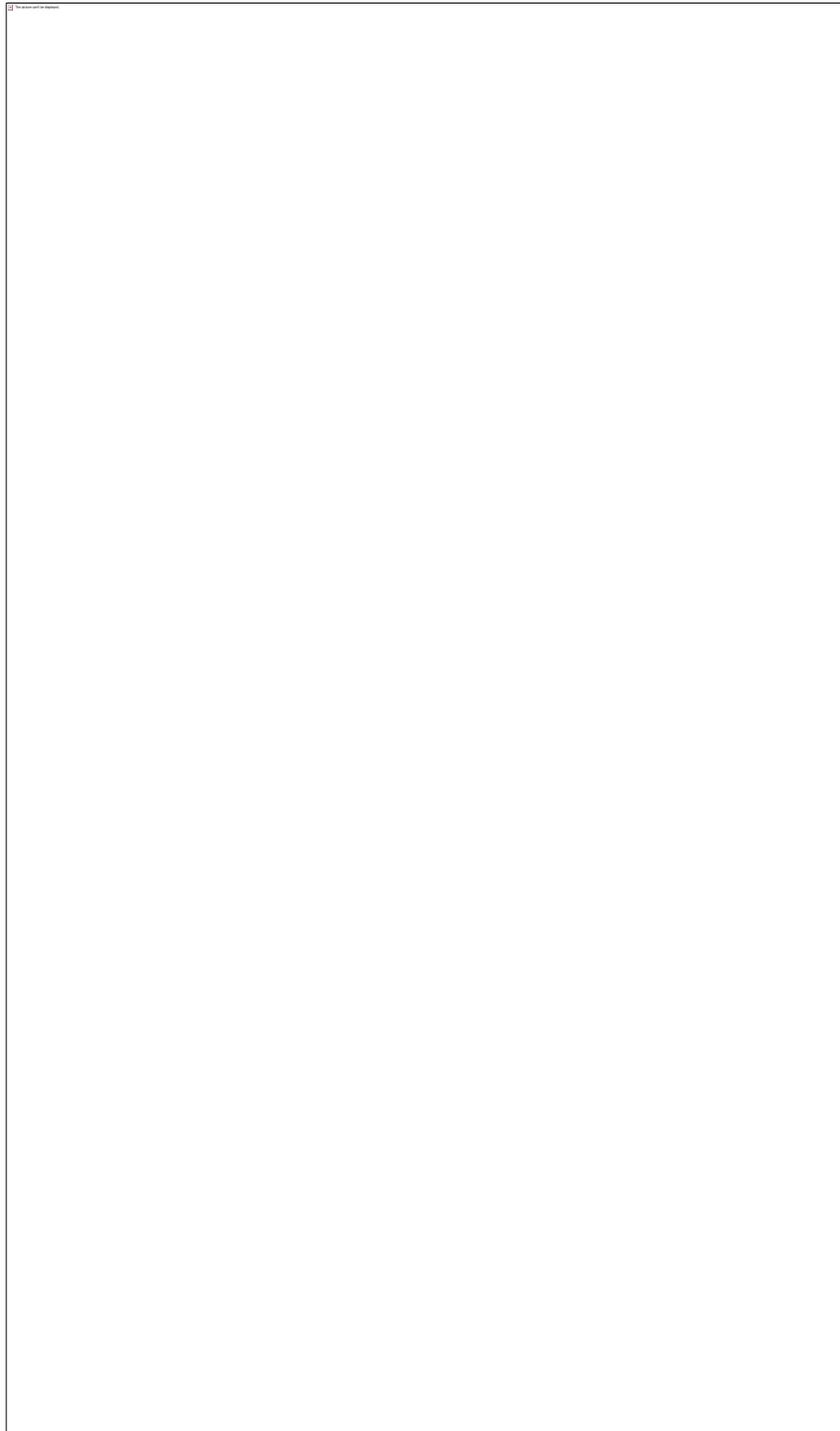
Complaint

Exhibit D



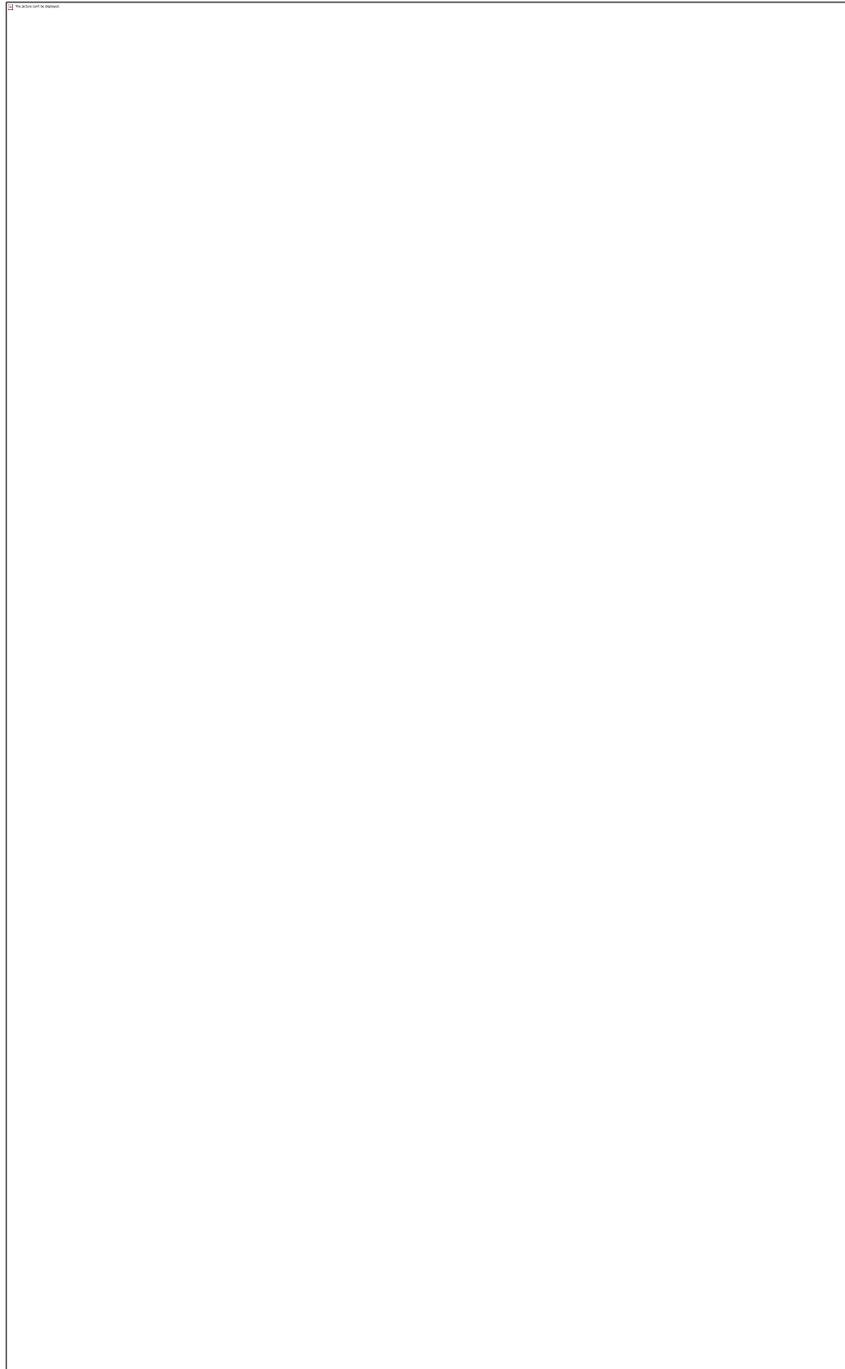
Complaint

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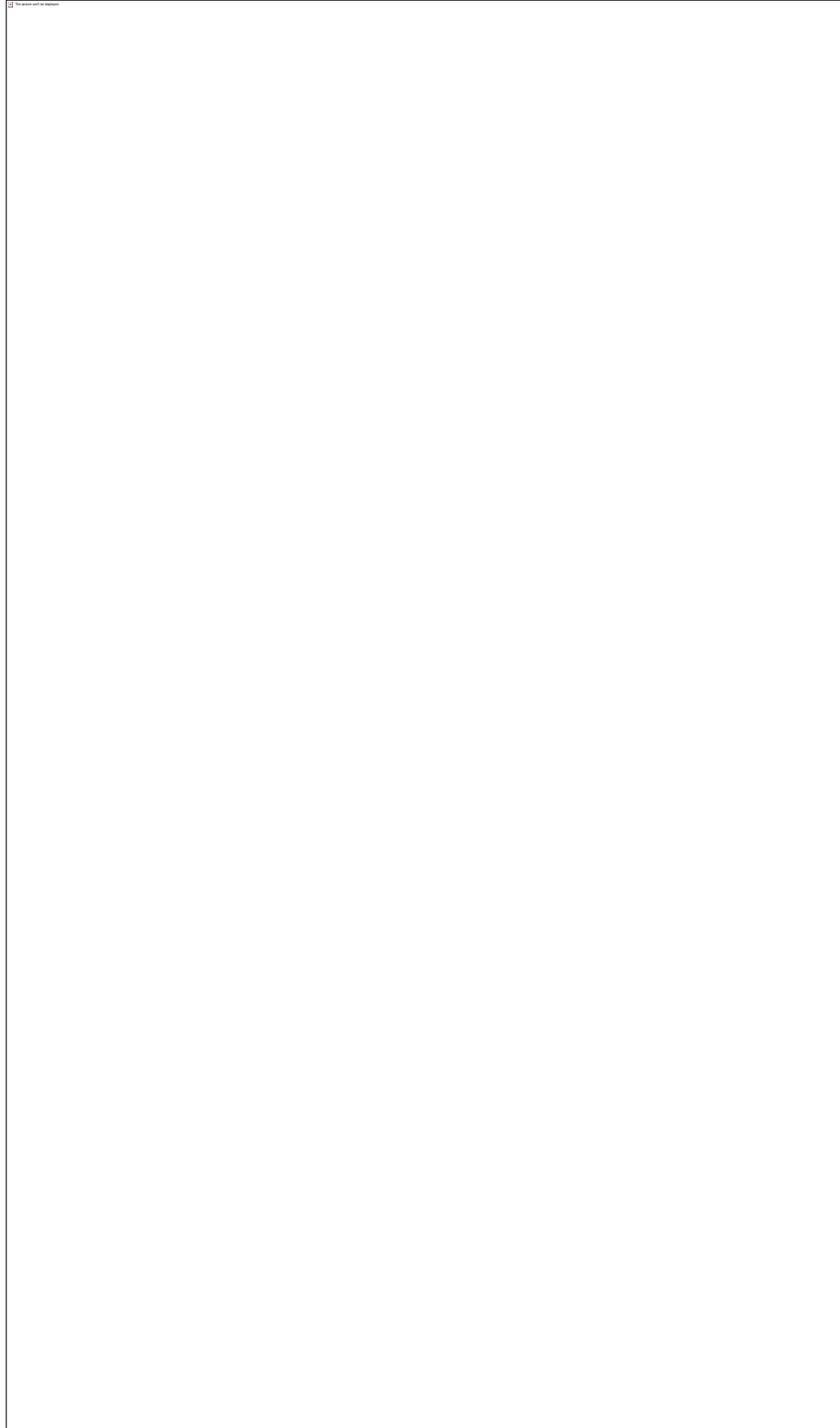
Complaint

Exhibit E



Complaint

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Decision and Order

Exhibits F, G, and H**Redacted as****CONFIDENTIAL****DECISION AND ORDER**

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C § 45 *et seq.*; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said consent agreement is for settlement purposes only and does not constitute an admission by the 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 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 prescribed in Section 2.34

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of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Kellogg Company (“Kellogg”) is a Delaware corporation with its principal office or place of business at One Kellogg Square, Battle Creek, Michigan, 49016.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

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

- A. Unless otherwise specified, “respondent” shall mean Kellogg Company, a corporation, its successors and assigns and their officers, and each of the above’s agents, representatives, and employees.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- C. “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.
- D. “Food” shall mean “food” as defined in Section 15 of the FTC Act, 15 U.S.C. § 55.
- E. The term “including” in this Order shall mean “without limitation.”

