

Complaint

IN THE MATTER OF

**K+S AKTIENGESELLSCHAFT
AND
INTERNATIONAL SALT COMPANY LLC**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket No. C-4273; File No. 091 0086
Complaint, November 9, 2009 - Decision, November 9, 2009*

This consent order addresses K+S AG's ("K+S"), and its subsidiary's, International Salt Company LLC ("ISCO"), acquisition of Morton International, Inc. ("Morton") and the anti-competitive effects that would result. The complaint alleges that the proposed acquisition would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act, by lessening competition in Maine and Connecticut for the sale and delivery of bulk de-icing road salt. ISCO and Morton are the two principal bidders in the states of Maine and Connecticut for the sale and delivery of bulk de-icing salt. Post-acquisition, the combined entity will have a market share exceeding 70 percent in both Maine and Connecticut. To preserve the competition that otherwise would be eliminated by the acquisition, the consent agreement requires ISCO to divest to Commission-approved buyers, Eastern Salt and Granite State, assets sufficient to enable these buyers to become viable competitors for the de-icing salt business in the relevant markets beginning with the 2010-2011 bidding cycle. With the divested assets, Granite State will be well positioned to compete for future business in Connecticut and to deliver salt to customers in a timely manner.

Participants

For the *Commission*: Joseph Brownman, Michelle Fetterman, Jill M. Frumin, Jeanne Liu, and Stephanie Reynolds.

For the *Respondents*: Andrea Agathoklis, Daniel J. Fletcher, Bruce C. McCulloch and Paul L. Yde, Freshfields Bruckhaus Deringer US LLP; Jeremy Calsyn and George Cary, Cleary Gottlieb Steen & Hamilton LLP.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested

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by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent K+S Aktiengesellschaft (“K+S”), a corporation, parent of Respondent International Salt Company LLC (“ISCO”), and The Dow Chemical Company (“Dow”), a corporation, both subject to the jurisdiction of the Commission, have agreed to an acquisition of Morton International, Inc. (“Morton”), from Dow in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I.**RESPONDENTS**

1. Respondent K+S is a German stock corporation, organized, existing, and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Bertha-von-Suttner Str. 7, 34131 Kassel, Germany.

2. Respondent ISCO is a Delaware limited liability company, existing, and doing business under and by virtue of the laws of the United States as a wholly-owned subsidiary of K+S, with its offices and principal place of business located at 655 Northern Boulevard, Clarks Summit, Pennsylvania 18411.

3. K+S is, and at all relevant times herein has been, engaged in “commerce” as defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is an entity whose business is in or affects “commerce” as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

4. ISCO is, and at all relevant times herein has been, engaged in “commerce” as defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is an entity whose business is in or affects “commerce” as defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

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II.

THE PROPOSED TRANSACTION

5. Pursuant to a Stock Purchase Agreement dated April 1, 2009 (the “Agreement”), K+S proposes to acquire Morton, from Dow, for approximately \$1.675 billion (the “Acquisition”).

III.

THE RELEVANT MARKETS

6. The relevant product market in which to analyze the effects of the Acquisition is the sale and delivery of bulk de-icing salt.

7. The relevant geographic areas in within which to analyze the effects of the Acquisition are the states of Maine and Connecticut.

IV.

STRUCTURE OF THE MARKET

8. The markets for the sale and delivery of bulk de-icing salt to customers in Maine and Connecticut are highly concentrated as measured by the Herfindahl-Hirschman Index (“HHI”). Post-acquisition, a combined ISCO and Morton will have a market share in excess of 70 percent in both Maine and Connecticut. Post-merger HHIs for Maine and Connecticut are 5,142 and 5,834, and the acquisition will increase HHI levels by 1,914 and 2,642, respectively. These market concentration levels far exceed the thresholds set out in the *Horizontal Merger Guidelines* and thus create a presumption that the proposed merger will create or enhance market power.

9. ISCO and Morton are actual and substantial competitors in the relevant markets. They are two of a small number of firms in the relevant markets and are the principal bidders for the sale and delivery of bulk de-icing salt to customers in the states of Maine and Connecticut. The percentage of bids won by ISCO and

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Morton exceeds 50 percent for each of these states during each of the last three years.

V.

ENTRY CONDITIONS

10. Entry into the relevant markets would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the Acquisition as set forth in Paragraph 11 below. Entry into the relevant markets is a difficult process because of, among other things, the lack of acceptable stockpile space along the coasts of Maine and Connecticut upon which to store bulk de-icing road salt. As a result, new entry into the relevant markets sufficient to achieve a significant market impact within two years is unlikely.

VI.

EFFECTS OF THE ACQUISITION

11. The effect of the Acquisition, if consummated, may be to substantially lessen competition and tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between ISCO and Morton in the markets for the sale and delivery of bulk de-icing salt in Maine and Connecticut;
- b. by increasing the ability of ISCO to raise prices unilaterally in the markets for the sale and delivery of bulk de-icing salt in Maine and Connecticut; and
- c. by increasing the likelihood of coordinated interaction among ISCO and the few remaining firms in the markets for the sale and delivery of bulk de-icing salt in Maine and Connecticut.

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VII.**VIOLATIONS CHARGED**

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

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

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

By the Commission.

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The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition of Morton International, Inc. (“Morton”), from The Dow Chemical Company (“Dow”), by K+S Aktiengesellschaft (“K+S”), the parent of International Salt Company LLC (“ISCO”), and K+S and ISCO, hereinafter sometimes referred to as “Respondents,” having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (AConsent Agreement”), containing an admission by

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

The Commission, having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having 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 enters the following Decision and Order ("Order"):

1. Respondent K+S is a German stock corporation, organized, existing and doing business under and by virtue of the laws of Germany, with its office and principal place of business located at Bertha-von-Suttner Str. 7, 34131 Kassel, Germany.
2. Respondent International Salt Company LLC is a Delaware limited liability company, existing and doing business under and by virtue of the laws of the United States as a wholly-owned subsidiary of K+S, with its offices and principal place of business located at 655 Northern Boulevard, Clarks Summit, Pennsylvania 18411.
3. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

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ORDER**I.**

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

- A. “Acquisition” means the acquisition of Morton International, Inc., a subsidiary of The Dow Chemical Company, by K+S.
- B. “Commission” means the Federal Trade Commission.
- C. “Commission-approved Acquirer” means each acquirer approved by the Commission pursuant to Paragraph II. and Paragraph III. (or Paragraph VI.) of this Order. If approved by the Commission, “Commission-approved Acquirer” includes Eastern and Granite State.
- D. “Connecticut Book of Business” means all rights to contracts between Respondent ISCO and the State of Connecticut for delivery of Deicing Salt in the state for the period beginning in the winter season of 2009 through April 30, 2010, to no fewer than five divisions and underlying municipalities, approved by the appropriate governmental entities, with awarded volume of Deicing Salt totaling approximately 75,000 tons of Deicing Salt; provided, however, that for purposes of the Granite State Divestiture Agreement that is referenced and attached to this Order, “Connecticut Book of Business” means the Customer contracts as described in Disclosure Schedule 4.03 of that agreement. “Connecticut Book of Business” includes all books, records, and other information necessary to allow Granite State (or another Commission-approved Acquirer of the Connecticut Divestiture Assets) to perform under the included contracts but shall not include any of Respondent ISCO’s historical information (bid, cost, or pricing) relating to this or any other contract.

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- E. “Connecticut Divestiture Assets” means
1. Connecticut Stockpile Space,
 2. Connecticut Book of Business,
 3. Other Services, and
 4. Connecticut Supply.
- F. “Connecticut Stockpile Space” means access to approximately 80,000 square feet of contiguous stockpile space with a capacity of approximately 70,000 tons located at the New Haven Terminal for a period at least through May 31, 2010.
- G. “Connecticut Supply” means a supply of Deicing Salt, consistent with Paragraph III.C. of this Order.
- H. “Customers” means the Connecticut and Maine governmental entities that acquire Deicing Salt on behalf of the respective states and municipalities as part of the Connecticut Book of Business or the Maine Book of Business.
- I. “Deicing Salt” means salt (sodium chloride) used to melt snow and ice on roads and highways.
- J. “Direct Cost” means the cost of: (1) labor, materials and other costs necessary to mine the Deicing Salt; (2) the transportation of the Deicing Salt from the mine to the loading port; (3) the cost of freight from the loading port to New Haven, CT, via ocean-going vessel; (4) the cargo insurance; and (5) an allocation of SPL’s overhead costs attributable to the Deicing Salt provided to ISCO in the ordinary course of business; provided however, that for purposes of the Connecticut Salt Supply Agreement between Respondents and Granite State that is referenced and attached to this Order, “Direct Cost” means the cost of supply as provided in that Agreement.

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- K. “Divestiture Agreement” means the agreements, licenses, assignments, and all other agreements entered into between the Commission-approved Acquirers and Respondents and approved by the Commission pursuant to Paragraph II. and Paragraph III. (or Paragraph VI.) of this Order; if approved by the Commission, “Divestiture Agreement” includes the Eastern Divestiture Agreement, the Granite State Divestiture Agreement, and the Connecticut Salt Supply Agreement.
- L. “Divestiture Assets” means the assets required by this Order to be divested and includes all of the following:
1. Maine Divestiture Assets,
 2. Searsport Stockpile Space, and
 3. Connecticut Divestiture Assets.
- M. “Divestiture Trustee” means a trustee appointed by the Commission pursuant to Paragraph VI. of this Order.
- N. “Eastern” means Eastern Salt Company, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 134 Middle Street, Suite 210, Lowell, MA 01852.
- O. “Eastern Divestiture Agreement” means the “Asset Purchase Agreement (Maine),” including all exhibits, appendices, and annexes, executed by Eastern and ISCO on September 10, 2009, and attached to this Order as Confidential Appendix A.
- P. “Gateway” means Gateway Terminal, the full service independent terminal operator headquartered in New Haven, Connecticut, which provides space for Deicing Salt and Other Services.

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- Q. “Granite State” means Granite State Minerals, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of New Hampshire with its office and principal place of business located at 227 Market St., Portsmouth, NH 03801.
- R. “Granite State Divestiture Agreement” means the “Asset Purchase Agreement (Connecticut),” including all exhibits, appendices, and annexes, executed by Granite State and Respondents on September 10, 2009, and attached to this Order as Confidential Appendix B.
- S. “K+S” means K+S Aktiengesellschaft, its directors, officers, employees, agents, representatives, successors, and assigns; its parents, joint ventures, subsidiaries, divisions, groups and affiliates controlled by K+S, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- T. “ISCO” means International Salt Company LLC.
- U. “Maine Book of Business” means all rights to contracts between Respondent ISCO and the State of Maine Department of Transportation Region 1 (“Maine DOT Region 1”) requiring delivery of Deicing Salt, and between Respondent ISCO and Greater Portland Council of Governments (“GPCOG”), requiring delivery of untreated Deicing Salt, based on awarded volumes totaling approximately 100,000 tons of Deicing Salt in the state of Maine for the period beginning in the winter season of 2009 and ending in the spring of 2010, approved by the appropriate governmental entities in the state; provided, however, that for purposes of the Eastern Divestiture Agreement that is referenced and attached to this Order, “Maine Book of Business” means the Customer contracts as described in Disclosure Schedule 4.03(a) of that agreement. “Maine Book of Business” includes all books, records, and other information necessary to allow Eastern (or another

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Commission-approved Acquirer of the Maine Divestiture Assets) to perform under the included contracts but shall not include any of Respondent ISCO's historical information (bid, cost, or pricing) relating to this or any other contract.

- V. "Maine Divestiture Assets" means:
1. Maine Stockpile Space,
 2. Maine Book of Business, and
 3. Other Services.
- W. "Maine Stockpile Space" means access to at least 40,000 square feet of contiguous stockpile space with a capacity of approximately 40,000 tons located at the Portland Terminal for a period at least through April 30, 2012.
- X. "McCabe" means McCabe Bait Co., Inc., a company providing general freight trucking and Other Services, located at 136 North St., Kennebunk, ME 04046.
- Y. "Monitor" means the independent third party appointed by the Commission pursuant to Paragraph V. of this Order.
- Z. "New Haven Terminal" means the terminal located at 400 Waterfront Street, New Haven, CT 06512, owned and operated by Gateway.
- AA. "Other Services" means all services provided in connection with Deicing Salt after the Deicing Salt has been transported by ship to the port, including but not limited to offloading the Deicing Salt from vessels, stevedoring, stockpiling or building the stockpile, transporting Deicing Salt from the vessel to the stockpile and from the stockpile to the ultimate customer, drayage of the product to the stockpile, wharfage, and scaling or weighing trucks.

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- BB. “Portland Terminal” means the terminal located at 59 Main Street, South Portland, ME, owned and operated by Sprague.
- CC. “Respondents” means K+S and ISCO, individually and collectively.
- DD. “SPL” means Sociedad Punta de Lobos, a wholly-owned subsidiary of K+S, located at Tajamar 183, Las Condes, Santiago, Chile.
- EE. “Searsport Stockpile Space” means access to approximately 2.75 acres of contiguous stockpile space with a capacity of approximately 90,000 tons located at the Searsport Terminal for a period at least through April 30, 2011.
- FF. “Searsport Terminal” means the terminal located at Mack Point – Trundy Road, Searsport, ME 04974, owned and operated by Sprague.
- GG. “Sprague” means Sprague Energy Corp, headquartered in Portsmouth, New Hampshire, which provides space for Deicing Salt and Other Services.
- HH. “Stockpile” means a pile of salt at a storage terminal.
- II. “Third Party” means an entity other than Respondents or a Commission-approved Acquirer, including but not limited to the Maine Department of Transportation, the Greater Portland Council of Governments, Sprague, Gateway, McCabe, and the Connecticut Department of Transportation.

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

- A. By no later than twenty (20) days after the Acquisition occurs, Respondents shall divest the Maine Divestiture Assets to Eastern pursuant to and in accordance with the Eastern Divestiture Agreement, absolutely and in

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good faith, and at no minimum price; *provided, however,* that if Respondents have divested the Maine Divestiture Assets to Eastern prior to the date this Order becomes final and if, at the time the Commission determines to make this Order final:

1. The Commission determines and notifies Respondents that Eastern is not an acceptable acquirer of the Maine Divestiture Assets, then Respondents shall immediately rescind the transaction with Eastern and shall divest the Maine Divestiture Assets no later than six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission; or
 2. The Commission determines and notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee pursuant to Paragraph VI. of this Order, to effect such modifications to the manner of divesting the Maine Divestiture Assets to Eastern (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.
- B. If Respondents have divested the Maine Divestiture Assets to Eastern (or another Commission-approved Acquirer) pursuant to the Eastern Divestiture Agreement (or another Divestiture Agreement), and the Commission has approved Eastern (or another Commission-approved Acquirer) and the manner in which the divestiture was accomplished, then solely at the option of Eastern (or another Commission-approved Acquirer), Respondents shall divest the Searsport Stockpile Space to Eastern (or another Commission-approved Acquirer) no later than August 15, 2010, pursuant to the terms applicable to

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divestiture of the Searsport Stockpile Space as included in the Eastern Divestiture Agreement (or another Divestiture Agreement).

- C. Prior to completing the Acquisition, Respondents shall:
1. Obtain all consents and approvals from all Third Parties and satisfy all other conditions required to transfer all rights and divest all assets as required by Paragraph II.A., including obtaining any consents or waivers of, or making any payments to, Third Parties; and
 2. Provide written notification to all Customers that Deicing Salt provided as part of the Maine Book of Business divested to the Commission-approved Acquirer will be provided by the Commission-approved Acquirer and not by Respondents.
- D. The Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets) shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Commission-approved Acquirer or to reduce any obligations of Respondents under such agreements, and each such agreement, if approved by the Commission as the Divestiture Agreement, shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply with all terms of the Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets), and any breach by Respondents of any term of the Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets) shall constitute a violation of this Order. If any term of the Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets) varies from the terms of

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this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents’ obligations under this Order. Any material modification of the Eastern Divestiture Agreement (or any other Divestiture Agreement effectuating divestiture of the Maine Divestiture Assets) between the date the Commission approves the Divestiture Agreement and the Closing Date, without the prior approval of the Commission, or any failure to meet any material condition precedent to closing (whether waived or not), shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreements, for a period of five (5) years after the relevant Closing Date, any modification of a Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondents shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Divestiture Agreement, or after any failure to meet any condition precedent (material or otherwise) to closing (whether waived or not).

- E. Until Respondents comply with Paragraph II. (and Paragraph VI.) of this Order, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Maine Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Maine Divestiture Assets.
- F. The purpose of the divestiture of the Maine Divestiture Assets, the Searsport Stockpile Space, and the additional requirements in Paragraph II. is to ensure the continued use of the assets in the same business in which the assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition in the sale and delivery of Deicing Salt in Maine resulting from the Acquisition as alleged in the Commission’s complaint.

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III.**IT IS FURTHER ORDERED** that

- A. By no later than twenty (20) days after the Acquisition occurs, Respondents shall divest the Connecticut Divestiture Assets to Granite State pursuant to and in accordance with the Granite State Divestiture Agreement, absolutely and in good faith, and at no minimum price; *provided, however,* that if Respondents have divested the Connecticut Divestiture Assets to Granite State prior to the date this Order becomes final and if, at the time the Commission determines to make this Order final:
1. The Commission determines and notifies Respondents that Granite State is not an acceptable acquirer of the Connecticut Divestiture Assets, then Respondents shall immediately rescind the transaction with Granite State and shall divest the Connecticut Divestiture Assets no later than six (6) months from the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission; or
 2. The Commission determines and notifies Respondents that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee, pursuant to Paragraph VI. of this Order, to effect such modifications to the manner of divesting the Connecticut Divestiture Assets to Granite State (including, but not limited to, entering into additional agreements or arrangements) as may be necessary to satisfy the requirements of this Order.