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- F. The terms “and” and “or” in this Order shall be construed conjunctively or disjunctively as necessary, to make the applicable phrase or sentence inclusive rather than exclusive.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Kellogg’s® Frosted Mini-Wheats® cereal, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that:

- A. eating a bowl of Kellogg’s® Frosted Mini-Wheats® cereal for breakfast is clinically shown to improve children’s attentiveness by nearly 20%, or by any other specific percentage; or
- B. eating a bowl of Kellogg’s® Frosted Mini-Wheats® cereal for breakfast is clinically shown to improve children’s attentiveness by nearly 20%, or by any other specific percentage, compared to children who ate no breakfast, unless, at the time it is made, the representation is true and non-misleading.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of Kellogg’s® Frosted Mini-Wheats® cereal or any other morning food or snack food, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, including through the use of a trade name or endorsement, about the benefits, performance, or efficacy of such product for cognitive function, cognitive processes, or cognitive health, unless the representation is true, non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Decision and Order

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any morning food or snack food, 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.

IV.

IT IS FURTHER ORDERED that nothing in this order shall prohibit respondent from making any representation for any product that is specifically permitted in labeling for such product by regulations promulgated by the Food and Drug Administration pursuant to the Nutrition Labeling and Education Act of 1990.

V.

IT IS FURTHER ORDERED that respondent Kellogg Company, and its successors and assigns, 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 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.

Decision and Order

VI.

IT IS FURTHER ORDERED that respondent Kellogg Company, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and other employees having primary 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.

VII.

IT IS FURTHER ORDERED that respondent Kellogg Company, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which 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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

VIII.

IT IS FURTHER ORDERED that respondent Kellogg Company, and its successors and assigns, 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

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detail the manner and form in which they have complied with this order.

IX.

This order will terminate on July 27, 2029, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

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

By the Commission.

Analysis to Aid Public Comment

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Kellogg Company (“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 and take appropriate action or make final the agreement’s proposed order.

This matter involves the advertising and promotion of Kellogg’s Frosted Mini-Wheats, a well-known breakfast cereal. According to the FTC complaint, Respondent represented, in various advertisements, that eating a bowl of Kellogg’s Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids’ attentiveness by nearly 20%. The complaint alleges that this claim is false or misleading because, in fact, in the clinical study referred to in respondent’s advertisements, only about half the kids who ate Frosted Mini-Wheats cereal showed any improvement after three hours as compared to their pre-breakfast baseline. In addition, overall, only one in seven kids who ate the cereal improved their attentiveness by 18% or more, and only about one in nine improved by 20% or more.

The FTC complaint also charges that Respondent represented, in other advertising, that eating a bowl of Kellogg’s Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids’ attentiveness by nearly 20% *when compared to kids who ate no breakfast*. The FTC alleges that this claim is also false or misleading, because in fact, kids in the clinical study who ate Frosted Mini-Wheats had an average of 10.6% better attentiveness three hours later than kids who had skipped breakfast. In addition, relatively few kids experienced better attentiveness near the 20% level.

The proposed consent order contains provisions designed to prevent Respondent from engaging in similar acts and practices in

Analysis to Aid Public Comment

the future. Part I of the proposed order prohibits Respondent from representing that (a) eating a bowl of Kellogg's Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%, or any other specific percentage; and (b) eating a bowl of Kellogg's Frosted Mini-Wheats cereal for breakfast is clinically shown to improve kids' attentiveness by nearly 20%, or any other specific percentage, compared to kids who ate no breakfast, unless the representation is true and non-misleading at the time it is made.

Part II of the proposed order prohibits Respondent from making any representations in advertising for Frosted Mini-Wheats or any other morning food or snack food about the benefits, performance, or efficacy of the product for cognitive function, processes, or health, unless the representation is true and non-misleading. In addition, Respondent must possess competent and reliable scientific evidence for such claims.

Part III of the proposed order prohibits Respondent from making misrepresentations in advertising for any morning food or snack food about the existence, contents, validity, results, conclusions, or interpretations of any test, study or research.

Part IV of the proposed order states that the order does not prohibit Respondent from making 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 V through VIII of the proposed order require Respondent to keep copies of relevant advertisements and materials substantiating claims made in the advertisements; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part IX provides that the order will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official

Analysis to Aid Public Comment

interpretation of the agreement and proposed order or to modify in any way their terms.

Complaint

IN THE MATTER OF

**SEARS HOLDINGS MANAGEMENT
CORPORATION**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4264; File No. 082 3099
Complaint, August 31, 2009 - Decision, August 31, 2009*

This consent order addresses Sears Holdings Management Corporation's ("respondent") advertising and dissemination from April 2007 through January 2008 of a software application that tracked nearly all of the Internet activities that took place on the computers of consumers who installed it. According to the complaint, respondent represented, in the process of soliciting consumers to download and install the application, that it would track consumers' "online browsing." The complaint alleges that this claim is deceptive because respondent failed to disclose adequately that the application would monitor nearly all of the Internet behavior that occurs on consumers' computers and tracked certain non-Internet-related activities taking place on those computers. The order prevents respondent from engaging in similar acts and practices in the future and sets out the definition of a "Tracking Application". In advertising or disseminating any Tracking Application the respondent must obtain express consent from consumers prior to downloading or installing a Tracking Application.

Participants

For the *Commission*: David K. Koehler and Carl H. Settlemyer, III.

For the *Respondents*: Charulata Pagar, Virtual Law Partners, LLP.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sears Holdings Management Corporation, a corporation, 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 Sears Holdings Management Corporation ("respondent" or "SHMC") is a Delaware corporation with its

Complaint

principal office or place of business at 3333 Beverly Road, Hoffman Estates, Illinois 60179. SHMC, a subsidiary of Sears Holdings Corporation (“SHC”) with shares owned by Sears, Roebuck and Co. and Kmart Management Corporation, handles marketing operations for the Sears Roebuck and Kmart retail stores, and operates the sears.com and kmart.com retail Internet websites.

2. The acts and practices of respondent, as alleged herein, have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

3. From on or about April 2007 through on or about January 2008, SHMC disseminated or caused to be disseminated via the Internet a software application for consumers to download and install onto their computers (the “Application”). The Application was created, developed, and managed for respondent by a third party in connection with SHMC’s “My SHC Community” market research program.

4. The Application, when installed, runs in the background at all times on consumers’ computers and transmits tracked information, including nearly all of the Internet behavior that occurs on those computers, to servers maintained on behalf of respondent. Information collected and transmitted includes: web browsing, filling shopping baskets, transacting business during secure sessions, completing online application forms, checking online accounts, and, through select header information, use of web-based email and instant messaging services.

5. SHMC, during the relevant time period, presented fifteen out of every hundred visitors to the sears.com and kmart.com websites with a “My SHC Community” pop-up box (Exhibit A) that said:

Ever wish you could talk directly to a retailer? Tell them about the products, services and offers that would really be right for you?

If you’re interested in becoming part of something new, something different, we’d like to invite you to become a member of My SHC Community. My SHC Community,

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sponsored by Sears Holdings Corporation, is a dynamic and highly interactive on-line community. It's a place where your voice is heard and your opinion matters, and what you want and need counts!

The pop-up box made no mention of the Application. Likewise, the general "Privacy Policy" statement accessed via the hyperlink in the pop-up box did not mention the Application.

6. The pop-up box message further invited consumers to enter their email address to receive a follow-up email from SHMC with more information. Subsequently, invitation messages (Exhibit B) were emailed to those consumers who supplied their email address. These emails stated, in pertinent part:

From shopping, current events, social networking, to entertainment and email, it seems that the Internet is playing a bigger and bigger role in our daily lives these days.

If you're interested in becoming part of something new, something different, we'd like to invite you to join a new and exciting online community; My SHC Community, sponsored by Sears Holdings Corporation. *Membership is absolutely free!*

My SHC Community is a dynamic and highly interactive online community. It's a place where your voice is heard and your opinion matters, and what you want and need counts! As a member of My SHC Community, you'll partner directly with the retail industry. You'll participate in exciting, engaging and on-going interactions – always on your terms and always by your choice. My SHC Community gives you the chance to help shape the future by sharing and receiving information about the products, services and offers that would really be right for you.

To become a member of My SHC Community, we simply ask you to complete the registration process which includes providing us with your contact information as well as answering a series of profile questions that will help us get to know you better. You'll also be asked to

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take a few minutes to download software that is powered by (VoiceFive). This research software will confidentially track your online browsing. This will help us better understand you and your needs, enabling us to create more relevant future offerings for you, other community members, and eventually all shoppers. You can uninstall the software at any time through the Add/Remove program utility on your computer. During the registration process, you'll learn more about this application software and you'll always have the opportunity to ask any and every question you may have.

Once you're a member of My SHC Community, you'll regularly interact with My SHC Community members as well as employees of Sears Holdings Corporation through special online engagements, surveys, chats and other fun and informative online techniques. We'll ask you to journal your shopping and purchasing behavior. Again, this will be when you want and how you want to record it – always on your terms and always by your choice. We'll also collect information on your internet usage. Community engagements are always fun and always voluntary!

The email invitation message then described what consumers would receive in exchange for becoming a member of the My SHC Community, including a \$10 payment for joining the “online community,” contingent upon the consumer retaining the Application on his or her computer for at least one month. Consumers who wished to proceed further would need to click a button, at the bottom, center portion of the invitation email, that said “Join Today!”

7. Consumers who clicked on the “Join Today!” button in the email invitation were directed to a landing page (Exhibit C) that restated many of the aforementioned representations about the potential interactions between members and the “community” and about the putative benefits of membership. The landing page did not mention the Application.

8. Consumers who clicked on the “Join Today” button in the landing page were directed to a registration page (Exhibit D). To

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complete registration, consumers needed to enter information, including their name, address, age, and email address. Below the fields for entering information, the registration page presented a “Privacy Statement and User License Agreement” (“PSULA”) in a “scroll box” that displayed ten lines of the multi-page document at a time (“Printable version” attached as Exhibit E). A description of the Application’s specific functions begins on approximately the 75th line down in the scroll box:

Computer hardware, software, and other configuration information: Our application may collect certain basic hardware, software, computer configuration and application usage information about the computer on which you install our application, including such data as the speed of the computer processor, its memory capacities and Internet connection speed. In addition, our application may report on devices connected to your computer, such as the type of printer or router you may be using.

Internet usage information: Once you install our application, it monitors all of the Internet behavior that occurs on the computer on which you install the application, including both your normal web browsing and the activity that you undertake during secure sessions, such as filling a shopping basket, completing an application form or checking your online accounts, which may include personal financial or health information. We may use the information that we monitor, such as name and address, for the purpose of better understanding your household demographics; however we make commercially viable efforts to automatically filter confidential personally identifiable information such as UserID, password, credit card numbers, and account numbers. Inadvertently, we may collect such information about our panelists; and when this happens, we make commercially viable efforts to purge our database of such information.

The software application also tracks the pace and style with which you enter information online (for example, whether you click on links, type in webpage names, or use shortcut keys), the usage of cookies, and statistics about your use of online applications (for example, it may

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observe that during a given period of use of a computer, the computer downloaded X number of bytes of data using a particular Internet enabled gaming application).

Please note: Our application does not examine the text of your instant messages or e-mail messages. We may, however, review select e-mail header information from web-based e-mails as a way to verify your contact information and online usage information.

The PSULA went on to describe how the information the Application would collect was transmitted to respondent's servers, how it might be used, and how it was maintained. It also described how consumers could stop participating in the online community and remove the Application from their computers. Respondent stated in the PSULA that it reserved the right to continue to use information collected prior to a consumer's "resignation."

9. Below the scroll box on the registration page was a link that consumers could click to access a printable version of the PSULA, and a blank checkbox next to the statement: "I am the authorized user of this computer and I have read, agree to, and have obtained the agreement of all computer users to the terms and conditions of the Privacy Statement and User License Agreement." To continue with the registration process, consumers needed to check the box and click the "Next" button at the bottom of the registration page.

10. Consumers who completed the required information, checked the box, and clicked the "Next" button on the registration page, were directed to an installation page (Exhibit F) that explained the Application download and installation process. Consumers were required to click a "Next" button to begin the download, and then click an "Install" or "Yes" button in a "security warning" dialog box to install the Application. Nothing on the installation page provided information on the Application.

11. When installed, the Application functioned and transmitted information substantially as described in the PSULA. The Application, when installed, would run in the background at all times on consumers' computers. Although the Application

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would be listed (as “mySHC Community”) in the “All Programs” menu and “Add/Remove” utilities of those computers, and the Application’s executable file name (“srhc.exe”) would be listed as a running process in Windows Task Manager, the Application would display to users of those computers no visible indication, such as a desktop or system tray icon, that it was running.

12. The Application transmitted, in real time, tracked information to servers maintained on behalf of respondent. The tracked information included not only information about websites consumers visited and links that they clicked, but also the text of secure pages, such as online banking statements, video rental transactions, library borrowing histories, online drug prescription records, and select header fields that could show the sender, recipient, subject, and size of web-based email messages.

13. Through the means described in paragraphs 3-12, respondent has represented, expressly or by implication, that the Application would track consumers’ “online browsing.” Respondent failed to disclose adequately that the software application, when installed, would: monitor nearly all of the Internet behavior that occurs on consumers’ computers, including information exchanged between consumers and websites other than those owned, operated, or affiliated with respondent, information provided in secure sessions when interacting with third-party websites, shopping carts, and online accounts, and headers of web-based email; track certain non-Internet-related activities taking place on those computers; and transmit nearly all of the monitored information (excluding selected categories of filtered information) to respondent’s remote computer servers. These facts would be material to consumers in deciding to install the software. Respondent’s failure to disclose these facts, in light of the representations made, was, and is, a deceptive practice.

14. 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 thirty-first day of August, 2009, has issued this complaint against respondent.

Complaint

By the Commission.

EXHIBIT A

Redacted as

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Exhibit B

My SHC Community - Yahoo! Mail

Page 1 of 2



My SHC Community

From: "Searsholdings@mysthccommunity.com" <Searsholdings@mysthccommunity.com>
To: [redacted]@yahoo.com



From shopping, current events, social networking, to entertainment and email, it seems that the Internet is playing a bigger and bigger role in our daily lives these days.



If you're interested in becoming part of something new, something different, we'd like to invite you to join a new and exciting online community; My SHC Community, sponsored by Sears Holdings Corporation. *Membership is absolutely free!*

My SHC Community is a dynamic and highly interactive online community. It's a place where your voice is heard and your opinion matters, and what you want and need counts! As a member of MY SHC Community, you'll partner directly with the retail industry. You'll participate in exciting, engaging and on-going interactions - always on your terms and always by your choice. My SHC Community gives you the chance to help shape the future by sharing and receiving information about the products, services and offers that would really be right for you.

To become a member of My SHC Community, we simply ask you to complete the registration process which includes providing us with your contact information as well as answering a series of profile questions that will help us get to know you better. You'll also be asked to take a few minutes to download software that is powered by (VoiceFive). This research software will confidentially track your online browsing. This will help us better understand you and your needs, enabling us to create more relevant future offerings for you, other community members, and eventually all shoppers. You can uninstall the software at any time through the Add/Remove program utility on your computer. During the registration process, you'll learn more about this application software and you'll always have the opportunity to ask any and every question you may have.

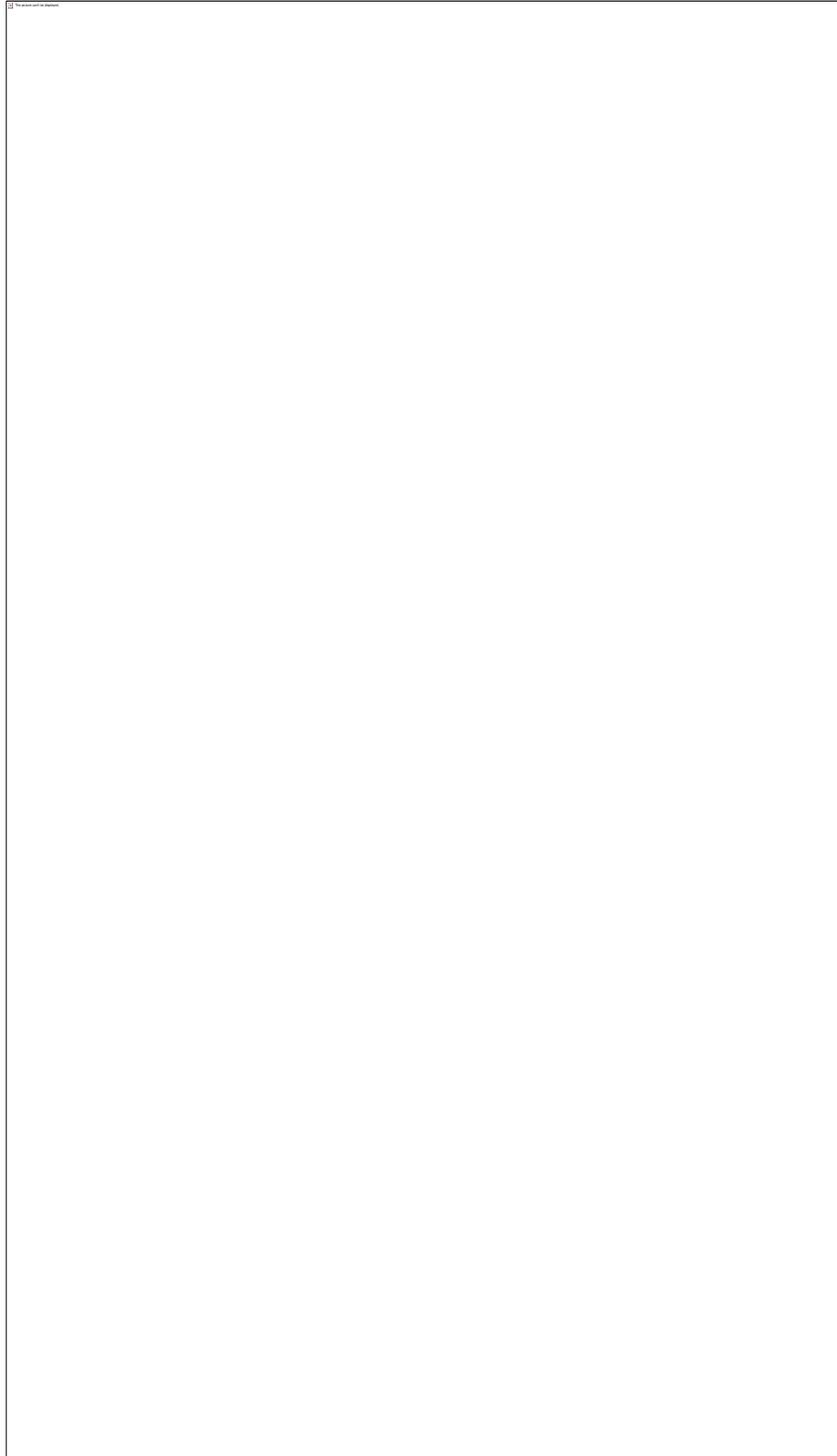
Once you're a member of My SHC Community, you'll regularly interact with My SHC Community members as well as employees of Sears Holdings Corporation through special online engagements, surveys, chats and other fun and informative online techniques. We'll ask you to journal your shopping and purchasing behavior. Again, this will be when you want and how you want to record it - always on your terms and always by your choice. We'll also collect information on your internet usage. Community engagements are always fun and always voluntary! In exchange for becoming a member of My SHC Community:

- You'll gain entry into the My SHC Community Registration Sweepstakes¹, with sweepstake drawings worth \$5,000, \$2,500, and \$1,000! Prizes are distributed every two months so there are lots of opportunities to win!
- \$10 sent to you after one month of active membership, just for joining this online community and installing the software application².
- Be among the first to try new products and take advantage of special offers.
- You may receive information directly from Sears Holdings Corporation. You'll have the chance to share your thoughts and feelings about products, services and offers. And you'll always have the opportunity to ask any and every question you have.
- You'll partner directly with employees of Sears Holdings Corporation. The more you engage in and interact with the community, the more opportunity you'll have to shape the future of retail experiences - in-store, on-line, and services!

To become a member now, simply click on the "join now" link below and follow the registration instructions.