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- B. Prior to completing the Acquisition, Respondents shall:
1. Obtain all consents and approvals from Third Parties and satisfy all other conditions required to transfer all rights and divest all assets as required by Paragraph III., including obtaining any consents or waivers of, or making any payments to, Third Parties;
 2. Provide written notification to all Customers that Deicing Salt provided as part of the Connecticut Book of Business divested to the Commission-approved Acquirer will be provided by the Commission-approved Acquirer and not by Respondents.
- C. To enable the Commission-approved Acquirer of the Connecticut Divestiture Assets to supply customers with Deicing Salt (“Connecticut Supply”) at an identical level, in an identical manner, and of identical quality as Respondents supplies customers with Deicing Salt, Respondents shall, pursuant to an agreement approved by the Commission (“Connecticut Salt Supply Agreement”):
1. Provide to the Commission-approved Acquirer of the Connecticut Divestiture Assets, at the option of the Commission-approved Acquirer
 - a. for a period of up to 36 consecutive months (the 36-month period to be determined by the Commission-approved Acquirer);
 - b. up to 120,000 tons of Deicing Salt per year, such quantity to be determined by the Commission-approved Acquirer of the Connecticut Divestiture Assets; provided, however, if the Connecticut Book of Business requires the Commission-approved Acquirer of the Connecticut Divestiture Assets to supply more than 120,000 tons of Deicing Salt in the

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(1) 2009-2010 contract year for the Connecticut Book of Business, and (2) the 2010-2011 contract year if the state of Connecticut extends the period of performance for the Connecticut Book of Business, Respondent ISCO shall provide the required Deicing Salt to the Commission-approved Acquirer consistent with this paragraph;

- c. at no more than Direct Cost.
2. Use reasonable efforts to minimize its costs in connection with the supply of Deicing Salt to the Commission-approved Acquirer in a manner that is consistent with Respondents' efforts to provide Deicing Salt to its own New Haven stockpiles; and
 3. Ensure that in the event of any Deicing Salt supply disruption:
 - a. alternative arrangements shall be made for the required Deicing Salt delivery to the Commission-approved Acquirer to commence as soon as possible;
 - b. the Commission-approved Acquirer's priority to receive Deicing Salt shall be restored as if the disrupting event had not occurred; and
 - c. the Commission-approved Acquirer will not be prejudiced relative to Respondent's operations in relation to the transport and delivery of Deicing Salt for the Commission-approved Acquirer's own account or on behalf of any of its affiliates.
- D. The Granite State Divestiture Agreement and the Connecticut Supply Agreement (or any other Divestiture Agreements effectuating divestiture of the Connecticut Divestiture Assets) shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in

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this Order shall be construed to reduce any rights or benefits of any Commission-approved Acquirer or to reduce any obligations of Respondents under such agreements, and each such agreement, if approved by the Commission as the Divestiture Agreements, shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply with all terms of the Divestiture Agreements, and any breach by Respondents of any term of the Divestiture Agreements shall constitute a violation of this Order. If any term of the Divestiture Agreements varies from the terms of this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondent’s obligations under this Order. Any material modification of any Divestiture Agreement between the date the Commission approves the Divestiture Agreement and the Closing Date, without the prior approval of the Commission, or any failure to meet any material condition precedent to closing (whether waived or not), shall constitute a violation of this Order. Notwithstanding any paragraph, section, or other provision of the Divestiture Agreements, for a period of five (5) years after the relevant Closing Date, any modification of a Divestiture Agreement, without the approval of the Commission, shall constitute a failure to comply with this Order. Respondents shall provide written notice to the Commission not more than five (5) days after any modification (material or otherwise) of the Divestiture Agreement, or after any failure to meet any condition precedent (material or otherwise) to closing (whether waived or not).

- E. Until Respondents comply with Paragraph III. (and Paragraph VI.) of this Order, Respondents shall take such actions as are necessary to maintain the viability and marketability of the Connecticut Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of the Connecticut Divestiture Assets.

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- F. The purpose of the divestiture of the Connecticut Divestiture Assets and the additional requirements in Paragraph III. is to ensure the continued use of the assets in the same business in which the assets were engaged at the time of the announcement of the proposed Acquisition by Respondents and to remedy the lessening of competition in the sale and delivery of Deicing Salt in Connecticut resulting from the Acquisition as alleged in the Commission's complaint.

IV.**IT IS FURTHER ORDERED** that

- A. If the Commission-approved Acquirer is unable to satisfy the terms of the Connecticut Book of Business or the Maine Book of Business, then ISCO shall perform under the terms as requested by the affected Customer as specified by the Customer in its formal consent to transfer its contract from ISCO to the Commission-approved Acquirer.
- B. Respondents shall not interfere with, or in any other way impede, the ability of the Commission-approved Acquirers to extend or enter into agreements with Sprague, Gateway, or other Third Parties, relating to the supply or sale of Deicing Salt in Connecticut and Maine.
- C. If any Customer, or person acting on behalf of any Customer, that would otherwise acquire Deicing Salt as part of the Connecticut Book of Business or the Maine Book of Business contacts Respondents with respect to placing an order, or places an order, for Deicing Salt, Respondents shall:
1. Notify the Customer-designated representative with responsibilities for procurement relating to that Customer, in such a manner that the representative receives the notification within 24 hours of the contact, or the placement of the order; and

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2. Maintain an accurate and verifiable record of that contact.

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

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

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responsibilities of the Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission including, but not limited to:

- a. assuring that Respondents expeditiously comply with all of their obligations and perform all their responsibilities as required by the Order to Maintain Assets and the Decision and Order in this matter; and
 - b. monitoring Respondents compliance with the Granite State Supply Agreement.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
 3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to the Respondents' compliance with their obligations under the Order. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with the Order.
 4. The Monitor shall serve, without bond or other security, at the expense of Respondents on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all monies derived from the divestiture and all expenses incurred, including fees for services

Decision and Order

rendered, subject to the approval of the Commission.

5. Respondents shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, malfeasance, willful or wanton acts, or bad faith by the Monitor.
 6. The Monitor Agreement shall state that within one (1) month from the date the Monitor is appointed pursuant to this Paragraph V., and every sixty (60) days thereafter, the Monitor shall report in writing to the Commission concerning performance of their obligations under the Order.
 7. Respondents may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement relating to the Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the

Decision and Order

Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph V.

- G. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- H. A Monitor appointed pursuant to this Order may be the same person appointed as the monitor appointed pursuant to the Order to Maintain Assets in this matter or the Divestiture Trustee pursuant to the relevant provisions of this Order.

VI.

IT IS FURTHER ORDERED that:

- A. If Respondents have not fully complied with their obligations to divest the Maine Divestiture Assets, the Searsport Stockpile Space, or the Connecticut Divestiture Assets as required by this Order, the Commission may appoint a trustee (“Divestiture Trustee”) to divest such assets and to effectuate the other provisions of this Order in a manner that satisfies the requirements of this Order. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the required assets. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.

Decision and Order

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effectuate the divestitures and satisfy the additional obligations required by Paragraph II. and Paragraph III. of this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to effectuate the divestitures and satisfy the additional obligations required by Paragraphs II. and III. of this Order.
 2. The Divestiture Trustee shall have twelve (12) months after the date the Commission approves the trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the Divestiture Trustee has submitted a plan to satisfy the obligations of Paragraphs II. and III., or

Decision and Order

believes that such can be achieved within a reasonable time, the period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; *provided, however*, the Commission may extend the period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered or otherwise conveyed by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondents shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestitures. Any delays caused by Respondents shall extend the time under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestitures shall be made in the manner and to an acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity or entities selected by Respondents from among those approved by the Commission; *provided further, however*, that

Decision and Order

Respondents shall select such entity within five (5) Days after receiving notification of the Commission's approval.

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

Decision and Order

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

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

- A. Within thirty (30) days after the date this Order becomes final, every sixty (60) Days thereafter until Respondents have fully complied with Paragraphs II.A. and II.C., III.A. and III.B (or Paragraph VI., as applicable), and every ninety (90) days thereafter until Respondents have complied with all remaining obligations of this Order and the Divestiture

Decision and Order

Agreement(s), Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall include in its reports, among other things that are required from time to time:

1. A full description of the efforts being made to comply with the relevant Paragraphs of this Order;
 2. A description of all substantive contacts or negotiations related to the divestitures and the identity of all parties contacted and copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing its obligations pursuant to Paragraph II. and Paragraph III. (or Paragraph VI., as applicable) of this Order.
- B. One year after the Order becomes final, annually for the next three (3) years on the anniversary of the date the Order becomes final, and at other times as the Commission may require, Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they have complied and are complying with the Order.

VIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed (1) dissolution of the Respondents, (2) acquisition, merger or consolidation of Respondents, or (3) any other change in the Respondents that may affect compliance obligations arising out of this Order, including, but not limited to, assignment, the creation or dissolution of subsidiaries, or any other change in Respondents.

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and

Decision and Order

upon five (5) days notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative(s) of the Commission:

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

By the Commission.

Confidential Appendix A

**[Redacted from Public Record Version but
Incorporated by Reference]**

Confidential Appendix B

**[Redacted from Public Record Version but
Incorporated by Reference]**

Analysis to Aid Public Comment

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

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from K+S Aktiengesellschaft ("K+S"), and its subsidiary, International Salt Company LLC ("ISCO"), that is designed to remedy the anticompetitive effects that would otherwise result from K+S's proposed acquisition of Morton International, Inc. ("Morton"), from The Dow Chemical Company ("Dow"). Under the terms of the proposed Consent Agreement, K+S is required to divest assets related to its bulk de-icing salt business in Maine to an up-front buyer, Eastern Salt Company, Inc. ("Eastern Salt" or "Maine Purchaser"), and to divest assets related to its bulk de-icing salt business in Connecticut to an up-front buyer, Granite State Minerals, Inc. ("Granite State" or "Connecticut Purchaser").

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

Pursuant to a Stock Purchase Agreement dated April 1, 2009 (the "Agreement"), K+S proposes to acquire Morton from Dow for approximately \$1.675 billion (the "Acquisition"). The Commission's complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in Maine and Connecticut for the sale and delivery of bulk de-icing road salt.

Analysis to Aid Public Comment

II. The Parties

K+S is currently one of the world's leading suppliers of salt products. K+S sells salt into the United States through its U.S. subsidiary, ISCO. Morton, headquartered in Chicago, Illinois, and a wholly-owned subsidiary of Dow, is a leading salt vendor in North America. Morton produces consumer salt, industrial salt, and de-icing salt. The acquisition of Morton will make K+S the largest producer and distributor of de-icing road salt for customers in Maine and Connecticut.

III. The Proposed Complaint

According to the Commission's proposed Complaint, the relevant product market in which to assess the competitive effects of the proposed Acquisition is the sale and delivery of bulk de-icing salt. The evidence indicates that there are no practical substitutes for bulk de-icing salt to melt snow and ice. The relevant geographic markets in which to assess the impact of the proposed Acquisition are the states of Maine and Connecticut.

The relevant markets are highly concentrated. ISCO and Morton are the two principal bidders in the states of Maine and Connecticut for the sale and delivery of bulk de-icing salt. Post-acquisition, the combined entity will have a market share exceeding 70 percent in both Maine and Connecticut. Post-merger HHIs for Maine and Connecticut are 5,142 and 5,834, and the acquisition will increase HHI levels by 1,914 and 2,642, respectively. These market concentration levels far exceed the thresholds set forth in the *Horizontal Merger Guidelines* and thus create a presumption that the proposed merger will create or enhance market power.

Entry into the relevant markets is difficult because, among other things, there is a lack of acceptable stockpile space along the coasts of Maine and Connecticut. As a result, new entry sufficient to achieve a significant market impact within two years is unlikely.

Finally, the Complaint alleges that the proposed Acquisition will reduce competition in the relevant markets by eliminating direct and substantial competition between ISCO and Morton, and

Analysis to Aid Public Comment

by increasing the likelihood that ISCO would increase prices either unilaterally or through coordinated interaction with the few remaining firms in the relevant markets.

IV. The Consent Agreement

To preserve the competition that otherwise would be eliminated by the Acquisition, the proposed Consent Agreement requires ISCO to divest to Commission-approved buyers, Eastern Salt and Granite State, assets sufficient to enable these buyers to become viable competitors for the de-icing salt business in the relevant markets beginning with the 2010-2011 bidding cycle. ISCO will divest to Eastern Salt the Maine Divestiture Assets, including: 1) stockpile space in the state, 2) all associated handling and trucking contracts, and 3) a book of de-icing salt business for the 2009-2010 winter season. ISCO will divest to Granite State the Connecticut Divestiture Assets, including: 1) stockpile space in the state, 2) all associated handling and trucking contracts, 3) a book of de-icing salt business for the 2009-2010 winter season, and 4) a three-year supply of de-icing salt at a price that is no more than ISCO's costs.

The Commission has preliminarily determined that Eastern Salt is a well-qualified buyer of the Maine Divestiture Assets and is well situated to replace the competition Morton provided in the state. Eastern Salt is a family-owned company that has been a de-icing salt supplier in other geographic markets along the East Coast for roughly 60 years. Eastern Salt is a vertically integrated supplier with a dependable, high-quality supply of de-icing salt. With the divested assets, Eastern Salt will be well positioned to compete for future business in Maine and to deliver salt to customers in a timely manner.

The Commission has preliminarily determined that Granite State is a well-qualified buyer of the Connecticut Divestiture Assets and is well situated to replace the competition Morton provided in the state. Granite State has experience supplying de-icing salt to customers in a number of states along the East Coast. The Consent Agreement requires ISCO to provide Granite State with a three-year supply of bulk de-icing salt at no more than ISCO's costs. The supply requirement will ensure that Granite State has a supply of salt in Connecticut during the 2010-2011 and

Analysis to Aid Public Comment

2011-2012 bid cycles while Granite State develops the necessary supply arrangements to serve Connecticut customers in subsequent years. With the divested assets, Granite State will be well positioned to compete for future business in Connecticut and to deliver salt to customers in a timely manner.

The proposed Consent Agreement requires that the divestitures occur no later than twenty (20) days after the Acquisition is consummated. However, if ISCO divests the assets to Eastern Salt or Granite State during the public comment period, and if, at the time the Commission decides to make the Order final, the Commission notifies K+S or ISCO that either purchaser is not an acceptable acquirer or that the asset purchase agreement with the Maine Purchaser or Connecticut Purchaser is not an acceptable manner of divestiture, then ISCO must immediately rescind the transaction in question and divest those assets to another buyer within six (6) months of the date the Order becomes final. At that time, Respondents must divest those assets only to an acquirer and in a manner that receives the prior approval of the Commission. The proposed Consent Agreement also enables the Commission to appoint a trustee to divest any assets identified in the Order that K+S or ISCO has not divested to satisfy the requirements of the Order.

The proposed Consent Agreement further requires K+S and ISCO to maintain the viability and marketability of the Maine Divestiture Assets and the Connecticut Divestiture Assets and to prevent the destruction, removal, wasting, deterioration, or impairment of those assets prior to divestiture.

In order to ensure that the Commission remains informed about the status of the divestitures, the proposed Consent Agreement requires K+S and ISCO to file reports with the Commission periodically until the divestitures are completed. Written reports describing how K+S and ISCO are complying with the Order must be filed one year after the Order becomes final and annually for the next three (3) years.

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

Complaint

IN THE MATTER OF

EXPATEDGE PARTNERS, LLCCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4269; File No. 092 3138**Complaint, November 9, 2009 - Decision, November 9, 2009*

This consent order addresses respondent ExpatEdge Partners, LLC, providers of software and consulting services to businesses with employees residing outside of origin. Respondent manages tax and payroll issues for employees that work outside their country of residence. The complaint alleges the respondent violated Section 5 of the FTC Act by making false and misleading representations concerning ExpatEdge Partners's participation in the Safe Harbor privacy framework. Safe Harbor is an international program for international data transfer between the U.S. and the European Union. Respondent advertised an incorrect status as to its compliance with the program. The order prohibits ExpatEdge from making misrepresentations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party.

Participants

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

For the *Respondent*: David S. Kolb, President, *pro se*.

COMPLAINT

1. The Federal Trade Commission, having reason to believe that ExpatEdge Partners, LLC ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent ExpatEdge Partners, LLC ("ExpatEdge") is a Minnesota limited liability corporation with its principal office or place of business at 750 Boone Avenue North, Suite 102, Minneapolis, Minnesota 55427.

2. Respondent is in the business of providing software and consulting services to businesses that offer "expatriate" programs to manage tax and payroll issues for

Decision and Order

employees that work outside their country of residence, including through a website (www.expatedge.com).

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

4. Since at least December 2002, respondent has set forth on its website, www.expatedge.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union (“U.S.-EU Safe Harbor Framework” or “Safe Harbor”).

U.S.-EU SAFE HARBOR FRAMEWORK

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

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce (“Commerce”) and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The Safe Harbor allows U.S. companies to transfer personal

Complaint

data lawfully from the EU. To join the Safe Harbor, a company must self-certify to Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

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

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

VIOLATIONS OF SECTION 5 OF THE FTC ACT

9. In November 2002, respondent submitted to Commerce a self-certification to the Safe Harbor, which it renewed in November 2003, November 2004, and November 2005.

10. In November 2006, respondent did not renew its self-certification to the Safe Harbor, and Commerce updated respondent's status to "not current" on its public website. To date, respondent has not renewed its self-certification to the Safe Harbor and remains in "not current" status on Commerce's website. (Exhibit A,

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Declaration of Damon C. Greer).

11. From at least December 2002 until July 2009, respondent has disseminated or caused to be disseminated privacy policies and statements on the www.expatedge.com website, including, but not limited to, the following statements:

ExpatEdge self-certifies the Policy to the U.S. Department of Commerce's Safe Harbor Privacy Program.

Exhibit B, December 2002 Privacy Policy; Exhibit C, Aug. 2004 Privacy Policy; Exhibit D, Dec. 2007 Privacy Policy; Exhibit E, Apr. 2009 Privacy Policy.

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

13. In truth and in fact, since November 2006, respondent has not been a current participant in the Safe Harbor. Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

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

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

By the Commission.

Complaint

Exhibit A



Decision and Order

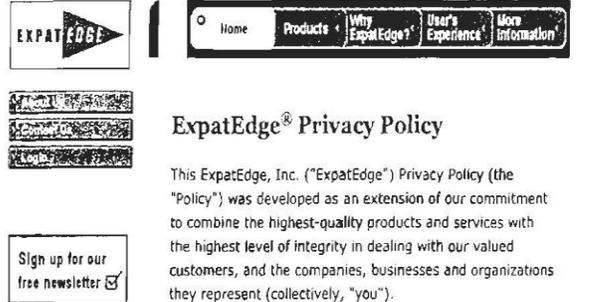


Complaint

Exhibit B

ExpatEdge - Privacy Policy

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EXPAT EDGE

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ExpatEdge® Privacy Policy

This ExpatEdge, Inc. ("ExpatEdge") Privacy Policy (the "Policy") was developed as an extension of our commitment to combine the highest-quality products and services with the highest level of integrity in dealing with our valued customers, and the companies, businesses and organizations they represent (collectively, "you").

Sign up for our free newsletter

ExpatEdge self-certifies the Policy to the U.S. Department of Commerce's Safe Harbor Privacy Principles. If you have any questions about this Policy, wish to amend, delete or add to any of your information contained at the Site, or otherwise wish to contact ExpatEdge directly, please email us at privacy@expatedge.com or call us at (650) 625-8161.