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Exhibits C, D, E, and F

Redacted as

CONFIDENTIAL

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C § 45 *et seq.*; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said consent agreement is for settlement purposes only and does not constitute an admission by the 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 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

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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 Sears Holdings Management Corporation is a Delaware corporation with its principal office or place of business at 3333 Beverly Road, Hoffman Estates, Illinois 60179.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

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

- A. Unless otherwise specified, “respondent” shall mean Sears Holdings Management Corporation, its successors and assigns, and its officers, agents, representatives, and employees.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- C. “Computer” shall mean any desktop or laptop computer, handheld device, telephone, or other electronic product or device that has a platform on which to download, install, or run any software program, code, script, or other content and to play any digital audio, visual, or audiovisual content.
- D. “Tracking Application” shall mean any software program or application disseminated by or on behalf of respondent, its subsidiaries or affiliated companies, that is capable of being installed on consumers’ computers and used by or on behalf of respondent to

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monitor, record, or transmit information about activities occurring on computers on which it is installed, or about data that is stored on, created on, transmitted from, or transmitted to the computers on which it is installed.

- E. “Affected Consumers” shall mean persons who, prior to the date of issuance of this order, downloaded and installed a Tracking Application on a computer in connection with the My SHC Community program or “on-line community.”
- F. “Collected Information” shall mean any information or data transmitted from a computer by a Tracking Application, installed prior to the date of issuance of this order, to any computer server owned by, operated by, or operated for the benefit of, Sears Holdings Management Corporation, its subsidiaries, or affiliated companies.
- G. “Clearly and prominently” shall mean:
1. In textual communications (*e.g.*, printed publications or words displayed on the screen of a computer), the required disclosures are of a type, size, and location sufficiently noticeable for an ordinary consumer to read and comprehend them, in print that contrasts with the background on which they appear;
 2. In communications disseminated orally or through audible means (*e.g.*, radio or streaming audio), the required disclosures are delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend them;
 3. In communications disseminated through video means (*e.g.*, television or streaming video), the required disclosures are in writing in a form consistent with subparagraph (A) of this definition and shall appear on the screen for a duration sufficient for an ordinary consumer to read and

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comprehend them, and in the same language as the predominant language that is used in the communication;

4. In communications made through interactive media, such as the Internet, online services, and software, the required disclosures are unavoidable and presented in a form consistent with subparagraph (A) of this definition, in addition to any audio or video presentation of them; and
5. In all instances, the required disclosures are presented in an understandable language and syntax, and with nothing contrary to, inconsistent with, or in mitigation of the disclosures used in any communication of them.

I.

IT IS ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, promotion, offering for sale, sale, or dissemination of any Tracking Application, in or affecting commerce, shall, prior to the consumer downloading or installing it:

- A. Clearly and prominently, and prior to the display of, and on a separate screen from, any final “end user license agreement,” “privacy policy,” “terms of use” page, or similar document, disclose: (1) all the types of data that the Tracking Application will monitor, record, or transmit, including but not limited to whether the data may include information from the consumer’s interactions with a specific set of websites or from a broader range of Internet interaction, whether the data may include transactions or information exchanged between the consumer and third parties in secure sessions, interactions with shopping baskets, application forms, or online accounts, and whether the information may include personal financial or health information; (2) how the

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data may be used; and (3) whether the data may be used by a third party; and

- B. Obtain express consent from the consumer to the download or installation of the Tracking Application and the collection of data by having the consumer indicate assent to those processes by clicking on a button or link that is not pre-selected as the default option and that is clearly labeled or otherwise clearly represented to convey that it will initiate those processes, or by taking a substantially similar action.

II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall:

- A. Within thirty (30) days after the date of service of this order, notify Affected Consumers that they have installed respondent's Tracking Application on their computers, that the Tracking Application collects and transmits to respondent and others the data described in the My SHC Community "Privacy Statement & User License Agreement," and notify them how to uninstall the Tracking Application. Notification shall be by the following means:
 - 1. For two (2) years after the date of service of this order, posting of a clear and prominent notice on the www.myshccommunity.com website; and
 - 2. For three (3) years after the date of service of this order, informing Affected Consumers who complain or inquire about any Tracking Application; and
- B. Provide prompt, toll-free, telephonic and electronic mail support to help Affected Consumers uninstall any Tracking Application.

Decision and Order

III.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, subsidiary, division, or other device, shall:

- A. Within three (3) days after the date of service of this order, cease collecting any data transmitted by any Tracking Application installed before the date of service of this Order; and
- B. Within five (5) days after the date of service of this order, destroy any Collected Information.

IV.

IT IS FURTHER ORDERED that respondent, Sears Holdings Management Corporation, and its successors and assigns, 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 with the terms and provisions of this order, including but not limited to:

- A. For a period of four (4) years, any documents, whether prepared by or on behalf of respondent, that:
 - 1. Comprise or relate to complaints or inquiries, whether received directly, indirectly, or through any third party, concerning a Tracking Application, and any responses to those complaints or inquiries;
 - 2. Are reasonably necessary to demonstrate full compliance with each provision of this order, including but not limited to, all documents obtained, created, generated, or which in any way relate to the requirements, provisions, terms of this order, and all reports submitted to the Commission pursuant to this order; and
 - 3. Contradict, qualify, or call into question respondent's compliance with this order; and

Decision and Order

- B. For a period of four (4) years after the last public dissemination thereof, all advertisements, terms of use, end-user license agreements, frequently asked questions, privacy policies, and similar documents relating to respondent's dissemination of any Tracking Application.

V.

IT IS FURTHER ORDERED that respondent, Sears Holdings Management Corporation, and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, managers, employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent, Sears Holdings Management Corporation, and its successors and assigns, 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 respondent, Sears Holdings Management Corporation, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the entity 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 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 entity name or address. *Provided, however,* that with respect to any proposed change in the entity about which respondent, Sears Holdings Management Corporation, and its successors and assigns, learns less than thirty (30) days prior to the date such action is to take place, respondent, Sears Holdings Management Corporation, and its successors and assigns, 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 Ave., N.W., Washington, D.C. 20580.

Decision and Order

VII.

IT IS FURTHER ORDERED that respondent, Sears Holdings Management Corporation, 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 the manner and form in which respondent has complied with this order.

VIII.

This order will terminate on August 31, 2029, 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 of 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 a 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.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Sears Holdings Management Corporation (“Respondent”).

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

This matter involves the advertising and dissemination from April 2007 through January 2008 of a software application (the “Application”) that tracked nearly all of the Internet activities that took place on the computers of consumers who installed it as part of Respondent’s “My SHC Community” market research program. According to the FTC complaint, Respondent represented, in the process of soliciting consumers to download and install the Application, that the Application would track consumers’ “online browsing.” The complaint alleges that this claim is deceptive because Respondent failed to disclose adequately that the Application, when installed, would do much more. Only in a lengthy user license agreement did Respondent disclose that the Application would: monitor nearly all of the Internet behavior that occurs on consumers’ computers, including information exchanged between consumers and websites other than those owned, operated, or affiliated with Respondent, information provided in secure sessions when interacting with third-party websites, shopping carts, and online accounts, and headers of web-based email; track certain non-Internet-related activities taking place on those computers; and transmit nearly all of the monitored information (excluding selected categories of filtered information) to Respondent’s remote computer servers.

The proposed order contains provisions designed to prevent Respondent from engaging in similar acts and practices in the

Analysis to Aid Public Comment

future. The proposed consent order defines a “Tracking Application” as “any software program or application . . . that is capable of being installed on consumers’ computers and used by or on behalf of respondent to monitor, record, or transmit information about activities occurring on computers on which it is installed, or about data that is stored on, created on, transmitted from, or transmitted to the computers on which it is installed.” Part I requires that Respondent, in advertising or disseminating any Tracking Application, disclose certain information clearly and prominently, prior to the downloading or installing of the application, and on a separate screen from any final “end user license agreement” or similar document. That information would include all the types of data that the Tracking Application will monitor, record, or transmit; how the data may be used; and whether the data may be used by a third party. In describing the types of data, Respondent would be required specifically to disclose: whether the data may include information from the consumer’s interactions with a specific set of websites or from a broader range of Internet interaction; whether the data may include transactions or information exchanged between the consumer and third parties in secure sessions, interactions with shopping baskets, application forms, or online accounts; and whether the information may include personal financial or health information. Respondent must also obtain express consent from consumers prior to downloading or installing a Tracking Application.

Part II of the proposed order requires Respondent to post a clear and prominent notice on the myshccommunity.com website advising consumers that the types of information the Application actually collected and transmitted to Sears and advising them how to uninstall the Application. It also requires Sears to provide prompt, toll-free, telephonic and email support to help affected consumers uninstall the Application.

Part III of the proposed order requires that Respondent, to the extent it has not already done so, cease collecting any data transmitted by any previously installed Tracking Application and to destroy any previously collected data.

Parts IV through VII of the proposed order require Respondent: to keep copies of relevant consumer complaints and

Analysis to Aid Public Comment

inquiries, documents demonstrating order compliance, and advertisements and other documents relating to dissemination of any Tracking Application; to provide copies of the order to certain of their personnel; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission. Part VIII provides that the order will terminate after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

ENHANCED VISION SYSTEMS, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4265; File No. 092 3010**Complaint, September 3, 2009 - Decision, September 3, 2009*

This consent order addresses the respondent, Enhanced Vision Systems, Inc., a developer of technology to assist the visually impaired. The complaint alleges that respondent violated Section 5(a) of the FTC Act through claiming false or misleading information on where its products were produced. The respondent advertised the products were purportedly “Made in the U.S.A.”, but a significant portion of their components are of foreign origin. The consent order contains a provision designed to prevent respondent from engaging in similar acts and practices in the future. The order prohibits respondent from representing the extent to which its vision-related products are made in the United States unless the representation is true and not misleading.

Participants

For the *Commission: Laura Schneider.*

For the *Respondents: Amy Ralph Mudge and Randal Shaheen, Arnold and Porter, LLP*

COMPLAINT

The Federal Trade Commission, having reason to believe that Enhanced Vision Systems, Inc. (“respondent”) has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Enhanced Vision Systems, Inc. is a California corporation with its principal office or place of business at 5882 Machine Drive, Huntington Beach, California 92649.
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 Federal Trade Commission Act.

Complaint

3. Respondent advertises, labels, develops, manufactures, offers for sale, sells, and/or distributes goods to the public throughout the United States, including vision enhancement products such as the Merlin desktop magnifier and Acrobat 3-in-one LCD portable video magnifier, and the Merlin and Acrobat family of products. Respondent sells these products to the public through dealers and retail outlets.

4. Respondent has disseminated or has caused to be disseminated advertisements, including in national print publications, on shipping boxes, and on data sheets provided to dealers and consumers, for certain of its products, including but not necessarily limited to the attached Exhibits A through E. The advertisements contain the following statements or depictions:

A. Enhanced Vision ad featuring the 3-in-1 Acrobat Magnifier, Exhibit A

“made in the USA”

Newsweek, May 12, 2008 and June 16, 2008

B. Enhanced Vision ad featuring the Desktop Merlin Magnifier, Exhibit B

“made in the USA”

AAA Journey - Maine, New Hampshire, Vermont,
September 2008

C. Enhanced Vision Ad, featuring the Desktop Merlin Magnifier, the handheld Amigo magnifier, and the 3-in-one Acrobat Magnifier, Exhibit C

“made in the USA”

VFW Magazine, August 2008

D. Acrobat LCD Data Sheet, Exhibit D

In text: “Acrobat, like all Enhanced Vision products is made in the U.S.A.”