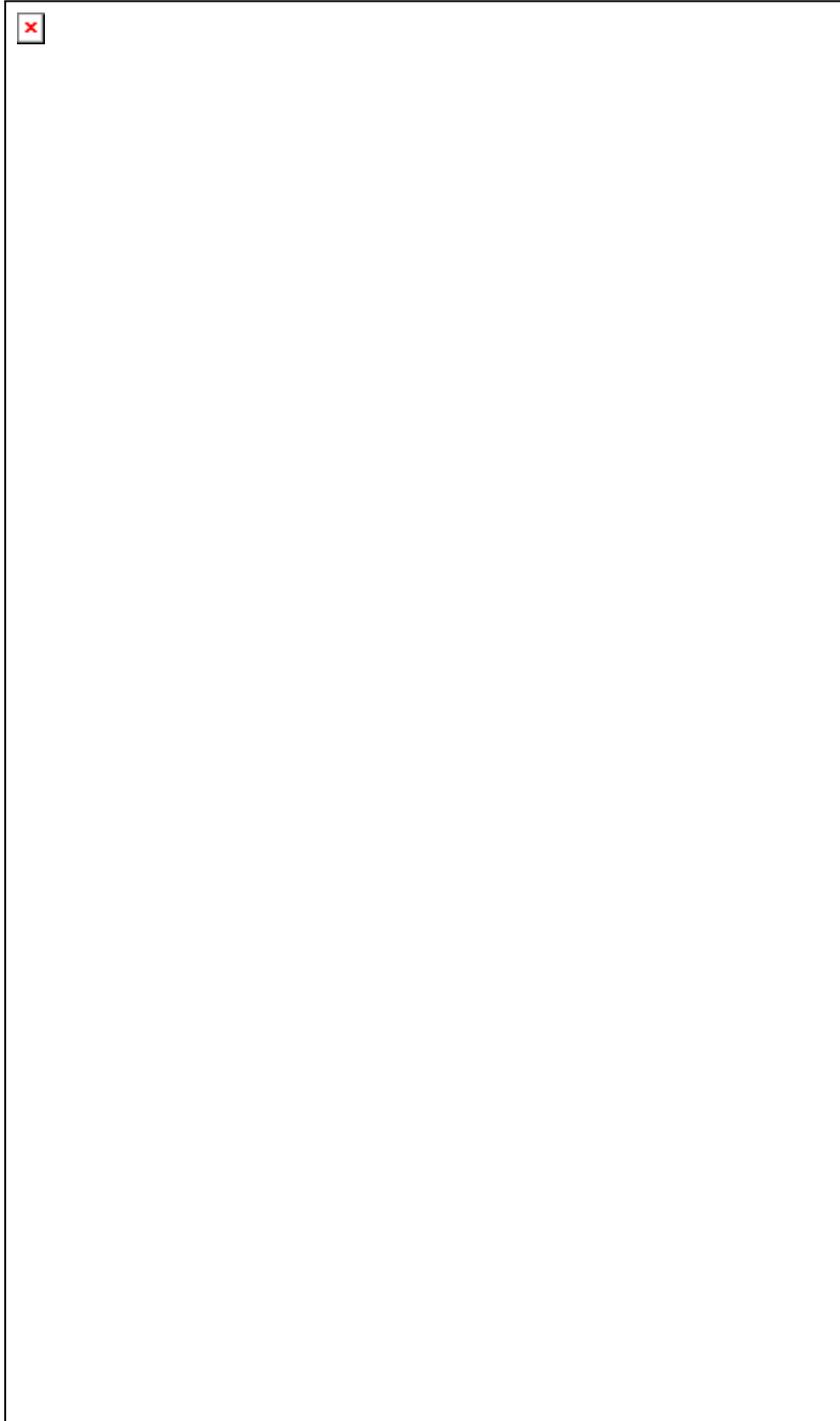
IF YOU DO NOT AGREE TO THE POLICY, YOU SHOULD NOT USE THIS INTERNET WEBSITE (THE "SITE"). WE MAY MODIFY THE POLICY FROM TIME TO TIME AND POST THOSE MODIFICATIONS HERE. YOUR CONTINUED USE OF THE SITE AFTER ANY SUCH MODIFICATION CONSTITUTES YOUR ACCEPTANCE OF THE MODIFIED POLICY.

1. Information. ExpatEdge obtains information from and about you in a number of different ways, including:

A. General Information. Some information is gathered automatically when you access the Site ("General Information"). This General Information (which includes Site pages visited, type of web browser used, type of operating system, and the domain name of your Internet Service Provider and similar Information) does not identify you personally.

B. Profile Information. Some information is not gathered automatically, and is instead supplied by you voluntarily when you use or register for certain services at the Site ("Profile Information"). If you wish to provide Profile

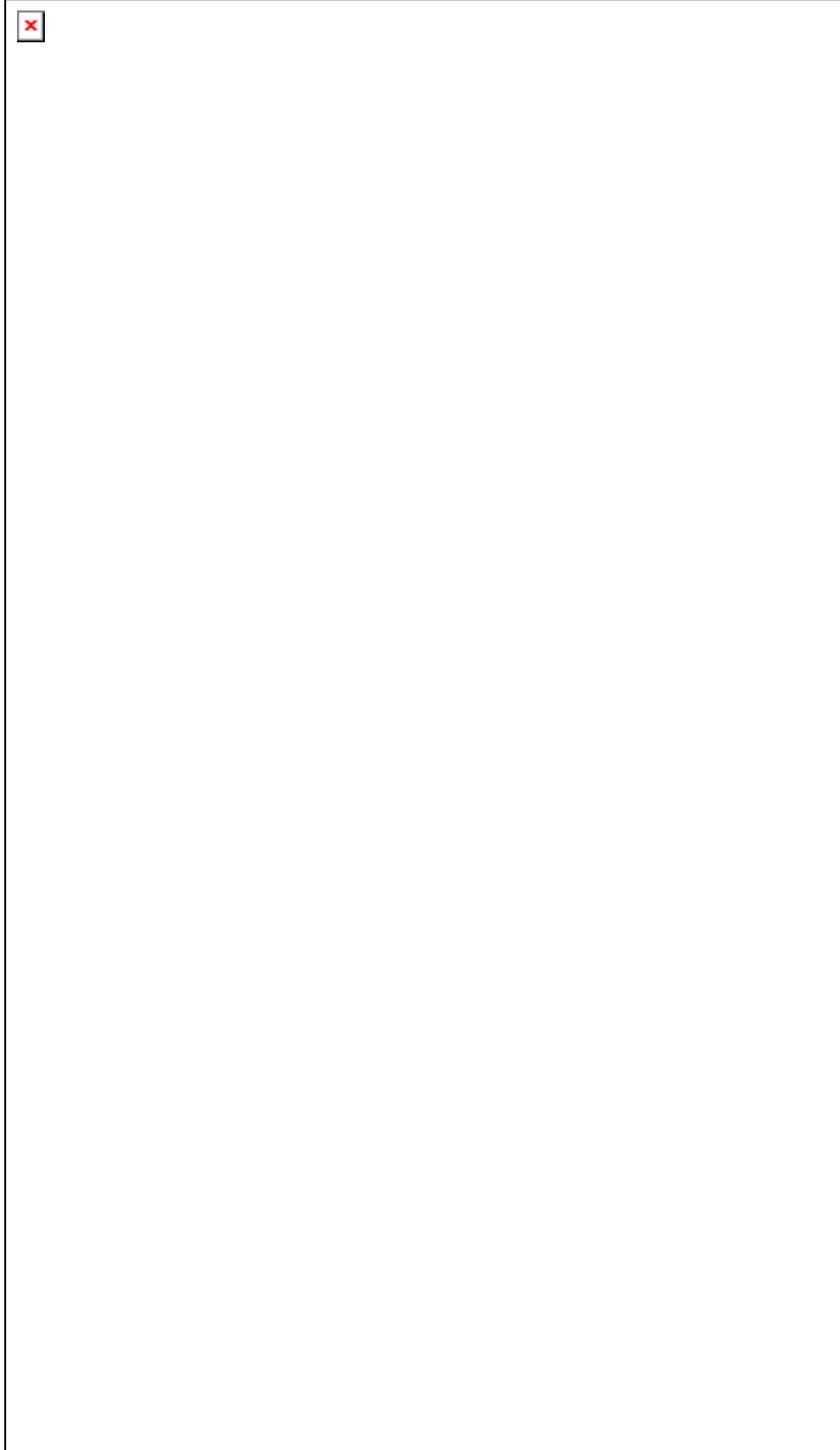
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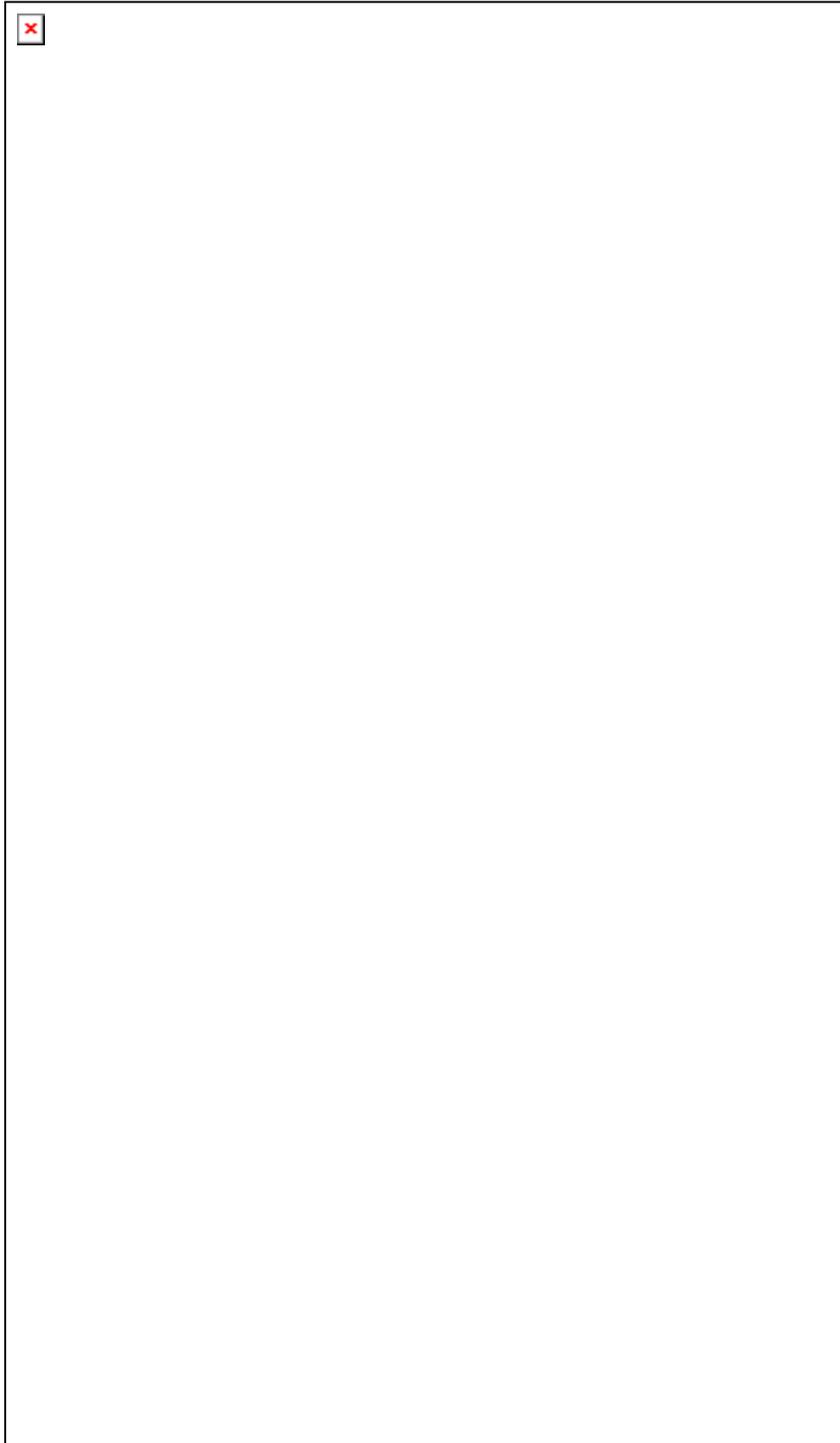
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Decision and Order



Complaint



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Exhibit C

ExpatEdge - Privacy Policy

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ExpatEdge® Privacy Policy

This ExpatEdge, Inc. ("ExpatEdge") Privacy Policy (the "Policy") was developed as an extension of our commitment to combine the highest-quality products and services with the highest level of integrity in dealing with our valued customers, and the companies, businesses and organizations they represent (collectively, "you").

ExpatEdge self-certifies the Policy to the U.S. Department of Commerce's Safe Harbor Privacy Principles. If you have any questions about this Policy, wish to amend, delete or add to any of your information contained at the Site, or otherwise wish to contact ExpatEdge directly, please email us at privacy@expatedge.com or call us at (650) 625-8161.

IF YOU DO NOT AGREE TO THE POLICY, YOU SHOULD NOT USE THIS INTERNET WEBSITE (THE "SITE"). WE MAY MODIFY THE POLICY FROM TIME TO TIME AND POST THOSE MODIFICATIONS HERE. YOUR CONTINUED USE OF THE SITE AFTER ANY SUCH MODIFICATION CONSTITUTES YOUR ACCEPTANCE OF THE MODIFIED POLICY.

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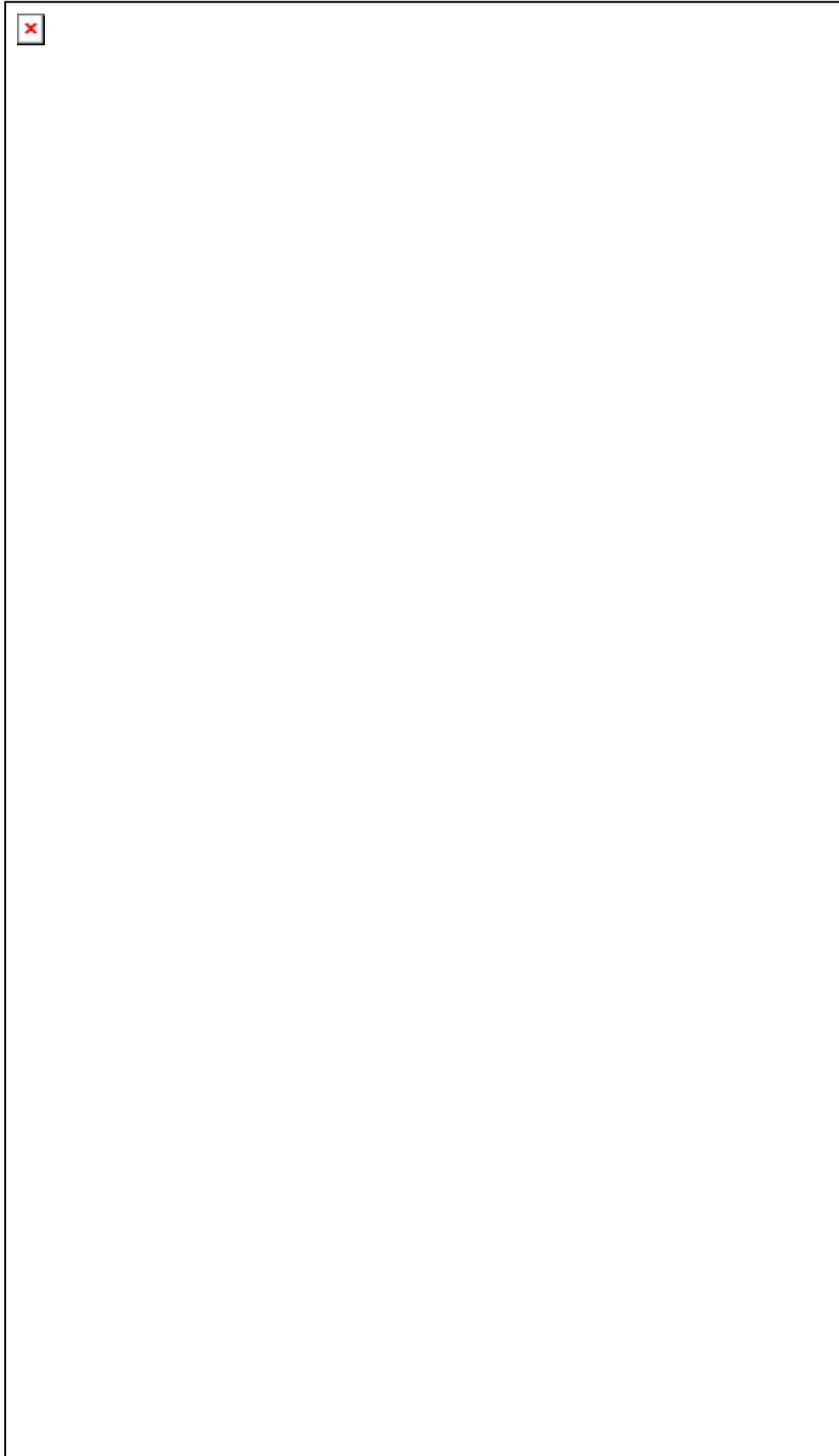
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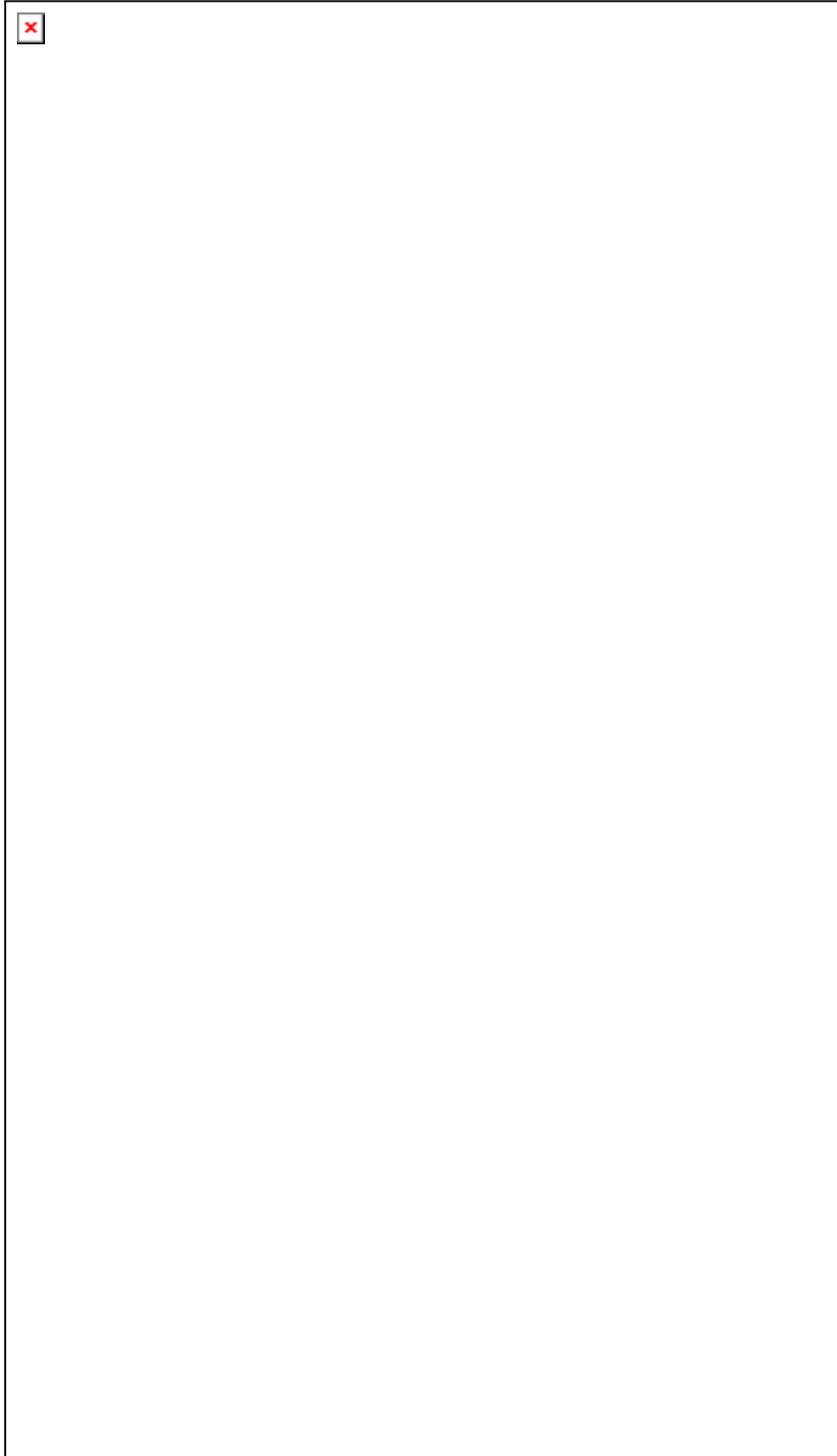
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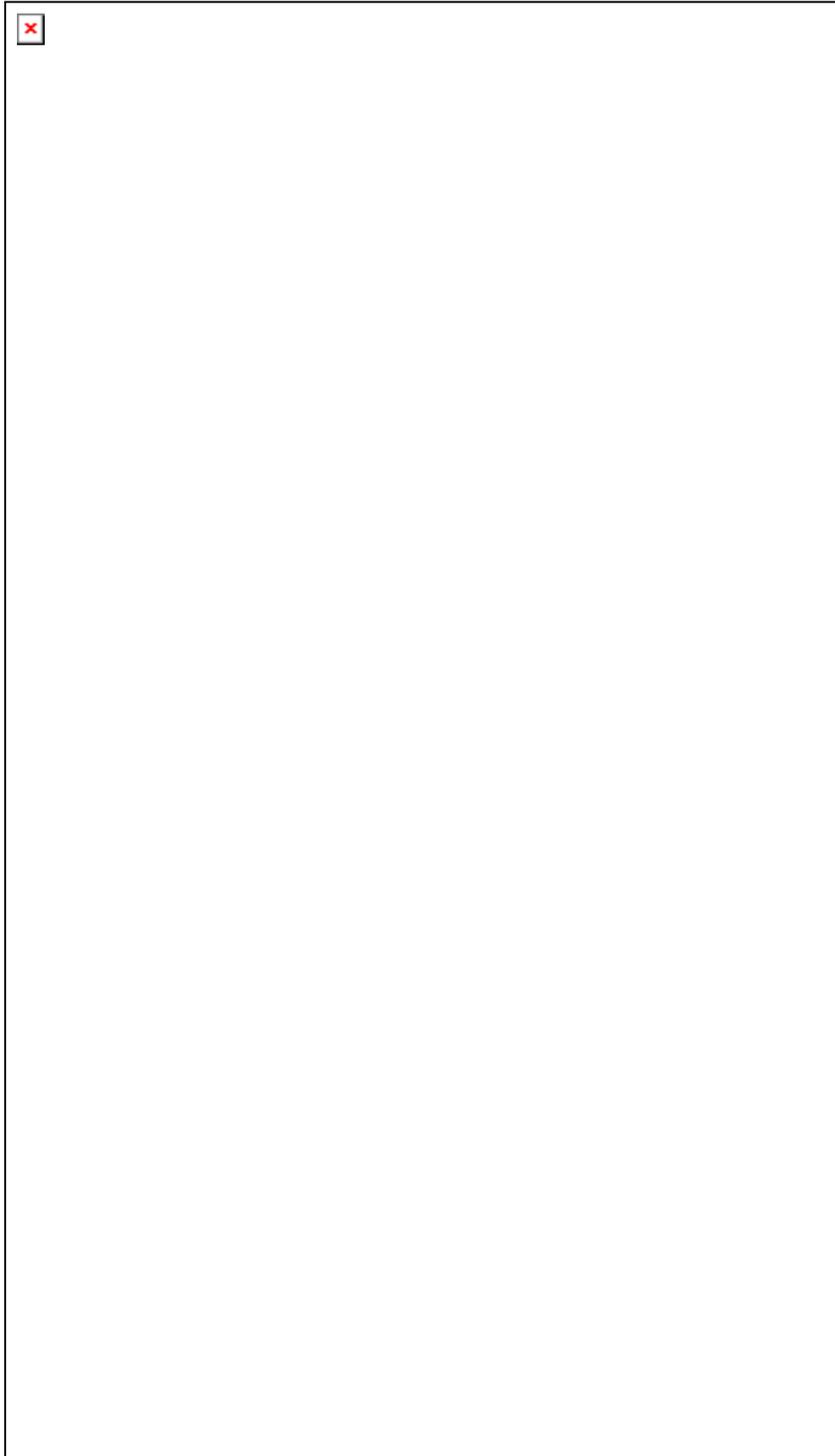
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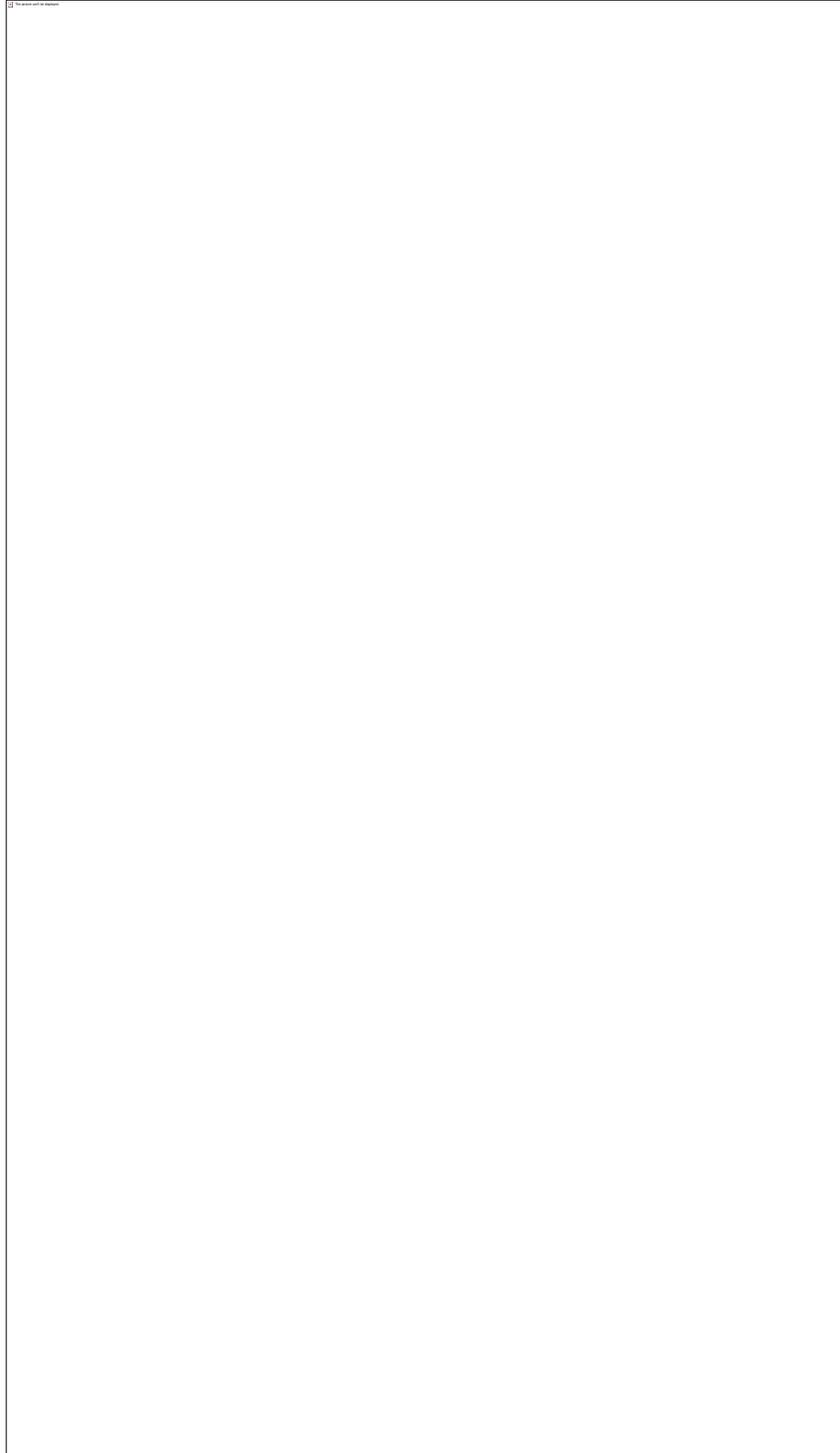
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Exhibit D

ExpatEdge - Privacy Policy

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ExpatEdge® Privacy Policy

This ExpatEdge Partners, LLC ("ExpatEdge") Privacy Policy (the "Policy") was developed as an extension of our commitment to combine the highest-quality products and services with the highest level of integrity in dealing with our valued customers, and the companies, businesses and organizations they represent (collectively, "you").

ExpatEdge self-certifies the Policy to the U.S. Department of Commerce's Safe Harbor Privacy Principles. If you have any questions about this Policy, wish to amend, delete or add to any of your information contained at the Site, or otherwise wish to contact ExpatEdge directly, please email us at privacy@expatedge.com or call us at (650) 566-1580.

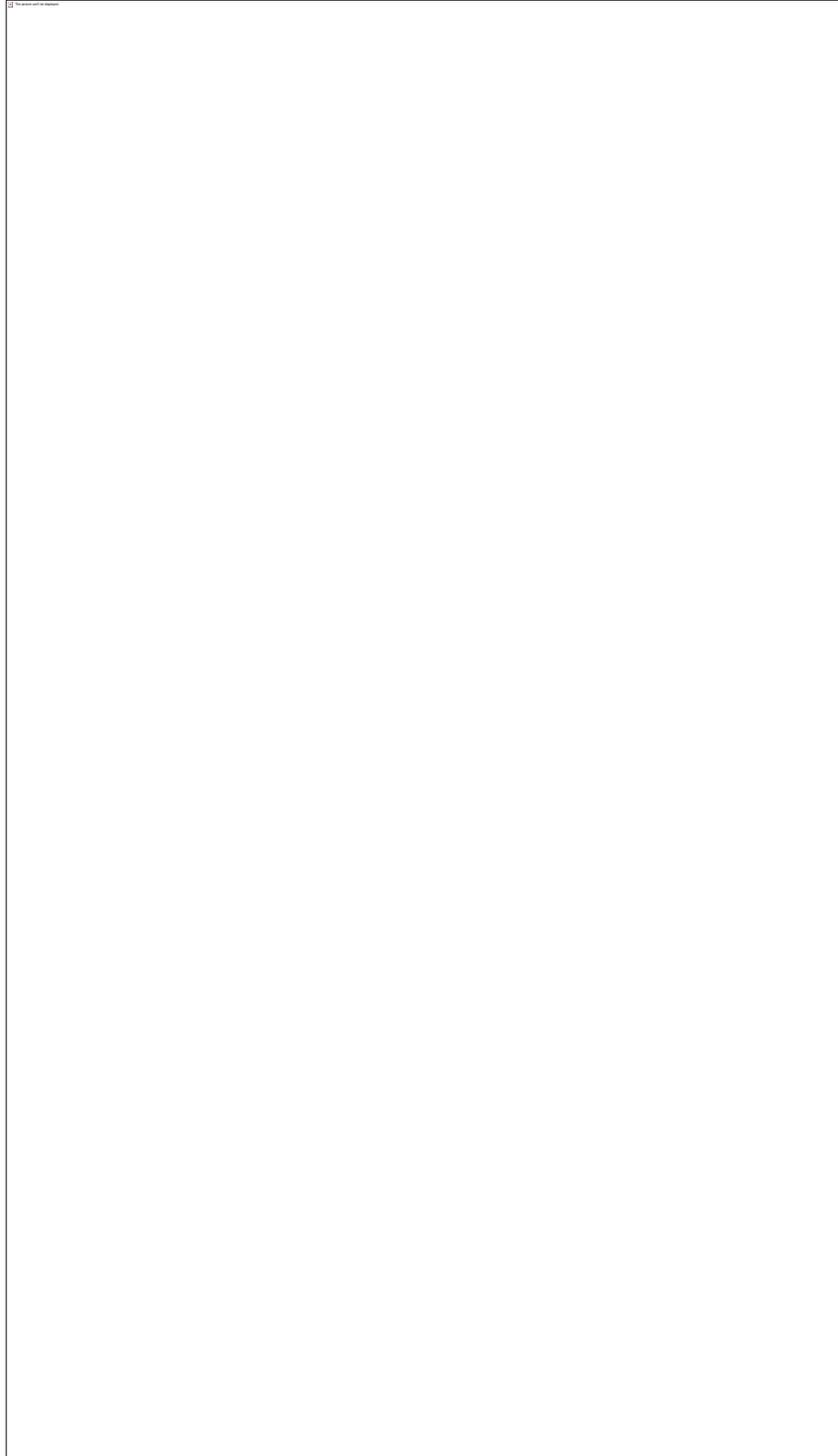
IF YOU DO NOT AGREE TO THE POLICY, YOU SHOULD NOT USE THIS INTERNET WEBSITE (THE "SITE"). WE MAY MODIFY THE POLICY FROM TIME TO TIME AND POST THOSE MODIFICATIONS HERE. YOUR CONTINUED USE OF THE SITE AFTER ANY SUCH MODIFICATION CONSTITUTES YOUR ACCEPTANCE OF THE MODIFIED POLICY.

1. Information. ExpatEdge obtains information from and about you in a number of different ways, including:

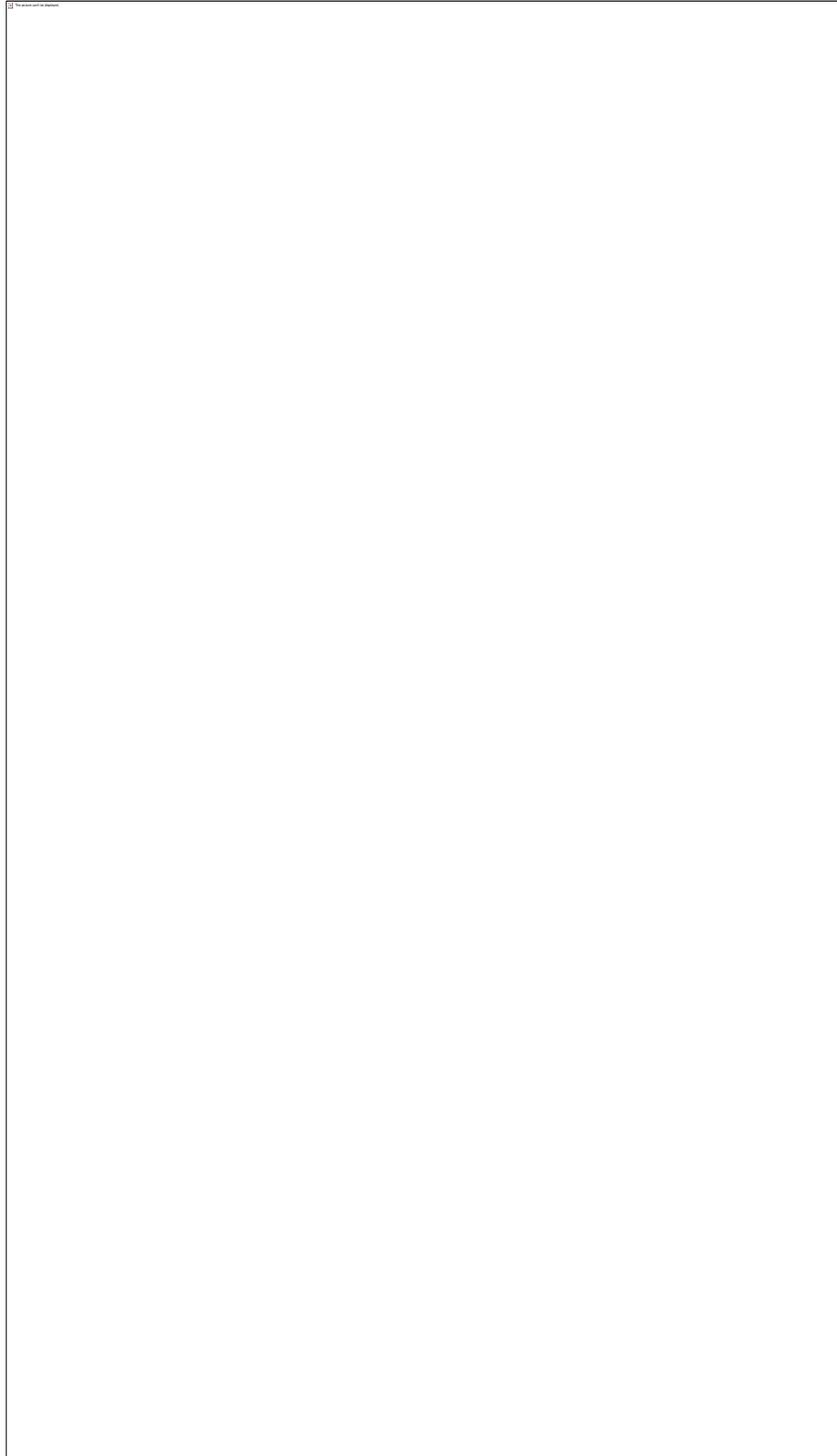
A. General Information. Some information is gathered automatically when you access the Site ("General Information"). This General Information (which includes Site pages visited, type of web browser used, type of operating system, and the domain name of your Internet Service Provider and similar information) does not identify you personally.