Complaint

Under Enhanced Vision Logo and contact information:
“*MADE IN THE U.S.A.*”

E. Merlin Plus Data Sheet, Exhibit E

1. Under Enhanced Vision Logo and contact information in red ink: “Made in the USA”

5. Through the means described in Paragraph 4, respondent has represented, expressly or by implication, that certain of its vision enhancement products, including the Merlin and Acrobat family of products, are made in the United States.

6. In truth and in fact, a significant portion of the components of such products is, or has been, of foreign origin. Therefore, the representation set forth in Paragraph 5 was, and is, false or misleading.

7. 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 third day of September, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A

Your vision is your independence.
With Enhanced Vision,
you can get both back!

Now you can read, watch TV, and function outside your home independently with affordable, high quality, made in the USA, low vision solutions.

Enhanced Vision offers the widest selection of innovative low vision aids, from desktop to portable devices. One simple call will get you one step closer to getting your independence back.

The 3-in-1 Acrobat magnifier

Call (888)811-3161 today for a no obligation demonstration.
Or visit us at EnhancedVision.com

enhanced

vision

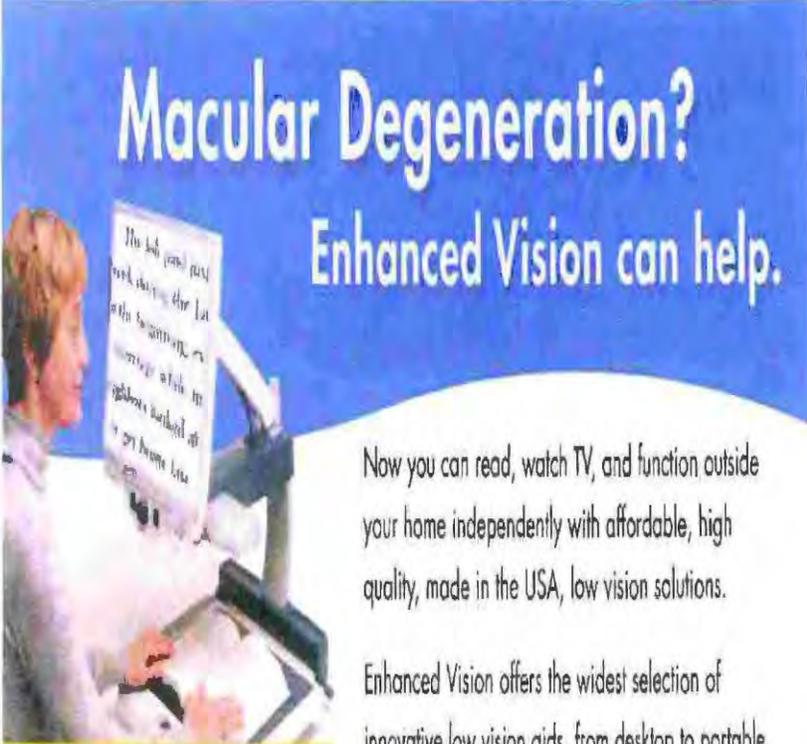
More choices. More solutions.

You'll see

(888)811-3161

Newsweek 50 Plus Edition - 5/12/08 & 6/16/08 Issues - 4.653 x 4.375 inches

Complaint

Exhibit B


Macular Degeneration?
Enhanced Vision can help.

Now you can read, watch TV, and function outside your home independently with affordable, high quality, made in the USA, low vision solutions.

Enhanced Vision offers the widest selection of innovative low vision aids, from desktop to portable devices. One simple call will get you one step closer to getting your independence back.

The desktop **Merlin** magnifier

enhanced
vision

More choices. More solutions. You'll see.

EnhancedVision.com

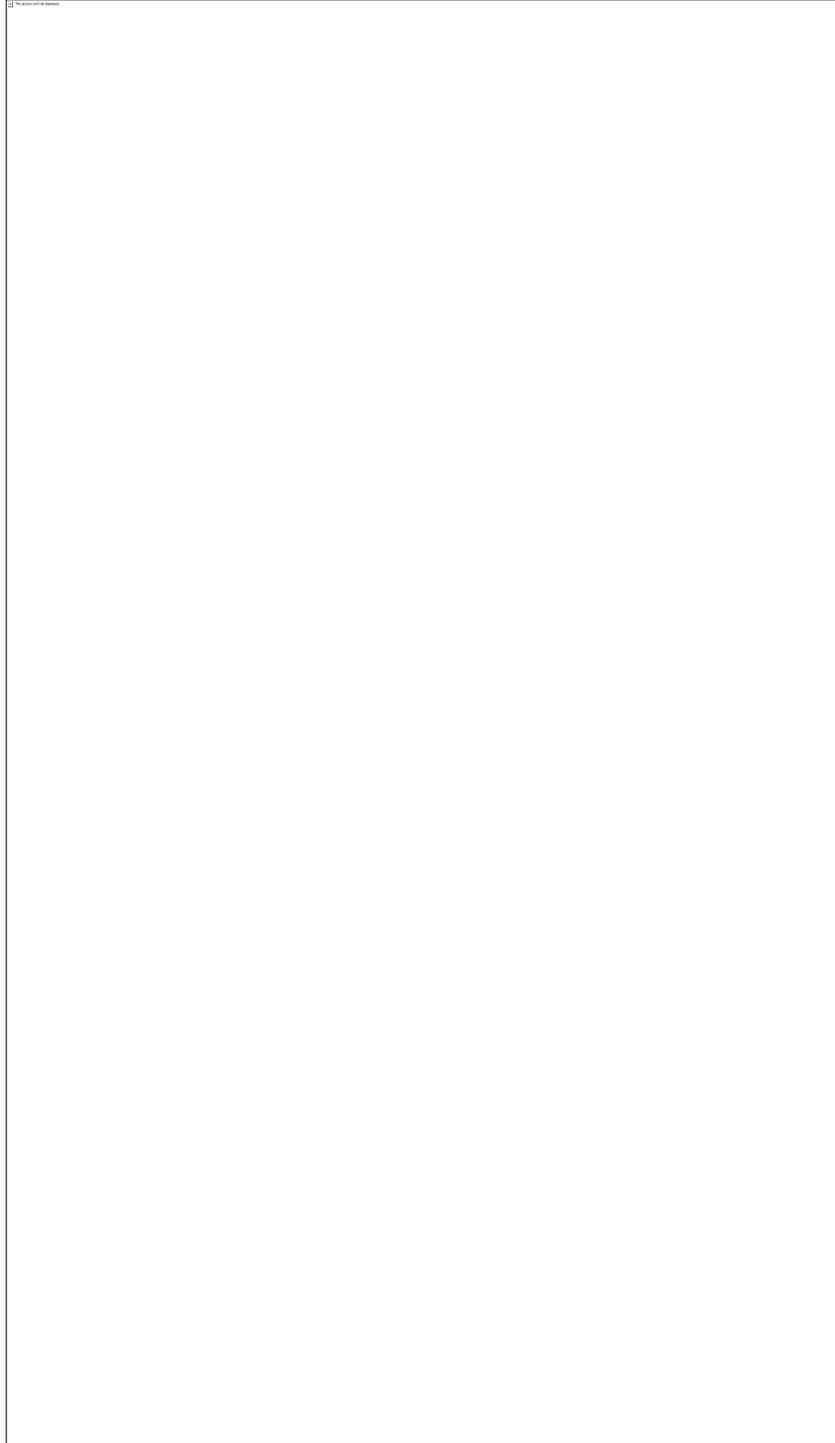
Call (888) 811-3161 today
for a no obligation demonstration.

AAA members receive \$50 off!

AAA Journey - Maine, New Hampshire, Vermont - September 2008 Issue - 6.875 x 4.625 inches