B. Profile Information. Some information is not gathered automatically, and is instead supplied by you voluntarily when you use or register for certain services at the Site ("Profile Information"). If you wish to provide Profile

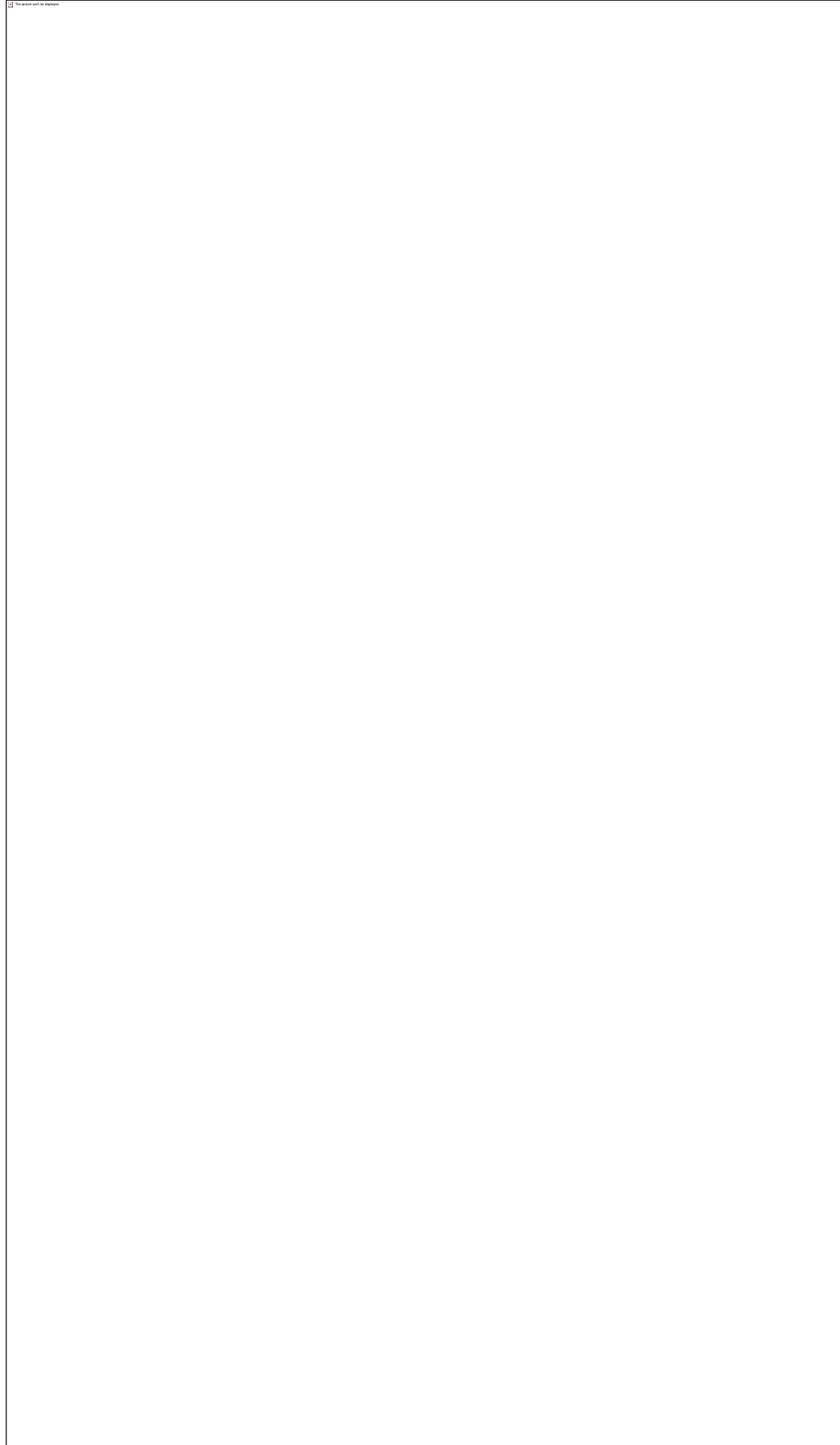
Decision and Order



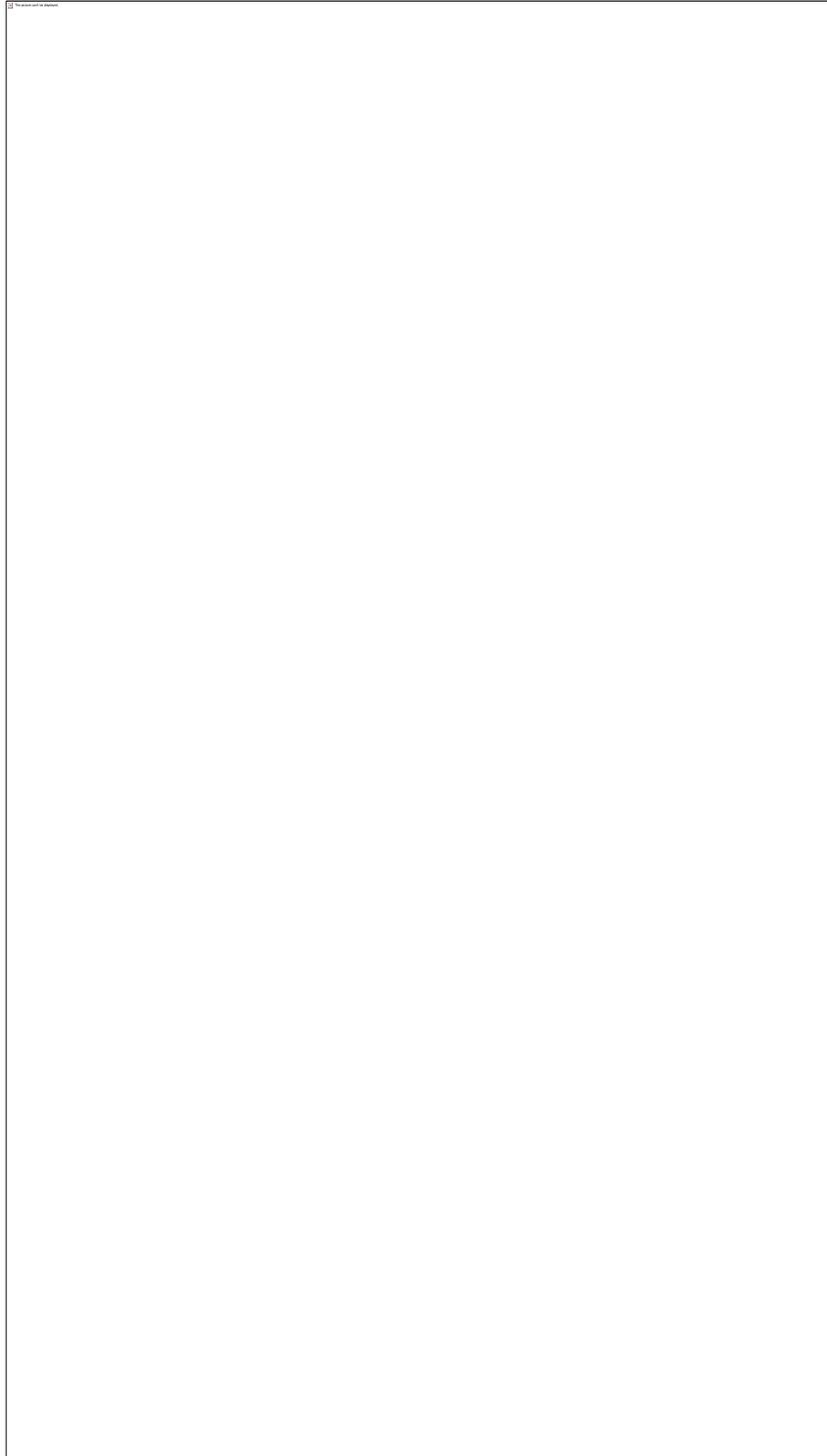
Complaint



Decision and Order



Complaint



Decision and Order

Exhibit E

ExpatEdge - Privacy Policy

Page 1 of 5

The screenshot shows the ExpatEdge website header. On the left is the ExpatEdge logo. To its right is a navigation menu with links for Home, Products, Why ExpatEdge?, User's Experience, and More Information. Below the navigation menu are three buttons: About Us, Contact Us, and Newsletter. At the bottom left of the screenshot is a sign-up box for a free newsletter with a checkbox.

ExpatEdge® Privacy Policy

This ExpatEdge Partners, LLC ("ExpatEdge") Privacy Policy (the "Policy") was developed as an extension of our commitment to combine the highest-quality products and services with the highest level of integrity in dealing with our valued customers, and the companies, businesses and organizations they represent (collectively, "you").

ExpatEdge self-certifies the Policy to the U.S. Department of Commerce's Safe Harbor Privacy Principles. If you have any questions about this Policy, wish to amend, delete or add to any of your information contained at the Site, or otherwise wish to contact ExpatEdge directly, please email us at privacy@expatedge.com or call us at (650) 566-1580.

IF YOU DO NOT AGREE TO THE POLICY, YOU SHOULD NOT USE THIS INTERNET WEBSITE (THE "SITE"). WE MAY MODIFY THE POLICY FROM TIME TO TIME AND POST THOSE MODIFICATIONS HERE. YOUR CONTINUED USE OF THE SITE AFTER ANY SUCH MODIFICATION CONSTITUTES YOUR ACCEPTANCE OF THE MODIFIED POLICY.

1. Information. ExpatEdge obtains information from and about you in a number of different ways, including:

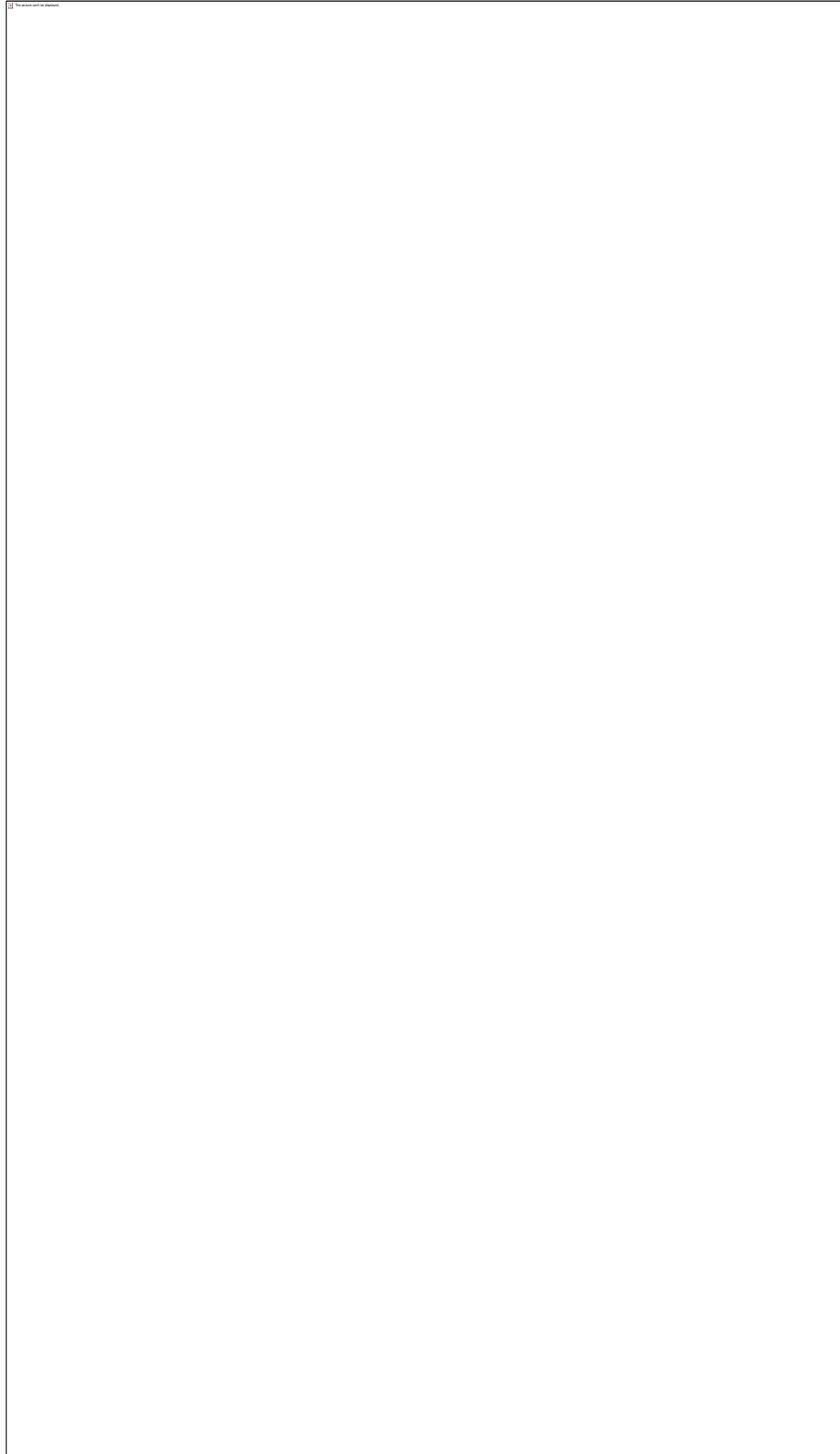
A. General Information. Some information is gathered automatically when you access the Site ("General Information"). This General Information (which includes Site pages visited, type of web browser used, type of operating system, and the domain name of your Internet Service Provider and similar information) does not identify you personally.

B. Profile Information. Some information is not gathered automatically, and is instead supplied by you voluntarily when you use or register for certain services at the Site ("Profile Information"). If you wish to provide Profile

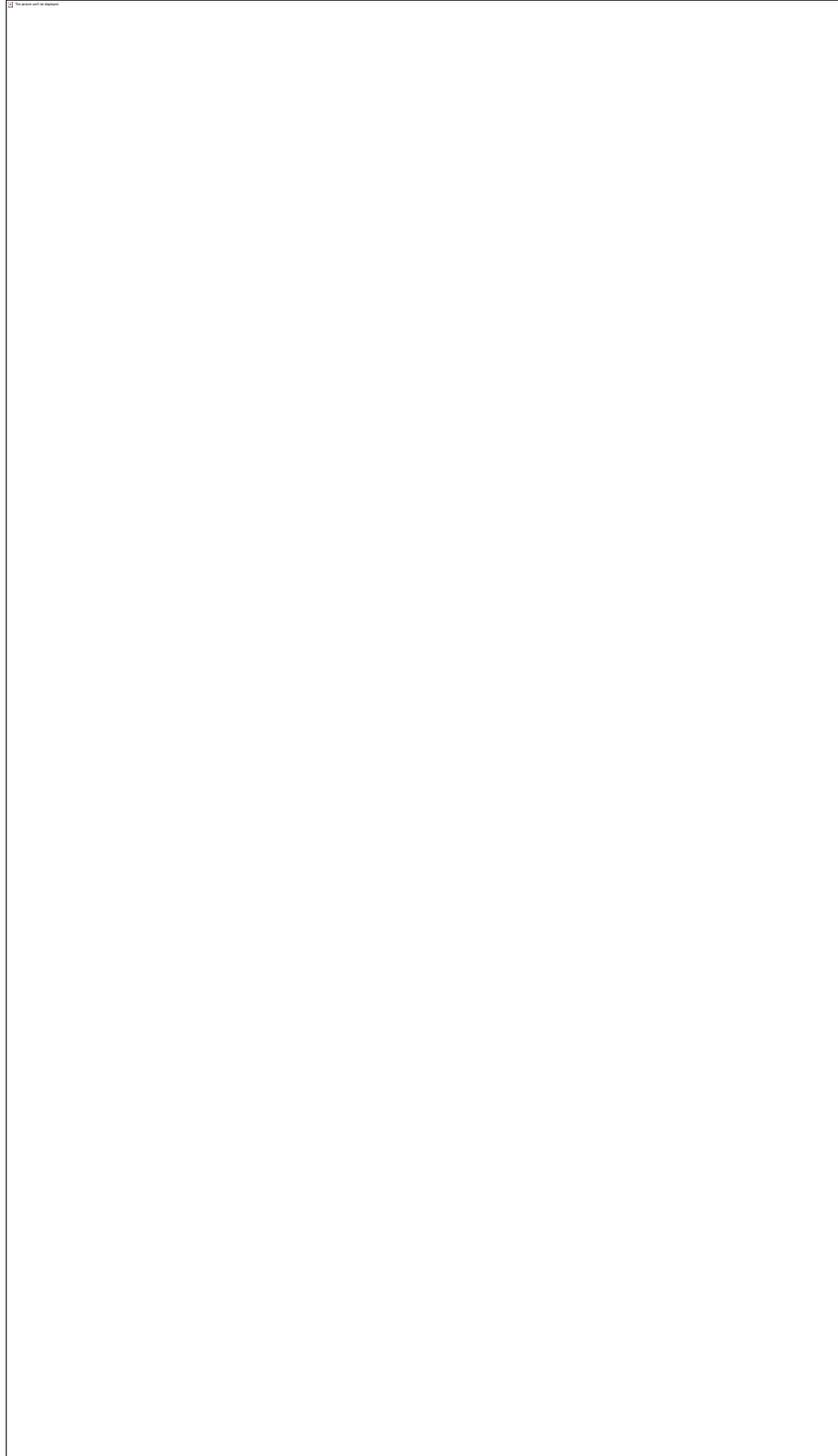
<http://www.expatedge.com/privacy.jsp>

4/20/2009

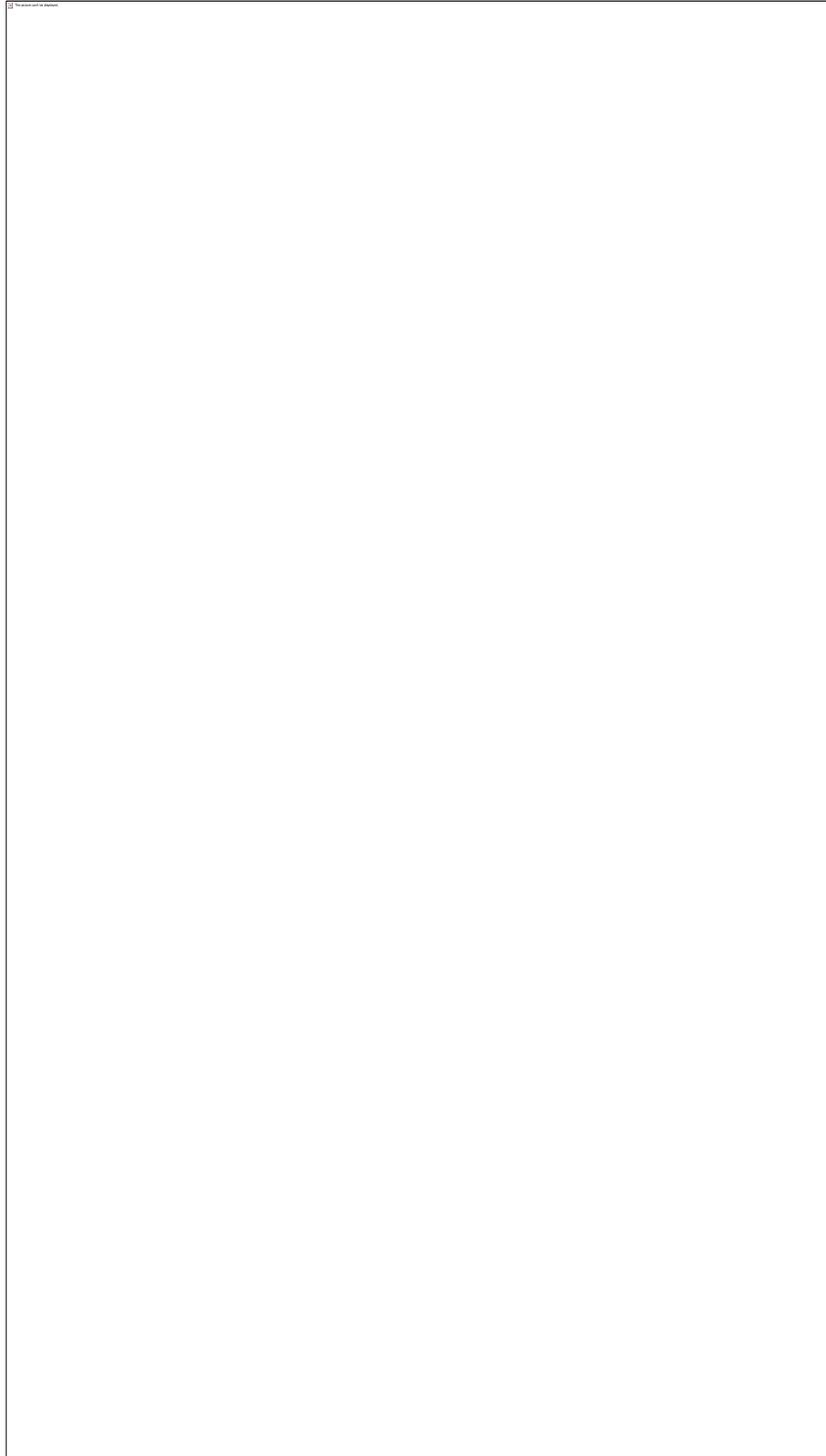
Complaint



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ExpatEdge - Privacy Policy

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royalty-free, irrevocable, perpetual, non-exclusive, transferable license (with a right to grant sublicenses through multiple tiers of sublicensees) to use, execute, display, copy, perform and modify such information as ExpatEdge sees fit for internal business purposes.