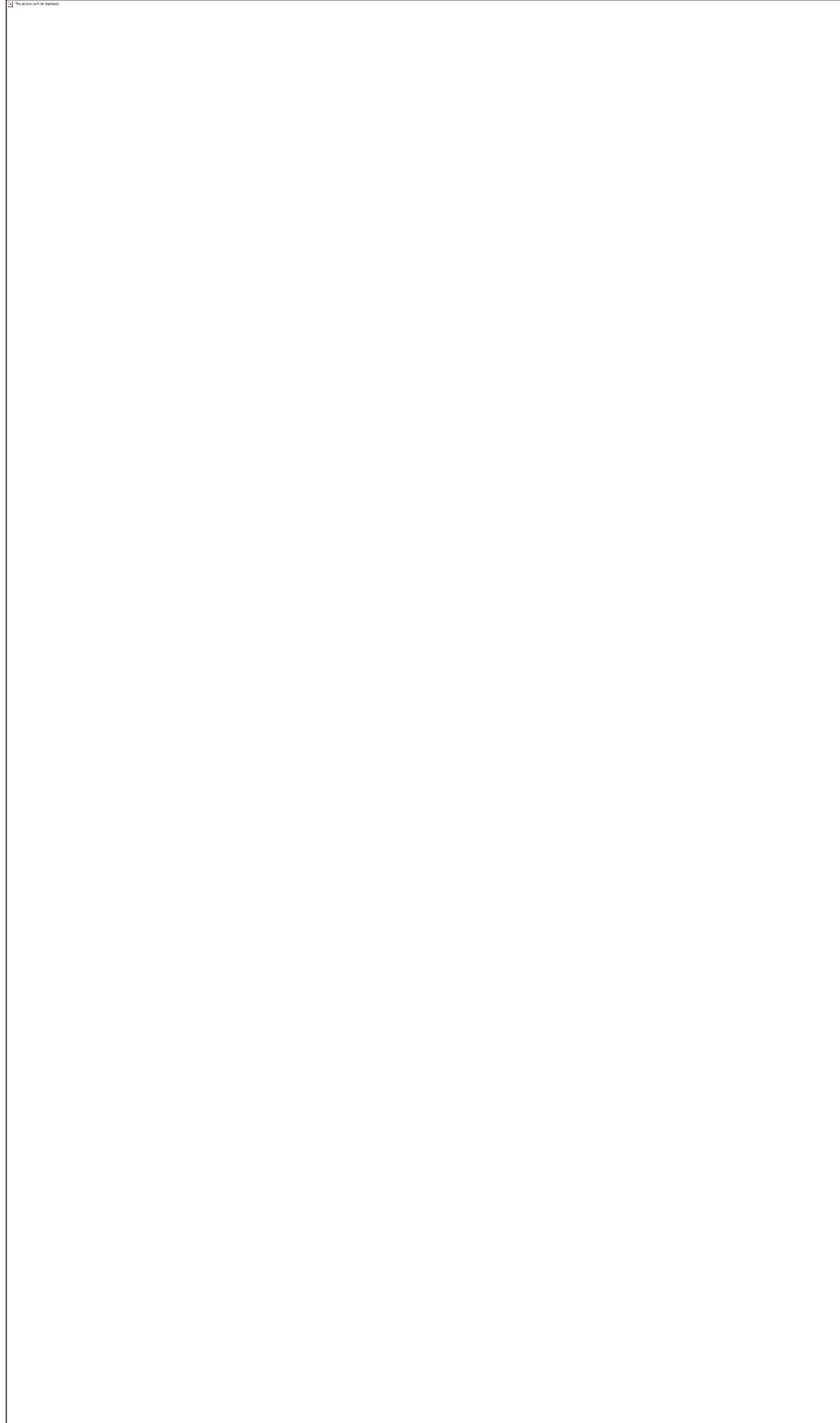
Complaint

Exhibit C



Complaint

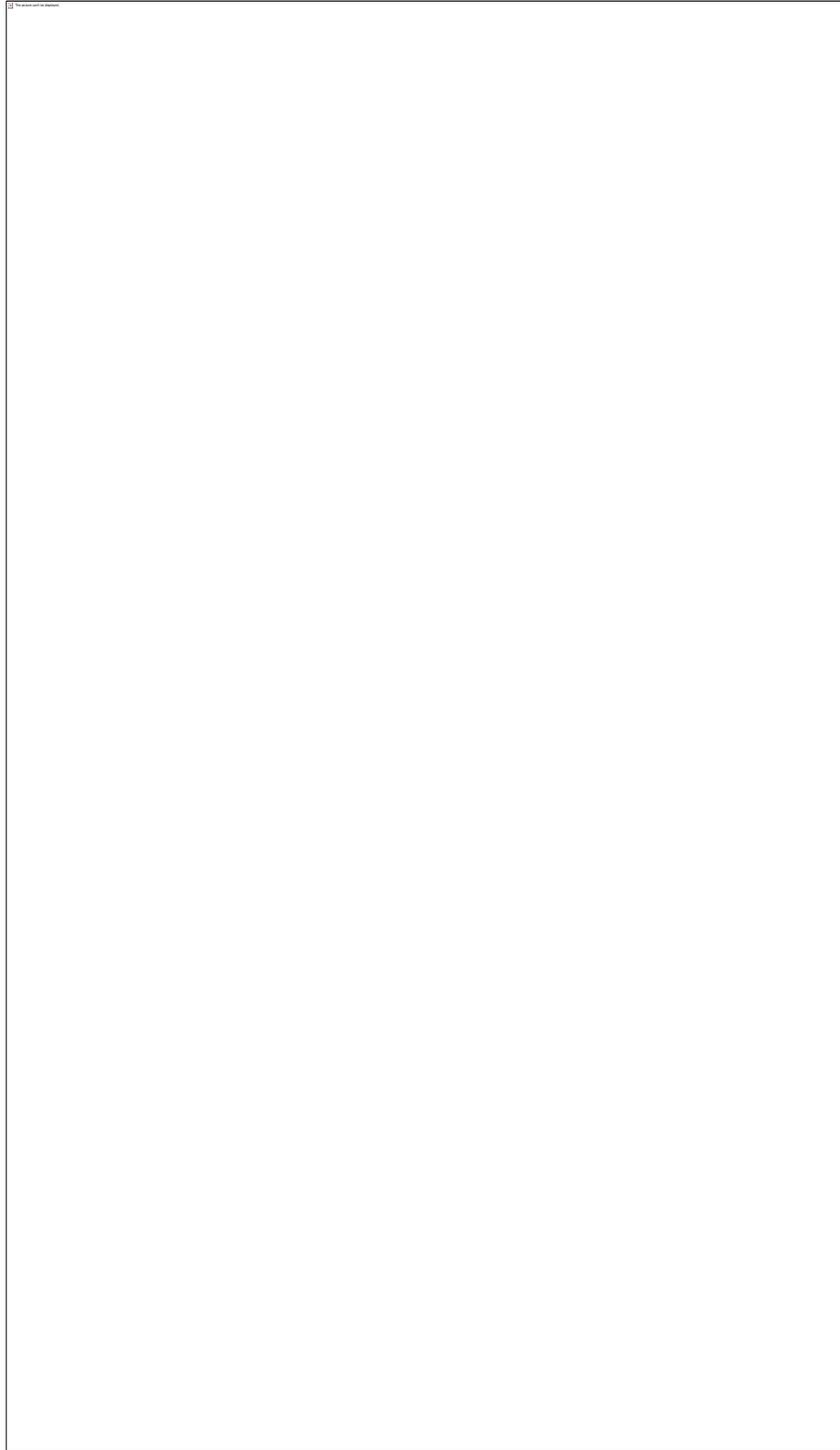
Exhibit D



Complaint

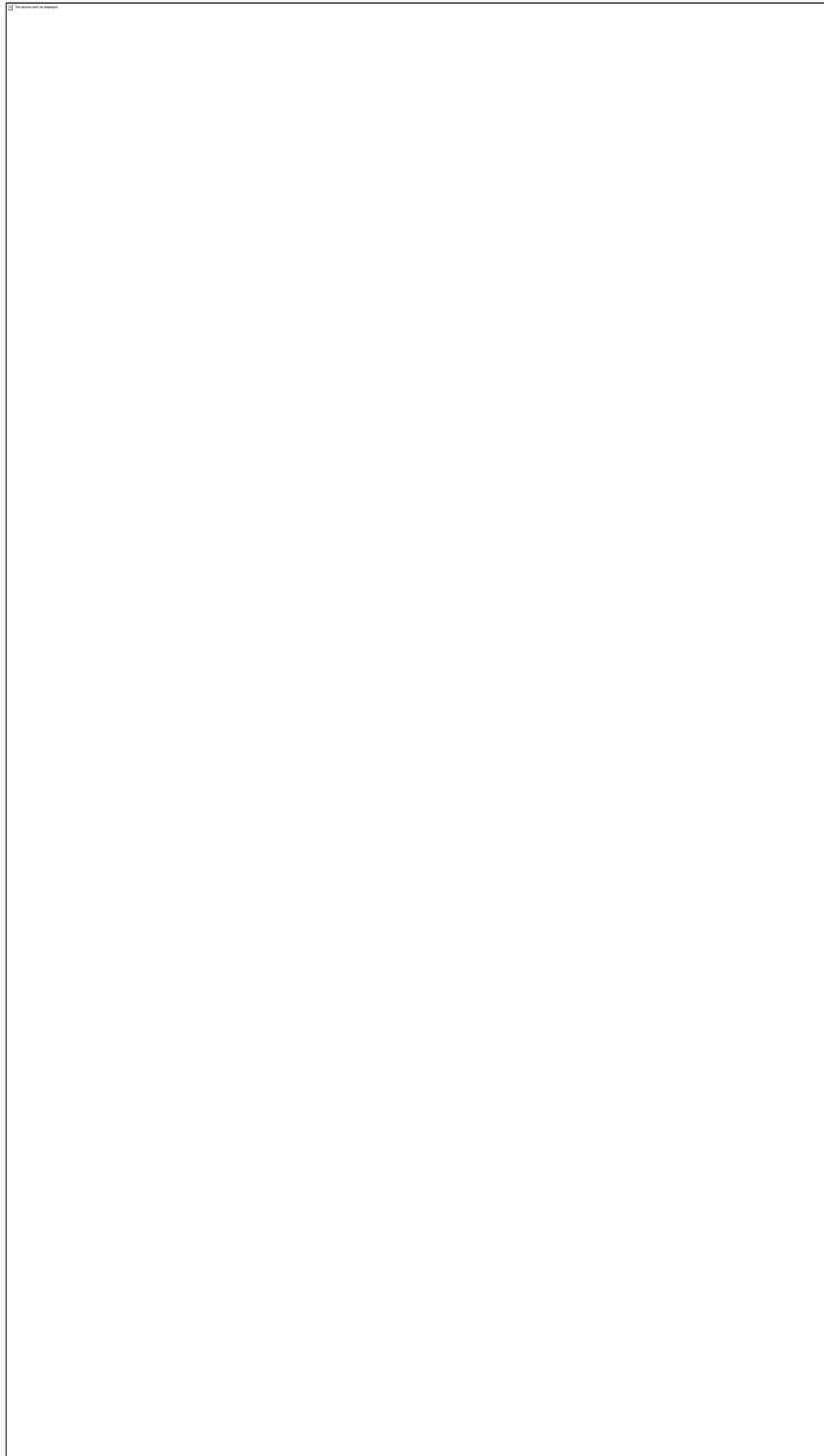
© 2000 Microsoft Corporation. All rights reserved. Microsoft, the Microsoft Dynamics logo, and "Your business. Our passion." are either registered trademarks or trademarks of Microsoft Corporation in the United States and/or other countries.

Complaint



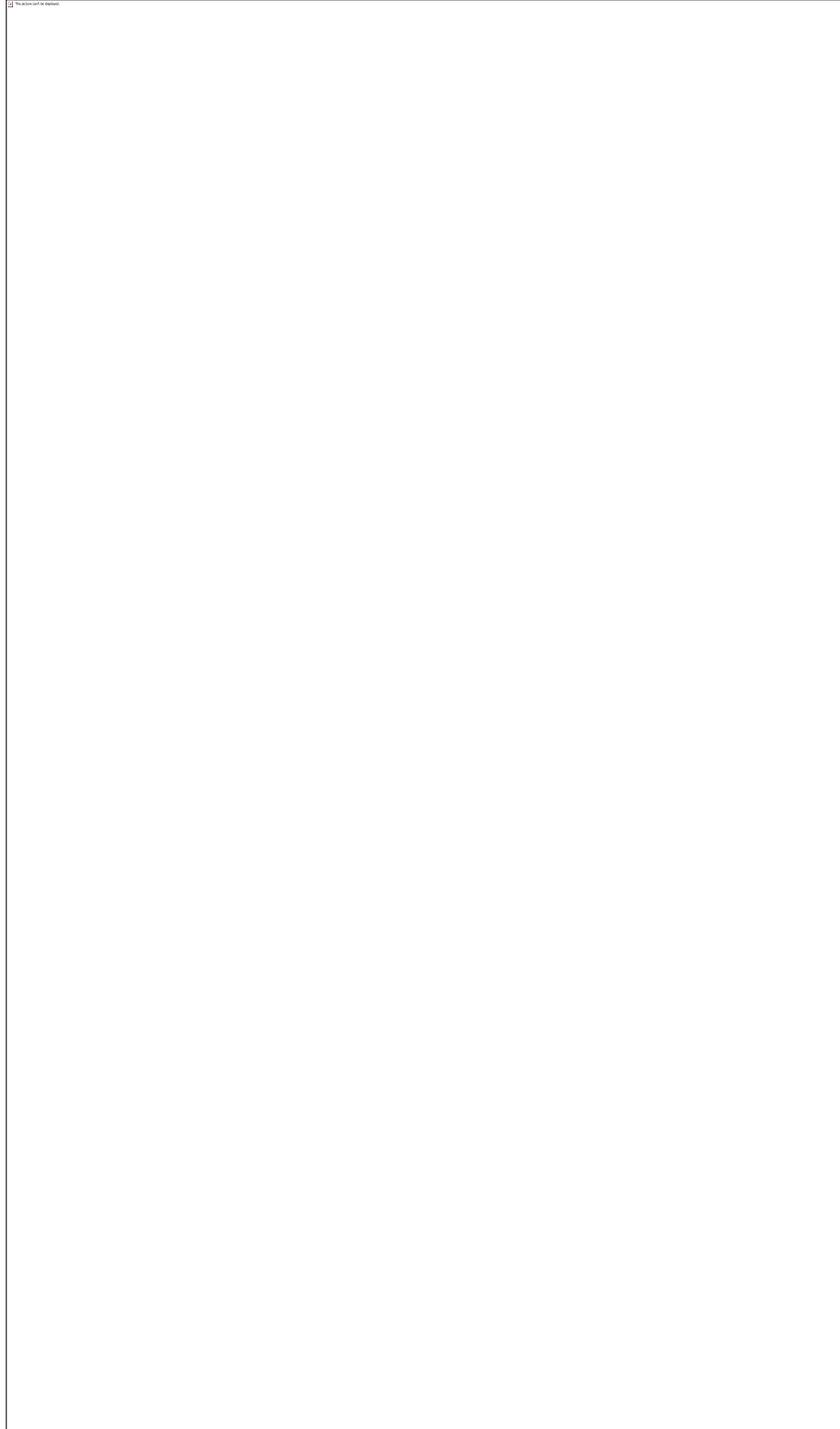
Complaint

© 2000 Enhanced Vision Systems, Inc.