8. General. This Policy constitutes the entire and only agreement between ExpatEdge and you regarding this subject matter and supersedes all prior or contemporaneous agreements, representations, warranties and understandings with respect thereto. You agree to review this Policy prior to reviewing any information or obtaining any documents from the Site. Any action related to this Policy shall be governed by the substantive laws of the State of California, without regard to conflicts of law principles. The State and Federal courts located in Santa Clara County, California, shall have sole jurisdiction over any dispute arising hereunder, and the parties hereby consent to the personal jurisdiction of such courts and to extra-territorial service of process. The United Nations Convention on Contracts for the International Sale of Goods shall not apply to this Policy. Neither this Policy, nor any rights hereunder, may be assigned by operation of law or otherwise, in whole in part, by you without the prior, written consent of ExpatEdge. Any purported assignment without such permission shall be void. ExpatEdge may assign this Policy, in whole or in part, without notice to you. Any waiver of any rights of either party must be in writing, signed by the waiving party, and any such waiver shall not operate as a waiver of any future breach of this Policy. In the event any portion of this Policy is found to be illegal or unenforceable, such portion shall be severed, and the remaining terms shall be separately enforced. The language in this Policy shall be interpreted as to its fair meaning and not strictly for or against either party. This Policy may be modified or amended by you only in writing, signed by both parties. Any purported modification or amendment inconsistent with the foregoing shall be void.

Privacy Policy
Copyright © 2000-2009 ExpatEdge Partners, LLC. All rights reserved.

<http://www.expatedge.com/privacy.jsp>

4/30/2009

Decision and Order

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of Complaint, which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the Respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent ExpatEdge Partners, LLC is a Minnesota limited liability corporation with its principal office or place of business at 750 Boone Avenue North, Suite 102, Minneapolis, Minnesota 55427.
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 ExpatEdge Partners, LLC and its subsidiaries, divisions, affiliates, successors and assigns.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

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

II.

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

- A. all advertisements, promotional materials, and any other statements containing any representations

Decision and Order

covered by this order, with all materials relied upon in disseminating the representation; and

- B. any documents, whether prepared by or on behalf of respondent, that call into question respondent's compliance with this order.

III.

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

IV.

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

Decision and Order

V.

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

VI.

This order will terminate on November 9, 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 fewer 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 as to such respondent will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis to Aid Public Comment

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

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

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

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

ExpatEdge provides software and consulting services to businesses that offer “expatriate” programs to manage tax and payroll issues for employees that work outside their country of residence, including through a website (www.expatedge.com). According to the Commission’s complaint, from at least December 2002 until July 2009, ExpatEdge has set forth on its website privacy policies and statements about its practices, including statements that it is a current participant in the Safe Harbor.

Analysis to Aid Public Comment

The Commission's complaint alleges that until July 2009, ExpatEdge falsely represented that it was a current participant in the Safe Harbor when, in fact, ExpatEdge has not been a current participant in the Safe Harbor since November 2006. The Commission's complaint alleges that in November 2002, ExpatEdge submitted to Commerce a self-certification to the Safe Harbor, which it renewed in November 2003, November 2004, and November 2005. ExpatEdge did not renew its self-certification to the Safe Harbor in November 2006, and Commerce updated its status to "not current" on the Commerce public website. To date, ExpatEdge has not renewed its self-certification to the Safe Harbor and remains in "not current" status on Commerce's website.

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

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

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

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

Complaint

IN THE MATTER OF

ONYX GRAPHICS, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4270; File No. 092 3139**Complaint November 9, 2009 - Decision, November 9, 2009*

This consent order addresses respondent Onyx Graphics, providers of software and consulting services to businesses with employees residing outside of origin. Respondent manages tax and payroll issues for employees that work outside their country of residence. The complaint alleges the respondent violated Section 5 of the FTC Act by making false and misleading representations concerning Onyx Graphics' participation in the Safe Harbor privacy framework. Safe Harbor is an international program for international data transfer between the U.S. and the European Union. Respondent advertised an incorrect status as to its compliance with the program. The order prohibits Onyx Graphics from making misrepresentations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party.

*Participants*For the *Commission: Molly Crawford and Katie Ratté*For the *Respondent: Jeb Hurley, Chief Executive Officer, pro se.***COMPLAINT**

The Federal Trade Commission, having reason to believe that Onyx Graphics, 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 Onyx Graphics, Inc. ("Onyx Graphics") is a Delaware corporation with its principal office or place of business at 6915 South High Tech Drive, Salt Lake City, Utah 84101.
2. Respondent is in the business of developing and marketing commercial printing software and solutions for the digital color

Complaint

printing marketplace, including through a website (www.onyxgfx.com).

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

4. Since at least October 2006, respondent has set forth on its website, www.onyxgfx.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union (“U.S.-EU Safe Harbor Framework” or “Safe Harbor”).

U.S.-EU SAFE HARBOR FRAMEWORK

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

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

Complaint

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

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

VIOLATIONS OF SECTION 5 OF THE FTC ACT

9. In August 2006, respondent submitted to Commerce a self-certification to the Safe Harbor.

10. In August 2007, respondent did not renew its self-certification to the Safe Harbor, and Commerce updated respondent’s status to “not current” on its public website. Until July 2009, respondent did not renew its self-certification to the Safe Harbor and was in “not current” status on Commerce’s website. (Exhibit A, Declaration of Damon C. Greer).

11. Since at least October 2006 to the present, respondent has disseminated or caused to be disseminated privacy policies and statements on the www.onyxgfx.com website, including, but not limited to, the following statements:

Safe Harbor Certified
ONYX is Safe Harber [sic] Certified. For
ONYX Safe Harbor Agreement, click here.

Complaint

For more information on being Safe Harbor Compliant, click [here](#).

Exhibit B, Privacy Policy.

Onyx has self-certified its privacy practices as consistent with the U.S.-E.U. Safe Harbor principles as published by the US Department of Commerce (the “Principles”). These include: Notice, Choice, Onward Transfer, Access and Accuracy, Security, and Oversight/Enforcement. More information about the U.S. Department of Commerce Safe Harbor Program can be found at <http://www.export.gov/safeharbor/>.

Exhibit C, Onyx Safe Harbor Statement.

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

13. In truth and in fact, from August 2007 to July 2009, respondent was not a current participant in the Safe Harbor. Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

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

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

By the Commission.

FEDERAL TRADE COMMISSION DECISIONS
VOLUME 148

Complaint

Exhibit A

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of)	
)	
ONYX GRAPHICS, INC.,)	DOCKET NO.
a corporation.)	
)	
_____)	

DECLARATION OF DAMON C. GREER

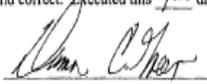
I, Damon C. Greer, based upon my personal knowledge concerning matters to which I am competent to testify, hereby declare as follows:

1. I am the Associate Director for Electronic Commerce in the Office of Technology and Electronic Commerce at the U.S. Department of Commerce ("Commerce"), and I am the lead administrator of the U.S.-E.U. Safe Harbor Framework.
2. Commerce is not a party to the captioned matter.
3. Commerce is responsible for developing and overseeing the U.S.-EU Safe Harbor Framework ("Safe Harbor"), a voluntary program that provides U.S. companies with a method for receiving personal data lawfully from the European Union. To join the Safe Harbor, a company must self-certify to Commerce that it complies with a set of principles that have been deemed to meet the EU's adequacy standard.
4. As Associate Director, I am responsible for maintaining an accurate list of those companies that self-certify to Commerce that they comply with the Safe Harbor principles. As part of my responsibilities, I oversee a public website, www.export.gov/safcharbor, where I post the names of companies that have self-certified. The listing of companies indicates, among other things, whether their self-certification is "current" or "not current." Companies are required to re-certify every year on the anniversary of the date they first self-certified in order to retain their status as "current" members of the Safe Harbor framework.
5. In August 2006, Onyx Graphics, Inc. ("Onyx") submitted a self-certification to Commerce. Onyx's next self-certification was due in August 2007.
6. Onyx did not submit a self-certification by the August 2007 deadline, and as a result I updated Onyx's status to "not current" on Commerce's public website. To date, I have

Complaint

not received any documents or information from Onyx to renew its self-certification.
Onyx is still in "not current" status on the Commerce website.

I declare under penalty of perjury under the Laws of the United States of America that
the foregoing is true and correct. Executed this 12 day of June, 2009, in Washington, D.C.



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

Complaint
Exhibit B

ONYX Graphics, Inc. - PosterShop inkjet RIP software and other leading RIP and Print w... Page 1 of 1



[PARTNER PORTAL](#) | [LOCATE A RESELLER](#) | [PRINTERS](#)

- About ONYX
- Privacy
- Industry Solutions
- Direct To Film/Printing
- Training
- Support
- Contact Us

ONYX Graphics, Inc. Legal, Online Privacy and Security statements

ONYX Graphics, Inc. understands that you may have concerns with how information we obtain about you is used and shared, as well as the security of this information. We would like to assure you that we will use any information you provide us with care. Because we gather certain types of information about the users on the ONYX Graphics, Inc. website, we feel you should fully understand the terms and conditions surrounding our acquisition and use of that information. ONYX Graphics, Inc. is committed to protecting your privacy on our website and has created this privacy statement in order to demonstrate our firm commitment. The following information describes our information gathering process, how we use the information, and what we do to secure it.

Copyright
All Web site materials, including, without limitation, the ONYX logo, design, text, graphics, other files, and the selection and arrangement thereof are ALL RIGHTS RESERVED Copyright © ONYX Graphics Inc. You may electronically copy and print to hard copy portions of this Web site for the sole purpose of using materials it contains for informational and non-commercial, personal use only. Any other use of the materials on this Web site including any commercial use, reproduction for purposes other than described above, modification, distribution, republishing, display, or performance without the prior written permission of ONYX Graphics, Inc. is strictly prohibited.

Logos, Trademarks and Registered Trademarks
ONYX, and specific ONYX Graphics, Inc. products referenced herein, are trademarks of ONYX Graphics, Inc. and may be registered in certain jurisdictions. Other product names, company names, marks, signs, and symbols referenced herein may be the trademarks or registered trademarks of their respective owners.

Information Automatically Logged
We use your IP address to help diagnose problems with our server and to administer our Web site.

Use of Cookies
A cookie is a file left on your computer when you visit a certain website. Should you return to the same site, the cookie allows the website to identify you as a return visitor. The ONYX Graphics, Inc. website uses cookies to save your password so you don't have to re-enter it each time you visit our site (where applicable). We also use cookies to track traffic to our website and for a variety of useful Internet applications. While you can disable cookies in your browser, we recommend that you leave them turned on to best experience our website and much of the Internet.

Your Information
Our online registration form requires you to provide us with your contact information (such as your name, email, and postal address), and demographic information (such as your age, gender, and income level). The contact information we obtain from some forms is used to ship purchases and to get in touch with you when necessary. You may opt-out of receiving future mailings - see the [choose-opt-out](#) section below. Financial information that is collected is used to bill the user for products and services.

Please note that we do not sell, rent, and we do not provide your information to third parties.

External Links
This site contains links to other sites. ONYX Graphics, Inc. is not responsible for the privacy practices or the content of such Web sites.

Choose Opt Out
Our site provides you the opportunity to opt-out of receiving promotional/marketing information from us.

Data Quality/Access
This site gives you the following options for changing and modifying information you previously provided:

- You can email mail to the following postal address: webmaster@onyxgfx.com
- You can call the following telephone number: 801-552-0900 and ask to speak to the Web Master.

Consulting the Web Site
If you have any questions about this privacy statement, the practices of this site, or your dealings with this Web site, you can contact webmaster@onyxgfx.com a reasonable time frame, customers can contact the Federal Trade Commission at www.ftc.gov/ftccomplaint.htm, or via phone at 1-877-435-7347.

Sale Harbor Certified
ONYX is Sale Harbor Certified. For ONYX Sale Harbor Agreement, click [here](#). For more information on being Sale Harbor Compliant, click [here](#).

Contacting the Web Site
If you have any questions about this privacy statement, the practices of this site, or your dealings with this Web site, you can contact webmaster@onyxgfx.com.

USA | Latin America | Austria | Belgium | Australia | Japan
© Copyright ONYX Graphics Inc. All rights reserved. [PRIVACY & LEGAL](#)

Complaint

Exhibit C

Onyx Safe Harbor Statement - Rev C (Final Sep 1 2006-Corrected Aug 3, 2007)

Introduction

Onyx Graphics, Inc. is strongly committed to protecting the privacy of those who entrust us with their personal information. Our customers and workers have certain expectations and trust in relation to the way we protect their personal information. We are pleased to provide you with this information to inform you of the Onyx' practices with respect to the collection and use of personal information received from the European Economic Area (EEA) and the transfer of such information from countries in the EEA to the United States.

Onyx has self-certified its privacy practices as consistent with U.S.-E.U. Safe Harbor principles as published by the US Department of Commerce (the "Principles"). These include: Notice, Choice, Onward Transfer, Access and Accuracy, Security, and Oversight/Enforcement. More information about the U.S. Department of Commerce Safe Harbor Program can be found at <http://www.export.gov/safeharbor/>.

Personal Data

This statement applies to all personal information we handle (except as noted below), including on-line, off-line, and manually processed data. For purposes of this statement, "personal information" means information that:

- is transferred from the EU to the United States;
- is recorded in any form;
- is about, or pertains to, a specific individual; and
- can be linked to that individual.

It does not include information that pertains to a specific individual, but from which that individual could not reasonably be identified. This is known as "aggregate data" and is not tied to a specific individual.

Principles Protecting Individuals' Privacy*Notice and Choice*

In accordance with Safe Harbor principles, we may process personal information in the course of providing professional services to our customers without the knowledge of individuals involved. Where we collect personal information directly from individuals in the E.U., we inform them about the types of personal information we collect from them, the purposes for which we collect and use it, and the types of non-agent third parties to which we disclose that information. We also inform those individuals about the choices and means, if any, we offer individuals for limiting the use or disclosure of their information.

Disclosures and Transfers

Complaint

ONYX will not disclose an individual's personal information to third parties, except when one or more of the following conditions is true:

- We have the individual's permission to make the disclosure;
- The disclosure is required by law or professional standards;
- The disclosure is reasonably related to the sale or disposition of all or part of our business;
- The information in question is publicly available;
- The disclosure is reasonably necessary for the establishment or defense of legal claims; or
- The disclosure is to another Onyx entity or to persons or entities providing services on our or the individual's behalf (each a "transferee"), consistent with the purpose for which the information was obtained, if the transferee, with respect to the information in question:
 - is subject to law providing an adequate level of privacy protection; or,
 - has agreed in writing to provide an adequate level of privacy protection; or
 - subscribes to the Principles.

Permitted transfers of information, either to third parties or within Onyx include the transfer of data from one jurisdiction to another, including transfers to and from the United States of America. Because privacy laws vary from one jurisdiction to another, personal information may be transferred to a jurisdiction where the laws provide less or different protection than the jurisdiction in which the information originated.

Data Security

Onyx takes your security seriously and takes reasonable steps to protect your information. To prevent unauthorized access or disclosure, maintain data accuracy, and ensure the appropriate use and confidentiality of information, either for its own purposes or on behalf of our customers, Onyx has put in place appropriate physical, electronic, and managerial procedures to safeguard and secure the information we process. However, we cannot guarantee the security of information on or transmitted via the Internet.

Data Integrity

We process personal information only in ways compatible with the purpose for which it was collected or subsequently authorized by the individual. To the extent necessary for such purposes, we take reasonable steps to make sure that personal information is accurate, complete, current, and otherwise reliable with regard to its intended use.

Access and Correction

Complaint

If an individual becomes aware that information we maintain about that individual is inaccurate, or if an individual would like to update or review his or her information, the individual may contact us using the contact information below. We will take reasonable steps to permit individuals to correct, amend, or delete information that is demonstrated to be inaccurate. The individual will need to provide sufficient identifying information, such as name, address, birth date, and/or a password. We may request additional identifying information as a security precaution. In addition, we may limit or deny access to personal information where providing such access would be unreasonably burdensome or expensive in the circumstances, or where we are otherwise permitted by the Safe Harbor Principles to do so. In some circumstances, we may charge a reasonable fee, where warranted, for access to personal information.

Enforcement and Dispute Resolution

Onyx utilizes the self-assessment approach to assure its compliance with our privacy statement. Onyx periodically verifies that the policy is accurate, comprehensive for the information intended to be covered, prominently displayed, completely implemented, and in conformity with the Principles. We encourage interested persons to raise any concerns with us using the contact information below. We will investigate and attempt to resolve complaints and disputes regarding use and disclosure of personal information in accordance with the principles contained in this policy.

With respect to any complaints relating to this policy that cannot be resolved through our internal processes, we have agreed to participate in the dispute resolution procedures of the panel established by the EU data protection authorities to resolve disputes pursuant to the Safe Harbor Principles. In the event that we or such authorities determine that we did not comply with this policy, we will take appropriate steps to address any adverse effects and to promote future compliance.