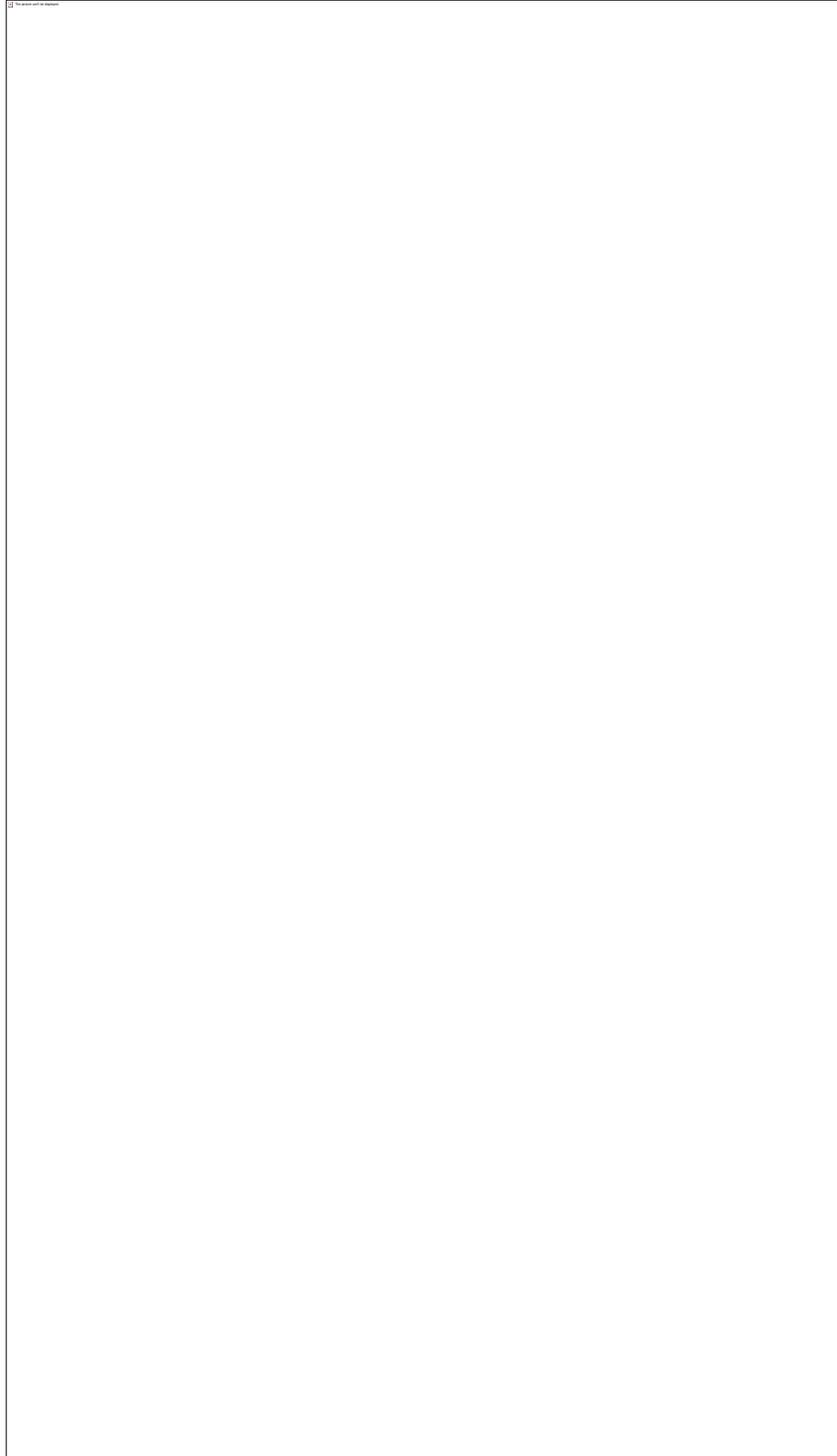
Complaint

Exhibit E



Complaint

© 2000 Enhanced Vision Systems, Inc.



Decision and Order

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the Respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; and

The Respondent and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), an admission by the Respondent of all the jurisdictional facts set forth in the aforesaid draft complaint, a statement that the signing of said consent agreement is for settlement purposes only and does not constitute an admission by the Respondent that the law has been violated as alleged in the 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 has reason to believe that the Respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such consent agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in 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 Enhanced Vision Systems, Inc. is a California corporation with its principal office or place of business at 5882 Machine Drive, Huntington Beach, California 92649. Respondent assembles its vision-related products from domestic and foreign components at that location.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

Decision and Order

Respondent, and the proceeding is in the public interest.

ORDER**DEFINITIONS**

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

- A. Unless otherwise specified, “Respondent” shall mean Enhanced Vision Systems, Inc., and its successors and assigns and its officers, agents, representatives, and employees.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

IT IS ORDERED that Respondent, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, marking, labeling, packaging, advertising, promotion, offering for sale, sale, or distribution of any vision-related product or package, in or affecting commerce, shall not represent, in any manner, expressly or by implication, the extent to which any such product or package is made in the United States, unless the representation is true and not misleading.

II.

IT IS FURTHER ORDERED that Respondent Enhanced Vision Systems, Inc., and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Commission for inspection and copying:

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

Decision and Order

- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
- D. All acknowledgments of receipt of this order, obtained pursuant to Part III.

III.

IT IS FURTHER ORDERED that for a period of three (3) years after the date of issuance of this order, Respondent Enhanced Vision Systems, Inc., and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors, 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 Enhanced Vision Systems, Inc., and its successors and assigns shall notify the Commission at least thirty (30) days prior to any change in respondent or any business entity that 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 formation of a new business entity; a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. *Provided, however,* that, with respect to any proposed change about which respondent learns less than thirty (30) days prior to

Decision and Order

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, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

V.

IT IS FURTHER ORDERED that Respondent Enhanced Vision Systems, Inc., and its successors and assigns shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports.

VI.

This order will terminate on September 3, 2029, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- 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

Analysis to Aid Public Comment

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 Enhanced Vision Systems, Inc., a corporation (“respondent”).

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 respondent’s marketing and sale of vision enhancement products purportedly “Made in the U.S.A.” According to the FTC complaint, respondent represented that certain of its vision enhancement products were made in the United States, when, in fact, a significant portion of their components are of foreign origin. *See* Enforcement Policy Statement on U.S. Origin Claims (1997) (“A product that is all or virtually all made in the United States will ordinarily be one in which all significant parts and processing that go into the product are of U.S. origin.”). Thus, the complaint alleges that respondent’s claim is false or misleading in violation of Section 5(a) of the FTC Act.

The proposed consent order contains a provision designed to prevent respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits respondent from

Analysis to Aid Public Comment

representing the extent to which its vision-related products are made in the United States unless the representation is true and not misleading. Parts II through V require respondent to keep copies of advertisements and materials relied upon in disseminating any representation covered by the order; to provide copies of the order to certain of its personnel, agents, and representatives having responsibilities with respect to the subject matter of the order; to notify the Commission of changes in corporate structure that might affect compliance obligations under the order; and to file compliance reports with the Commission and respond to other requests from FTC staff. Part VI 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

CONSTELLATION BRANDS, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4266; File No. 092 3035*
Complaint, October 2, 2009 - Decision, October 2, 2009

This consent order addresses respondent Constellation Brands, Inc., an International producer and marketer of wine, beer, and spirits. The complaint alleged unsubstantiated claims made in advertising for the beverage alcohol product “Wide Eye” schnapps. According to the complaint, the company represented, expressly or by implication, that consumers who drink “Wide Eye” will remain alert when consuming alcohol, but could not substantiate the representation at the time it was made. Therefore, the representation was, and is, in violation of Section 5 of the FTC Act by being false and misleading. The consent order prohibits the company from advertising that consumers who drink its product will remain alert when consuming alcohol unless that representation is true, non-misleading, and, at the time it is made, the company possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

*Participants*For the *Commission: Janet M. Evans.*For the *Respondents: Marc E. Sorini, McDermott, Will & Emery, LLP.***COMPLAINT**

The Federal Trade Commission, having reason to believe that Constellation Brands, Inc. 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 Constellation Brands, Inc. (“respondent”) is a Delaware corporation with its principal office or place of business at 207 High Point Drive, Building 200, Victor, NY 14561.

Complaint

2. Respondent has advertised, offered for sale, sold, and distributed beverage alcohol products to the public, including Wide Eye, a caffeinated schnapps introduced by the company in 2007. Wide Eye is a “food” within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

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

4. To induce customers to purchase Wide Eye, respondent has disseminated, or caused to be disseminated, advertisements, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

- A. Video appearing on www.wideeye.com and vids.myspace.com (Exhibit A, transcript, and Exhibit B, DVD containing ad).

[Music, with alarm sounds, plays in the background.]

CLOSE UP IMAGE OF AN UNIDENTIFIED WOMAN: Come on, take your shot.

ON SCREEN: I am your wake up call. Wide Eye

WOMAN: Take it cold.

ON SCREEN: Finely Distilled Schnapps Combined with Caffeine

WOMAN: Take it crisp.

ON SCREEN: Caffeinated Schnapps is here.
[images of product logo, people partying and dancing, and a boxer, flash on the screen]

WOMAN: Take it now.

ON SCREEN: Wide Eye

Complaint

WOMAN: I demand to be served as coldly as your soul.

ON SCREEN: I demand to be served as coldly as your soul. Get Yours @ WideEye.com

WOMAN: Take your shot.