Privacy Statement Changes

This privacy statement may be changed from time to time, consistent with the requirements of the Safe Harbor. We will post any revised policy on this Web site, or a similar Web site that replaces this Web site.

Information Subject to Other Policies

We are committed to following the Principles for all personal information within the scope of the Safe Harbor Agreement. However, certain information is subject to policies of the company that may differ in some respects from the general policies set forth in this statement.

Information obtained from or relating to customers or former customers is further subject to the terms of any privacy notice to the customer, any engagement letter or letters with the customer, and applicable laws and professional standards.

Complaint

How to Contact Us

Questions, comments or complaints about Onyx's Safe Harbor Data Privacy Statement or data collection and processing practices can be e-mailed to privacyoffice@onyxgfx.com, mailed to Privacy Office, Onyx Graphics, 6915 High Tech Drive, Salt Lake City, UT, 84047.

EFFECTIVE DATE: September 1 2006

Decision and Order

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of Complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the Respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Onyx Graphics, Inc. is a Delaware corporation with its principal office or place of business at 6915 High Tech Drive, Salt Lake City, Utah 84047.
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 Onyx Graphics, Inc. and its subsidiaries, divisions, affiliates, successors and assigns.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

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

II.

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

- A. all advertisements, promotional materials, and any other statements containing any representations

Decision and Order

covered by this order, with all materials relied upon in disseminating the representation; and

- B. any documents, whether prepared by or on behalf of respondent, that calls into question respondent's compliance with this order.

III.

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

IV.

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

Decision and Order

V.

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

VI.

This order will terminate on November 9, 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 fewer 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 as to such respondent will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

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

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

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

Onyx Graphics develops and markets commercial printing software and solutions for the digital color printing marketplace, including through a website (www.onyxgfx.com). According to the Commission’s complaint, since at least October 2006, Onyx Graphics has set forth on its website privacy policies and statements about its practices, including statements that it is a current participant in the Safe Harbor.

Analysis to Aid Public Comment

The Commission's complaint alleges that Onyx Graphics falsely represented that it was a current participant in the Safe Harbor when, in fact, from August 2007 until July 2009, Onyx Graphics was not a current participant in the Safe Harbor. The Commission's complaint alleges that in August 2006, Onyx Graphics submitted a self-certification to Commerce, which it did not renew in August 2007. Commerce then updated the company's status to "not current" on the Commerce public website. Onyx Graphics remained in "not current" status until it submitted a self-certification to Commerce in July 2009.

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

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

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

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

Complaint

IN THE MATTER OF

PROGRESSIVE GAITWAYS LLCCONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4271; File No. 092 3141**Complaint, November 9, 2009 - Decision, November 9, 2009*

This consent order addresses respondent Progressive Gaitways LLC, providers of software and consulting services to businesses with employees residing outside of origin. Respondent manages tax and payroll issues for employees that work outside their country of residence. The complaint alleges the respondent violated Section 5 of the FTC Act by making false and misleading representations concerning Progressive Gaitways, LLC's participation in the Safe Harbor privacy framework. Safe Harbor is an international program for international data transfer between the U.S. and the European Union. Respondent advertised an incorrect status as to its compliance with the program. The order prohibits Progressive Gaitways, LLC from making misrepresentations about its membership in any privacy, security, or any other compliance program sponsored by the government or any other third party.

Participants

For the *Commission: Molly Crawford and Katie Ratté*

For the *Respondent: Sheila Heidmiller, Macheledt Bales & Heidmiller LLP.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Progressive Gaitways LLC ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Progressive Gaitways LLC ("Progressive Gaitways") is a Colorado company with its principal office or place of business at 305 Society Drive, #C-3, Telluride, Colorado 81435.

Complaint

2. Respondent is in the business of selling medical equipment, including through two websites (www.theratogs.com and www.gaitways.com).

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

4. Since at least December 2008, respondent has set forth on its website, www.theratogs.com, privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union (“U.S.-EU Safe Harbor Framework” or “Safe Harbor”). Since at least June 2007, respondent has set forth on its website, www.gaitways.com, the same privacy policies and statements, including the statements related to participation in the Safe Harbor.

U.S.-EU SAFE HARBOR FRAMEWORK

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

6. To satisfy the EU adequacy standard for certain commercial transfers, the U.S. Department of Commerce (“Commerce”) and the EC negotiated the U.S.-EU Safe Harbor Framework, which went into effect in 2000. The Safe Harbor allows U.S. companies to transfer personal data lawfully from the EU. To join the Safe Harbor, a company must self-certify to

Complaint

Commerce that it complies with seven principles and related requirements that have been deemed to meet the EU's adequacy standard.

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

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

VIOLATIONS OF SECTION 5 OF THE FTC ACT

9. In November 2004, respondent submitted to Commerce a self-certification to the Safe Harbor on behalf of its www.theratogs.com website. Respondent renewed that self-certification in November 2005.

10. In November 2006, respondent did not renew its self-certification to the Safe Harbor for the www.theratogs.com website, and Commerce updated respondent's status to "not current" on its public website. To date, respondent has not renewed its self-certification to the Safe Harbor and remains in "not current" status on Commerce's website. (Exhibit A, Declaration of Damon C. Greer).

11. From at least December 2008 until June 2009, respondent has disseminated or caused to be disseminated privacy policies

Complaint

and statements on the www.theratogs.com website, including, but not limited to, the following statements:

TheraTogs is a participant in the Safe Harbor program developed by the U.S. Department of Commerce and the European Union. We have certified that we adhere to the Safe Harbor Privacy Principles agreed upon by the U.S. and the European Union. For more information about the Safe Harbor and to view our certification, visit the U.S. Department of Commerce's Safe Harbor website at <http://www.export.gov/safeharbor>.

Exhibit B, December 2008 Privacy Policy

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

13. In truth and in fact, since November 2006, respondent has not been a current participant in the Safe Harbor. Therefore, the representations set forth in Paragraph 11 were, and are, false or misleading.

14. From at least June 2007 until June 2009, respondent has disseminated or caused to be disseminated privacy policies and statements on the www.gaitways.com website, including, but not limited to, the following statements:

PGW [Progressive Gaitways] is a participant in the Safe Harbor program developed by the U.S. Department of Commerce and the European Union. We have certified that we adhere to the Safe Harbor Privacy Principles agreed upon by the U.S. and the European Union. For more information about the Safe Harbor and to view our certification, visit the U.S. Department of Commerce's Safe Harbor website at <http://www.export.gov/safeharbor>.

Exhibit C, December 2008 Privacy Policy.

Complaint

2. Respondent has never submitted a self-certification to the Safe Harbor on behalf of its www.gaitways.com website. (Exhibit A, Declaration of Damon C. Greer).

3. Through the means described in Paragraph 14, respondent represented, expressly or by implication, that it is a current participant in the Safe Harbor.

4. In truth and in fact, respondent has never self-certified to the Safe Harbor for its www.gaitways.com website. Therefore, the representations set forth in Paragraph 14 were, and are, false or misleading.

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

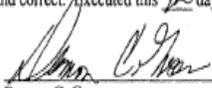
THEREFORE, the Federal Trade Commission this ninth day of November, 2009, has issued this complaint against respondent.

By the Commission.

Complaint

6. PGW did not submit a self-certification by the November 2006 deadline, and as a result I updated PGW's status to "not current" on Commerce's public website. To date, I have not received any documents or information from PGW to renew its self-certification. PGW is still in "not current" status on the Commerce website.
7. PGW has never submitted a self-certification to the Safe Harbor on behalf of its www.gaitways.com website.

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



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

Complaint

Exhibit B

Privacy Policy and Terms and Conditions of Use
for TheraTogs, Inc.
<www.theratogs.com>

Welcome and thank you for visiting the TheraTogs™ product website owned by TheraTogs, Inc. (hereafter the "TheraTogs" website). As used herein, the words "you" and "your" refer to any person or entity accessing the TheraTogs website. The words "we," "us," and "our" refer to the TheraTogs website. The following describes how we handle information we may learn about you from your visit to our website or through other voluntary means and provides the rules that govern your use of our site.

I. These Terms and Conditions Govern Your Use of Our Site

A. *Use of our site constitutes contractual agreement.* AS A CONDITION TO AND IN CONSIDERATION OF ACCESSING AND USING OUR SITE, YOU AGREE TO BE BOUND BY THESE TERMS AND CONDITIONS OF USE AND BY OUR PRIVACY POLICY (COLLECTIVELY OUR "TERMS AND CONDITIONS"). USING THIS SITE CONSTITUTES YOUR ACCEPTANCE OF AND AGREEMENT TO BE BOUND BY THESE TERMS AND CONDITIONS. IF YOU DO NOT WISH TO BE BOUND BY THESE TERMS AND CONDITIONS, YOU SHOULD NOT USE/VISIT OUR SITE.

B. *Amendments to these Terms and Conditions.* We reserve the right to modify, alter, or otherwise update these Terms and Conditions at any time. Any changes will apply prospectively only, as of the effective date found at the bottom of these Terms and Conditions. It is your responsibility to review these Terms and Conditions before accepting them. We may of course change, move, or delete portions of our site, or add to our site from time to time.

II. How to Contact Us

If you have questions about our Terms and Conditions, your dealings with our website, or technical problems with the operation of our website, you may contact us as provided below:

By phone at: 888-634-0495 (toll free) or 970-728-7078

By email at: admin@theratogs.com

III. Exceptions to Our Privacy Policy

There are exceptions to our Privacy Policy in that, if required or allowed by law, it may be necessary for TheraTogs to release or use Personally Identifiable Information we in good faith believe is appropriate in connection with legal proceedings, or in response to a subpoena, warrant, court order, levy, attachment, order of a court-appointed receiver, or other comparable legal process, including subpoenas from private parties in a civil action.

IV. No Medical Advice

Any health or health-related material provided on this site is for information purposes only. It is intended to be general in nature and does not constitute medical advice. TheraTogs is not a health care professional, and any health or health-related material contained on this site should not be used as a substitute for medical advice from a health care professional. THERATOGS ASSUMES NO RESPONSIBILITY FOR HOW YOU USE OR MISUSE THE INFORMATION YOU OBTAIN FROM THIS SITE, AND THERATOGS EXPRESSLY DISCLAIMS ANY SUCH OBLIGATIONS.

V. Policies for Children (Individuals Under the Age of 13)

Our site is not directed to children under the age of 13. If you are under the age of 13, you may not disclose or provide Personally Identifiable Information on our site. Parents and guardians should supervise children's access to the Internet. In the event we discover that a child under the age of 13 has provided Personally Identifiable

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Information to us, in accordance with the Children's Online Privacy Protection Act of 1998, we will delete the child's Personally Identifiable Information from our files to the extent possible.

VI. Safe Harbor

TheraTogs is located in the U.S. If you are located outside the U.S., any information you provide to us will be transferred to the U.S. If you do not wish to have your Personally Identifiable Information leave your country, do not provide the information to us. TheraTogs is a participant in the Safe Harbor program developed by the U.S. Department of Commerce and the European Union. We have certified that we adhere to the Safe Harbor Privacy Principles agreed upon by the U.S. and the European Union. For more information about the Safe Harbor and to view our certification, visit the U.S. Department of Commerce's Safe Harbor website at <http://www.export.gov/safeharbor>. You may also contact us directly (see Section II above) regarding our participation in the Safe Harbor.

VII. Notice

A. The TheraTogs™ product is a Class I medical device intended to be issued by and applied under the supervision of a licensed healthcare practitioner. This website exists for the purpose of fulfilling our mission, which is to improve the mobility and stability of people with lower extremity deformities and movement disorders related to neuromotor dysfunction and pathomechanics. In pursuit of that mission, we design and develop the TheraTogs™ product and other products, provide professional education and development to healthcare practitioners, and provide professional consultation to practitioners and facilities. We may collect, process, and store Personally Identifiable Information electronically and/or in hard copy form. The primary purpose for collecting such data is to further our mission. TheraTogs does not collect sensitive personal data (racial or ethnic origin, political opinions, religious or similar beliefs, trade union membership, physical or mental health, sexual orientation, or criminal records).

B. Types of information. Information you may provide in visiting our site falls into two broad categories: personally identifiable information, and aggregate information. "Personally Identifiable Information" is information that can be used to identify or contact you, such as your name, email address, or mailing address. "Aggregate Information" is information that does not identify you, and may include, for example, statistical information concerning the Web pages on our site that users most frequent, or anonymized medical data provided by clinicians. Our Privacy Policy governs both categories of Information. The information we receive depends upon what you do when you visit our site, as detailed below.

C. Personally Identifiable Information. We do not share with unrelated third parties any Personally Identifiable Information you provide to us. By "unrelated third parties" we mean anyone who is not directly involved in the maintenance, hosting, or running of our site, or not involved in fulfilling requests you make at our site. We use Personally Identifiable Information you provide to us only for the purposes for which you have provided it. For example, if you request information about our products, submit feedback and comments, register for an Interservice Kit, order a product, fill out a product/customer registration form, or send us an email, you may provide us with Personally Identifiable Information. We will use any such Personally Identifiable Information only to respond to and/or fulfill your requests. Please note that, if you register for an upcoming event and the event is co-sponsored with another entity (which will be stated), you may also be providing Personally Identifiable Information to the co-sponsor (as well as to us). In any such situation, we will request that any such co-sponsor use the Personally Identifiable Information only for purposes related to registration of the event. If, at any time, you decide you no longer wish to have us contact you and/or provide you with the information/goods/services you requested, simply notify us (see Section II above) to that effect.

D. Aggregate Information. We may collect Aggregate Information about your use of our site through cookies and similar computer/Internet technologies. "Cookies" are small pieces of information that a website transfers to your hard drive, where it is stored by your browser on your computer's hard drive for record-keeping purposes (such as storing user preferences). For instance, if you visit our site to browse or to read or download information, we may collect and store one or more of the following: the name of the domain name and host from which you access the Internet (for example, aol.com); the Internet Protocol (IP) address of the computer you are using; the browser software you use and your operating system; the date and time you access our site, and other activity on our site; and the

Complaint

Internet address of the website from which you linked to our site. If we use cookies or other similar computer/Internet technologies, we use the Aggregate Information collected for system administration, to measure the number of visitors to our site, to improve site performance, to help us make our site more useful, to gather broad Aggregate Information, etc. If we use cookies or other similar computer/Internet technologies, they do not collect or retain Personally Identifiable Information, nor do we link Aggregate Information to Personally Identifiable Information. Additionally, we do not authorize any third parties to use cookies we may create at our site for their own purposes. Please be advised, however, that sites you link to from our site may use cookies or other similar computer/Internet technologies in other ways and for other purposes. You should read and understand the privacy policy of the site(s) you link to in order to determine whether and how a particular site uses such technologies. Please note that most browsers are initially set up to accept cookies. You can reset your browser to refuse all cookies or indicate when a cookie is being sent. You should consult the help section of your Web browser software to learn how to do this. Be advised, however, that disabling cookies may prevent you from viewing or using certain Web pages.

E. *Third-Party Payment Processing.* We use a third party to process online orders. This third party is currently Verisign. Please be advised that Verisign's privacy policy (rather than TheraTogs' Privacy Policy) applies to the processing of your payment and associated handling of your Personally Identifiable Information by Verisign. The privacy policy of Verisign is available on the Web pages where you make an online purchase. You should read the Verisign privacy policy before making an online purchase. If you do not wish to purchase our products online, please contact us (see Section II above) to make other arrangements.

VIII. Choice

You have the opportunity to choose whether your Personally Identifiable Information is disclosed to a third party or used for a purpose that is incompatible with the purpose for which it was originally collected. Currently, TheraTogs does not disclose Personally Identifiable Information to third parties (other than parties that perform functions on behalf of TheraTogs), and we do not use Personally Identifiable Information for any purpose that is incompatible with the purposes for which it was originally collected.

IX. onward Transfer and Limitations of Use, Disclosure

A. *Onward Transfer, Limitations of Use, Disclosure.* TheraTogs will only disclose or share Personally Identifiable Information with an outside entity or third party administrator if consistent with the principles of notice and choice, as specified above. By submitting Personally Identifiable Information to us, you authorize certain transfers of such information. For instance, if you request information about a product in a country in which we have a distributor located, we may forward your query to the distributor in that territory. The country in which the distributor is located may or may not be a country the European Union has deemed to have "adequate" data protection laws. However, we will request that the distributor or other party safeguard Personally Identifiable Information consistent with the principles of notice and choice in this Privacy Policy. Additionally, where TheraTogs has knowledge that an agent is using or disclosing Personally Identifiable in a manner contrary to this Privacy Policy, we will take reasonable steps to prevent or stop the use or disclosure.

X. Security

A. *Access and security.* Each of our employees abides by our Privacy Policy, and only authorized individuals have access to your Personally Identifiable Information. We have in place security control systems designed to help prevent loss or theft and unauthorized access, disclosure, copying, use, or modification of your Personally Identifiable Information. **DUE TO THE NATURE OF THE INTERNET AND DEVELOPING TECHNOLOGIES, HOWEVER, THERATOGS CANNOT GUARANTEE OR WARRANT THE SECURITY OF YOUR INFORMATION, AND THERATOGS EXPRESSLY DISCLAIMS ANY SUCH OBLIGATIONS.**

B. *Do not use or access this website via a wireless network.* Do not provide Personally Identifiable Information to us using a wireless network, computer, or other device. Even if your machine is running wireless encryption protocols, there is a high security risk inherent in wireless networks. It is impossible for us to make any assurances as to the security of any such transmissions.

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C. Email. If you communicate with us via email, we will share your correspondence with employees, representatives, or agents most capable of addressing your correspondence. We will retain your communication until we have done our very best to provide you with a complete and satisfactory response and may subsequently retain your communication for our records. Please be advised that email does not provide a means for completely secure and private communications. Although reasonable efforts will be made to keep your information confidential, from a technical standpoint, there is still a risk and it is impossible for us to guarantee the security of such transmissions.

D. Password protected areas. TheraTogs does not warrant or represent that the information you submit to password protected areas of our website will be protected against loss, misuse, or alteration by third parties. You are solely responsible for taking all steps to ensure that no other person has access to password protected areas of our site accessed through your password or account. It is your sole responsibility to (1) control the dissemination and use of your password; (2) authorize, monitor, and control access to and use of your password and password protected areas of our site accessed through your password or account; and (3) promptly inform TheraTogs of any need to deactivate a password. You permit TheraTogs and all other persons or entities involved in the operation of our site to transmit, monitor, retrieve, store, and use your Personally Identifiable Information in connection with the operation of password protected areas of our site.