ON SCREEN: Wake Up@WideEye.com

WOMAN: Cold as your soul.

ON SCREEN: Cherry Bomb [product image]

WOMAN: Cold as your soul.

ON SCREEN: Mango Chili [product image]

WOMAN: Cold as your soul.

ON SCREEN: Pomegranate Spice [product image]
[images of product logo, people partying and dancing, and a boxer, flash on the screen]

WOMAN: Cold as your soul.

ON SCREEN: Wide Eye. Wake Up@WideEye.com

B. Text on www.wideeye.com (Exhibit C).

3 Rounds of Flavor. Introducing caffeinated schnapps. Wakes up sweet, then goes off like an alarm.

When you party with the world's first caffeinated schnapps it'll seem like the rest of the world is sleepwalking through life.

C. Print ad (Spin magazine) (Exhibit D).

Complaint

[depiction of a woman boxer holding a bottle of Wide Eye]

This is your wake up call. Caffeinated schnapps is here. Get yours at wideeye.com.

5. Through the means described in Paragraph 4, including the statements and depictions contained in the advertisements attached as Exhibits A through D, among others, respondent has represented, expressly or by implication, that consumers who drink Wide Eye will remain alert when consuming alcohol.

6. Through the means described in Paragraph 4, including the statements and depictions contained in the advertisements attached as Exhibits A through D, among others, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 5 at the time the representation was made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 5 at the time the representation was made. Therefore, the representation set forth in Paragraph 6 was, and is, false and misleading.

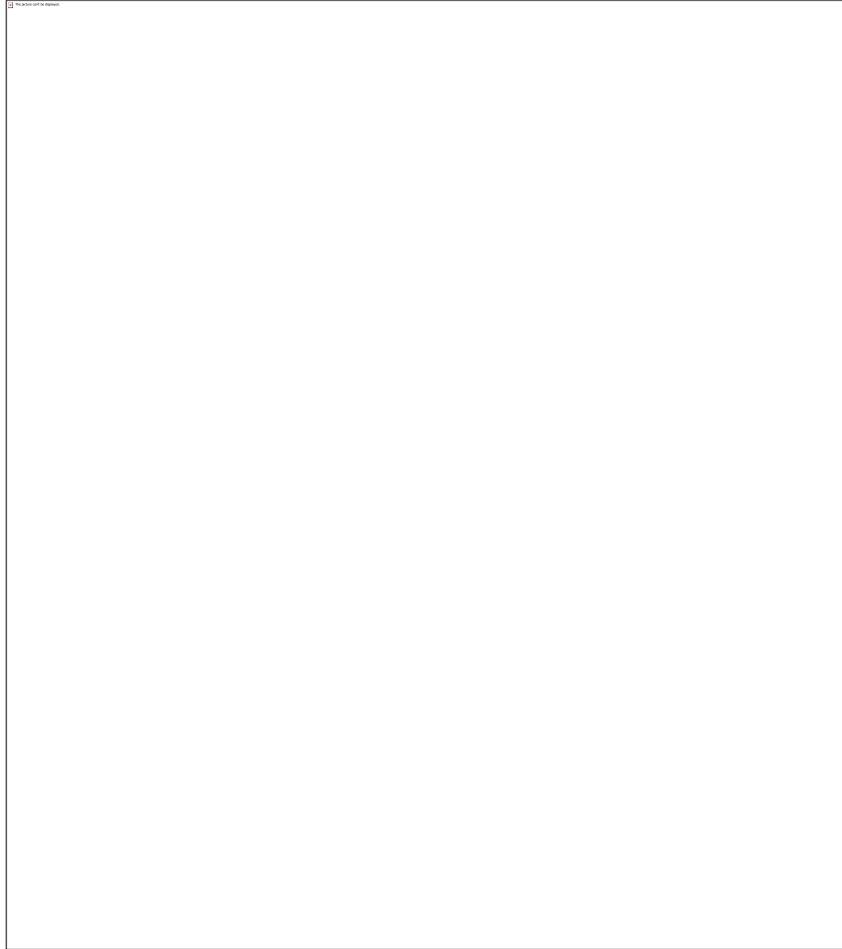
8. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

THEREFORE, the Federal Trade Commission this second day of October, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

Exhibit A



Complaint

Exhibit B



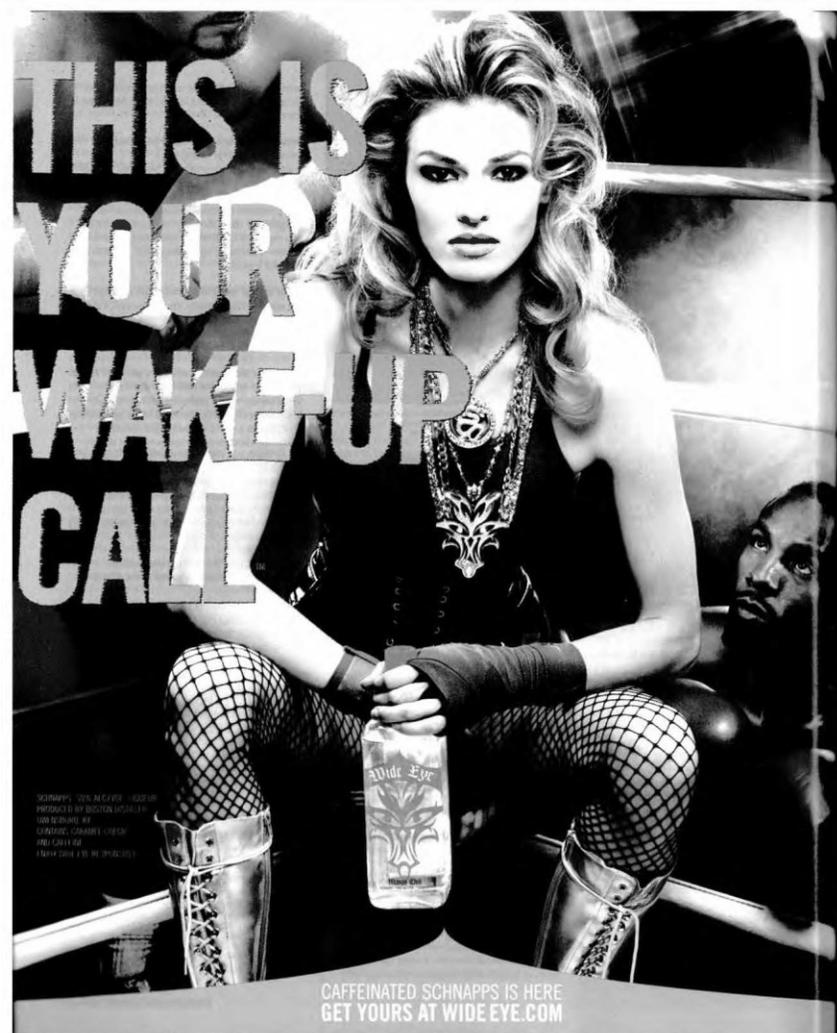
Complaint

Exhibit C



Complaint

Exhibit D



Decision and Order

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondent with violation of the Federal Trade Commission Act, 15 U.S.C. § 45 *et seq.*; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondent has violated the Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having duly considered the comments filed thereafter by interested persons pursuant to § 2.34 of its Rules, 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 Constellation Brands, Inc. is a Delaware corporation with its principal office or place of business at 207 High Point Drive, Building 200, Victor, NY 14561.
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.

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ORDER**DEFINITIONS**

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

- A. Unless otherwise specified, “respondent” shall mean Constellation Brands, Inc., its successors and assigns and their officers, and each of the above’s agents, representatives, and employees.
- B. “Wide Eye” shall mean respondent’s distilled spirit beverage alcohol product, a caffeinated schnapps containing 30% alcohol by volume.
- C. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- D. “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.

I.

IT IS ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of Wide Eye or any other beverage alcohol product containing caffeine, ginseng, taurine, guarana, or any stimulant, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name or endorsement, that consumers who drink such product will remain alert when consuming alcohol, unless the representation is true, non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

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II.

IT IS FURTHER ORDERED that respondent, directly or through any corporation, partnership, subsidiary, division, trade name, or other device, in connection with the advertising, promotion, offering for sale, sale, or distribution of any beverage alcohol product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, including through the use of a product name or endorsement, that such product or any ingredient therein will counteract the effects of alcohol consumption, unless the representation is true, non-misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

III.

IT IS FURTHER ORDERED that respondent Constellation Brands, Inc. and its successors and assigns 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 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.

IV.

IT IS FURTHER ORDERED that respondent Constellations Brands, Inc. and its successors and assigns shall deliver a copy of this order to all current and future principals, officers, directors,

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

V.

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

VI.

IT IS FURTHER ORDERED that respondent Constellation Brands, Inc. and its successors and assigns shall, within sixty (60) days after service of this order, and, upon reasonable notice, at such 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.

Analysis to Aid Public Comment

VII.

This order will terminate on October 2, 2029, 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 this order, whichever comes later; *provided, however*, that the filing of such 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, Commissioner Harbour recused.

**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 Constellation Brands, Inc. ("the company"). The proposed consent order has been placed on the public record

Analysis to Aid Public Comment

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

This matter involves alleged unsubstantiated claims made in advertising for the beverage alcohol product Wide Eye schnapps, introduced by the company in 2007. Wide Eye contains 30% alcohol by volume plus caffeine. The company promoted Wide Eye through Internet advertising, including web video and print ads. Among other things, the company made the following claims about Wide Eye: "Wake up @ WideEye.com," "I am your wake up call," "Wakes up sweet, then goes off like an alarm," and "When you party with the world's first caffeinated schnapps it'll seem like the rest of the world is sleepwalking through life."

According to the FTC complaint, the company represented, expressly or by implication, that consumers who drink Wide Eye will remain alert when consuming alcohol. The complaint alleges that the company did not possess and rely upon a reasonable basis that substantiated the representation at the time it was made. Therefore, the representation was, and is, false and misleading.

The proposed consent order contains provisions designed to prevent the company from engaging in similar acts and practices in the future. Part I of the proposed consent order prohibits the company, in connection with the advertising, sale, or distribution of Wide Eye or any other beverage alcohol product containing caffeine, ginseng, taurine, guarana, or any stimulant, from representing, expressly or by implication, including through the use of a product name or endorsement, that consumers who drink such a product will remain alert when consuming alcohol unless that representation is true, non-misleading, and, at the time it is made, the company possesses and relies upon competent and reliable scientific evidence that substantiates the representation. Part II of the consent order further prevents the company from representing, expressly or by implication, including through the use of a product name or endorsement, that any beverage alcohol product or any ingredient therein will counteract the effects of alcohol consumption, unless that representation is true, non-

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misleading, and, at the time it is made, the company possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

Parts III through VI of the consent order require the company to keep copies of relevant advertisements and promotional materials, to provide copies of the order to certain of its personnel, to notify the Commission of changes in corporate structure, and to file compliance reports with the Commission. Part VII provides that the order will terminate after twenty (20) years with certain exceptions.

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