E. Assignment or Transfer of Personally Identifiable Information. TheraTogs might at any time sell certain assets or the company, or parts of it, may be sold, merged, or otherwise transferred. If such a transaction occurs, Personally Identifiable Information may be one of the transferred assets. TheraTogs may assign its rights and duties under these Terms and Conditions to any party at any time without notice to you. In the event TheraTogs assigns or transfers your Personally Identifiable Information and its rights hereunder to a third party, you agree that TheraTogs may do so, on the condition that any such third party agrees to abide by our Privacy Policy as it applies to any Personally Identifiable Information the third party may receive in the course of such assignment or transfer. **THERATOGS, HOWEVER, CANNOT GUARANTEE OR WARRANT THAT SUCH THIRD PARTY WILL IN FACT ABIDE BY OUR PRIVACY POLICY, AND THERATOGS EXPRESSLY DISCLAIMS ANY SUCH OBLIGATIONS.**

XI. Data Integrity

TheraTogs will only collect Personally Identifiable Information relevant to its proposed use. Reasonable measures will be taken to ensure that the information is reliable for its intended use, accurate, complete, and current.

XII. Access

You will generally have access through us to your Personally Identifiable Information, except where such access would impose a disproportionate burden or expense on TheraTogs, or would interfere with the privacy rights of third parties. You may also request, in certain circumstances, that we correct, amend, or delete your Personally Identifiable Information in accordance with local laws. Please understand that it may be impossible to remove information completely, due to backups and records of deletions. We reserve the right to limit the number of requests made under this Section, and to charge a fee for requests exceeding a certain number or if the process is abused or misused. Requests under this Section should be made using the contact information provided above in Section II.

XIII. Enforcement and Accountability

TheraTogs will have compliance reviews conducted as part of the self-audit process, and provide appropriate training to those who have access to Personally Identifiable Information. Anyone who violates our Privacy Policy is subject to disciplinary action, up to and including termination where appropriate and permitted by applicable law.

XIV. Dispute Resolution

Anyone who submits Personally Identifiable Information to TheraTogs who feels we have mishandled the Personally Identifiable Information in violation of the Safe Harbor requirements should contact us (see Section II

Complaint

above) with a written description of the complaint. After receiving any such complaint, we will contact you to set up a time and manner to discuss the complaint. If these good faith efforts to resolve the complaint fail, you may contact an independent dispute resolution body. TheraTogs agrees to submit to mediation and/or arbitration through the American Arbitration Association for any such unresolved complaints. Any complaint shall be resolved in a manner consistent with the Safe Harbor principles in a manner necessary to remedy the effects of noncompliance and to assure that future processing of personal data will be in conformity with the Safe Harbor principles.

XV. Links to Other Websites

Our site may contain links to other sites ("Third Party Sites"). We do not necessarily endorse, sanction, or verify any of these Third Party Sites or anything posted on these sites, and we provide such links merely for the convenience of our users. Once you access a Third Party Site through a link on our site, you are subject to the privacy policy and terms and conditions of use of the Third Party Site. We have no control and bear no responsibility for any action or policy associated with any Third Party Site. Concerns regarding these sites should be directed to the Third Party Sites.

XVI. Ownership of Site Contents; Downloading

Unless otherwise noted, all text, images, illustrations, designs, icons, photographs, video clips, and other materials that are part of our site (collectively the "Materials") are copyrighted works, trademarks, trade dress, or other intellectual properties owned, controlled, or licensed by TheraTogs or used under principles of "fair use." The Materials of our site and the site as a whole are intended solely for your personal use. You may download or copy the Materials for such personal use, provided that you do not remove any copyright or other proprietary notices contained on the Materials. By allowing you to download these Materials for personal use, we expressly do not transfer to you any right, title, or interest in the Materials.

XVII. User Comments

All comments, feedback, postcards, suggestions, ideas, and other submissions disclosed, submitted, or offered to TheraTogs through our site or otherwise disclosed, submitted, or offered in connection with your use of our site (collectively "User Comments") shall be and remain the property of TheraTogs. You agree that TheraTogs may use or disclose User Comments in any manner consistent with our Privacy Policy. TheraTogs shall be free to use, without restriction and without compensation to you, any ideas, concepts, know-how, suggestions, or techniques contained in any User Comments you send to us for any purpose whatsoever. TheraTogs has no obligation to respond to any User Comments, and we reserve the right, but undertake no duty, to review, edit, move, or delete any User Comments, in our sole discretion and without notice.

XVIII. Content of User-Posted Information; Other Use of Our Site

You are prohibited from posting or transmitting any advertising "spam," unlawful material, or other material we deem otherwise inappropriate for our site. **THERATOGS DISCLAIMS ANY AND ALL RESPONSIBILITY OR LIABILITY ARISING FROM, CONNECTED TO, OR ASSOCIATED WITH THE CONTENT OF ANY USER POSTINGS.** You agree to refrain from undertaking any activity that imposes an unreasonable or disproportionate burden on our site. TheraTogs reserves the sole discretion to deny, revoke, or otherwise restrict the access privileges of any user who at any time fails to comply with these Terms and Conditions.

XIX. Complaints Regarding Perceived Infringement

TheraTogs respects intellectual property rights, and will deny access to our site to anyone who, in our discretion, repeatedly infringes the intellectual property rights of others. In addition, we will use reasonable efforts, in light of our resources, to accommodate generally accepted technical measures used by copyright owners to identify and protect their copyrighted works. If you believe materials posted on our site infringe rights you enjoy under copyright law in specific materials (collectively a "Work"), we request that you direct your concerns to our "Designated Agent" provided below, pursuant to the Digital Millennium Copyright Act (17 U.S.C. §512) (hereafter the "DMCA"). Your notice to our Designated Agent should follow the notice provisions set out in the DMCA.

Complaint

Additional information about the DMCA can be obtained from the website of the Copyright Office located at <http://www.dsg.gov>. Upon receiving your notice, we agree to respond to it and, if appropriate, remove or disable access to material you believe infringes your Work.

Designated Agent: Sheila M. Heidmiller, Esq.
 Macheledt Bales & Heidmiller LLP
 Las Sendas Suites
 7248 E. Tasman Street
 Mesa, AZ 85207
 Phone: 480-773-7807
 Email: sheilah@mbh-law.com

XX. Disclaimer and Limitation of Liability

A. *Disclaimer.* While we use reasonable efforts to include accurate and up-to-date information on our site, we make no warranties or representations as to its accuracy. TheraTogs assumes no liability or responsibility for any errors or omissions in the content on our site. **OUR SITE AND ALL CONTENTS OF OUR SITE ARE PROVIDED ON AN "AS IS" BASIS WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF TITLE OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. YOU ACKNOWLEDGE THAT YOUR USE OF OUR SITE IS AT YOUR SOLE RISK, THAT YOU ASSUME FULL RESPONSIBILITY FOR ALL COSTS ASSOCIATED WITH ALL NECESSARY SERVICING OR REPAIRS OF ANY EQUIPMENT YOU USE IN CONNECTION WITH YOUR USE OF OUR SITE, AND THAT THERATOGS SHALL NOT BE LIABLE FOR ANY DAMAGES OF ANY KIND RELATED TO YOUR USE OF OUR SITE.** Please note that some jurisdictions may not allow the exclusion of implied warranties, so some of the above exclusions may not apply to you. Check your local laws for any restrictions or limitations regarding the exclusion of implied warranties.

B. *Limitation of Liability.* **NEITHER THERATOGS NOR ANY OTHER PARTY INVOLVED IN CREATING, PRODUCING, HOSTING, OR DEVELOPING OUR SITE SHALL BE LIABLE FOR ANY DIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, INDIRECT, OR PUNITIVE DAMAGES ARISING OUT OF YOUR ACCESS TO OR USE OF OUR SITE. THE USE OF THE SERVICES OR THE DOWNLOADING OR OTHER USE OF ANY MATERIALS THROUGH OUR SITE IS DONE AT YOUR OWN DISCRETION AND RISK AND WITH YOUR AGREEMENT THAT YOU WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE TO YOUR COMPUTER SYSTEM, LOSS OF DATA, OR OTHER HARM THAT RESULTS FROM SUCH ACTIVITIES. THERATOGS ASSUMES NO LIABILITY FOR ANY COMPUTER VIRUS, WORM, OR OTHER SIMILAR SOFTWARE CODE THAT MAY BE DOWNLOADED TO YOUR COMPUTER FROM OUR SITE OR IN CONNECTION WITH ANY SERVICES OR MATERIALS OFFERED THROUGH OUR SITE. THERATOGS WILL NOT BE LIABLE FOR ANY DAMAGES OF ANY KIND ARISING FROM THE USE OF OUR SITE, INCLUDING, BUT NOT LIMITED TO DIRECT, INDIRECT, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, WHETHER IN AN ACTION OF CONTRACT OR NEGLIGENCE OR OTHER TORTIOUS ACTION. Some jurisdictions prohibit the exclusion or limitation of liability for consequential or incidental damages. Accordingly, some of the limitations and exclusions set forth above may not apply to you.**

XXI. Indemnification

You agree to defend, indemnify and hold TheraTogs harmless from and against any and all claims, damages, costs, and expenses, including attorney's fees, arising from or in any way related to your failure to comply with these Terms and Conditions of your use of our site.

Complaint

XXII. Choice of Law and Jurisdiction

Unless otherwise specified, our site and the Contents thereof are displayed solely for the purpose of promoting the mission of TheraTogs. Subject to Section XIV, these Terms and Conditions shall be construed in accordance with the laws of the State of Colorado, without regard to any conflict of law provisions. Subject to Section XIV, any dispute arising under these Terms and Conditions shall be resolved exclusively by the state or federal courts sitting in Colorado.

XXIII. Headings

The headings in these Terms and Conditions are included solely for convenience and will not limit or otherwise affect this Privacy Policy or any interpretation thereof.

XXIV. Severability

If for any reason a court of competent jurisdiction finds any provision of these Terms and Conditions, or any portion thereof, to be unenforceable, that provision shall be enforced to the maximum extent permissible so as to affect the intent of these Terms & Conditions, and the remainder of these Terms and Conditions shall continue in full force and effect.

XXV. Non-Transferability

Your right to use our site and your duties and obligations under these Terms and Conditions are NOT transferable.

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Effective Date: January 10, 2006

Complaint

Exhibit C

Privacy Policy and Terms and Conditions of Use
for Progressive GaitWays, L.L.C.
<www.gaitways.com>

Welcome and thank you for visiting the PGW product website owned by Progressive GaitWays, L.L.C. (hereafter the "PGW" website). As used herein, the words "you" and "your" refer to any person or entity accessing the PGW website. The words "we," "us," and "our" refer to the PGW website. The following describes how we handle information we may learn about you from your visit to our website or through other voluntary means and provides the rules that govern your use of our site.

I. These Terms and Conditions Govern Your Use of Our Site

A. Use of our site constitutes contractual agreement. AS A CONDITION TO AND IN CONSIDERATION OF ACCESSING AND USING OUR SITE, YOU AGREE TO BE BOUND BY THESE TERMS AND CONDITIONS OF USE AND BY OUR PRIVACY POLICY (COLLECTIVELY OUR "TERMS AND CONDITIONS"). USING THIS SITE CONSTITUTES YOUR ACCEPTANCE OF AND AGREEMENT TO BE BOUND BY THESE TERMS AND CONDITIONS. IF YOU DO NOT WISH TO BE BOUND BY THESE TERMS AND CONDITIONS, YOU SHOULD NOT USE/VISIT OUR SITE.

B. Amendments to these Terms and Conditions. We reserve the right to modify, alter, or otherwise update these Terms and Conditions at any time. Any changes will apply prospectively only, as of the effective date found at the bottom of these Terms and Conditions. It is your responsibility to review these Terms and Conditions before accepting them. We may of course change, move, or delete portions of our site, or add to our site from time to time.

II. How to Contact Us

If you have questions about our Terms and Conditions, your dealings with our website, or technical problems with the operation of our website, you may contact us as provided below:

By phone at: (888) 396-7241

By email at: admin@gaitways.com

III. Exceptions to Our Privacy Policy

There are exceptions to our Privacy Policy in that, if required or allowed by law, it may be necessary for PGW to release or use Personally Identifiable Information we in good faith believe is appropriate in connection with legal proceedings, or in response to a subpoena, warrant, court order, levy, attachment, order of a court-appointed receiver, or other comparable legal process, including subpoenas from private parties in a civil action.

IV. No Medical Advice

Any health or health-related material provided on this site is for information purposes only. It is intended to be general in nature and does not constitute medical advice. PGW is not a health care professional, and any health or health-related material contained on this site should not be used as a substitute for medical advice from a health care professional. **PGW ASSUMES NO RESPONSIBILITY FOR HOW YOU USE OR MISUSE THE INFORMATION YOU OBTAIN FROM THIS SITE, AND PGW EXPRESSLY DISCLAIMS ANY SUCH OBLIGATIONS.**

V. Policies for Children (Individuals Under the Age of 13)

Our site is not directed to children under the age of 13. **If you are under the age of 13, you may not disclose or provide Personally Identifiable Information on our site.** Parents and guardians should supervise children's access to the Internet. In the event we discover that a child under the age of 13 has provided Personally Identifiable

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information to us, in accordance with the Children's Online Privacy Protection Act of 1998, we will delete the child's Personally Identifiable Information from our files to the extent possible.

VI. Safe Harbor

PGW is located in the U.S. If you are located outside the U.S., any information you provide to us will be transferred to the U.S. If you do not wish to have your Personally Identifiable Information leave your country, do not provide the information to us. PGW is a participant in the Safe Harbor program developed by the U.S. Department of Commerce and the European Union. We have certified that we adhere to the Safe Harbor Privacy Principles agreed upon by the U.S. and the European Union. For more information about the Safe Harbor and to view our certification, visit the U.S. Department of Commerce's Safe Harbor website at <http://www.export.gov/safeharbor>. You may also contact us directly (see Section II above) regarding our participation in the Safe Harbor.

VII. Notice

A. *Types of information.* Information you may provide in visiting our site falls into two broad categories: personally identifiable information, and aggregate information. "Personally Identifiable Information" is information that can be used to identify or contact you, such as your name, email address, or mailing address. "Aggregate Information" is information that does not identify you, and may include, for example, statistical information concerning the Web pages on our site that users most frequent, or anonymized medical data provided by clinicians. Our Privacy Policy governs both categories of information. The information we receive depends upon what you do when you visit our site, as detailed below.

B. *Personally Identifiable Information.* We do not share with unrelated third parties any Personally Identifiable Information you provide to us. By "unrelated third parties" we mean anyone who is not directly involved in the maintenance, hosting, or running of our site, or not involved in fulfilling requests you make at our site. We use Personally Identifiable Information you provide to us only for the purposes for which you have provided it. For example, if you request information about our products, submit feedback and comments, register for an Inservice Kit, order a product, fill out a product/customer registration form, or send us an email, you may provide us with Personally Identifiable Information. We will use any such Personally Identifiable Information only to respond to and/or fulfill your requests. Please note that, if you register for an upcoming event and the event is co-sponsored with another entity (which will be stated), you may also be providing Personally Identifiable Information to the co-sponsor (as well as to us). In any such situation, we will request that any such co-sponsor use the Personally Identifiable Information only for purposes related to registration of the event. If, at any time, you decide you no longer wish to have us contact you and/or provide you with the information/goods/services you requested, simply notify us (see Section II above) to that effect.

C. *Aggregate Information.* We may collect Aggregate Information about your use of our site through cookies and similar computer/Internet technologies. "Cookies" are small pieces of information that a website transfers to your hard drive, where it is stored by your browser on your computer's hard drive for record-keeping purposes (such as storing user preferences). For instance, if you visit our site to browse or to read or download information, we may collect and store one or more of the following: the name of the domain name and host from which you access the Internet (for example, aol.com); the Internet Protocol (IP) address of the computer you are using; the browser software you use and your operating system; the date and time you access our site, and other activity on our site; and the Internet address of the website from which you linked to our site. If we use cookies or other similar computer/Internet technologies, we use the Aggregate Information collected for system administration, to measure the number of visitors to our site, to improve site performance, to help us make our site more useful, to gather broad Aggregate Information, etc. If we use cookies or other similar computer/Internet technologies, they do not collect or retain Personally Identifiable Information, nor do we link Aggregate Information to Personally Identifiable Information. Additionally, we do not authorize any third parties to use cookies we may create at our site for their own purposes. Please be advised, however, that sites you link to from our site may use cookies or other similar computer/Internet technologies in other ways and for other purposes. You should read and understand the privacy policy of the sites you link to in order to determine whether and how a particular site uses such technologies. Please note that most browsers are initially set up to accept cookies. You can reset your browser to refuse all cookies or indicate when a cookie is being

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sent. You should consult the help section of your Web browser software to learn how to do this. Be advised, however, that disabling cookies may prevent you from viewing or using certain Web pages.

D. Third-Party Payment Processing. We use a third party to process online orders. This third party is currently ECommerce Exchange. Please be advised that ECommerce Exchange's privacy policy (rather than PGW's Privacy Policy) applies to the processing of your payment and associated handling of your Personally Identifiable Information by ECommerce Exchange. The privacy policy of ECommerce Exchange is available on the Web pages where you make an online purchase. You should read the ECommerce Exchange privacy policy before making an online purchase. If you do not wish to purchase our products online, please contact us (see Section II above) to make other arrangements.

VIII. Choice

You have the opportunity to choose whether your Personally Identifiable Information is disclosed to a third party or used for a purpose that is incompatible with the purpose for which it was originally collected. Currently, PGW does not disclose Personally Identifiable Information to third parties (other than parties that perform functions on behalf of PGW), and we do not use Personally Identifiable Information for any purpose that is incompatible with the purposes for which it was originally collected.

IX. Onward Transfer and Limitations of Use, Disclosure

A. Onward Transfer, Limitations of Use, Disclosure. PGW will only disclose or share Personally Identifiable Information with an outside entity or third party administrator if consistent with the principles of notice and choice, as specified above. By submitting Personally Identifiable Information to us, you authorize certain transfers of such information. For instance, if you request information about a product in a country in which we have a distributor located, we may forward your query to the distributor in that territory. The country in which the distributor is located may or may not be a country the European Union has deemed to have "adequate" data protection laws. However, we will request that the distributor or other party safeguard Personally Identifiable Information consistent with the principles of notice and choice in this Privacy Policy. Additionally, where PGW has knowledge that an agent is using or disclosing Personally Identifiable Information in a manner contrary to this Privacy Policy, we will take reasonable steps to prevent or stop the use or disclosure.

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Complaint

D. Password protected areas. PGW does not warrant or represent that the information you submit to password protected areas of our website will be protected against loss, misuse, or alteration by third parties. You are solely responsible for taking all steps to ensure that no other person has access to password protected areas of our site accessed through your password or account. It is your sole responsibility to (1) control the dissemination and use of your password; (2) authorize, monitor, and control access to and use of your password and password protected areas of our site accessed through your password or account; and (3) promptly inform PGW of any need to deactivate a password. You permit PGW and all other persons or entities involved in the operation of our site to transmit, monitor, retrieve, store, and use your Personally Identifiable Information in connection with the operation of password protected areas of our site.

E. Assignment or Transfer of Personally Identifiable Information. PGW might at any time sell certain assets or the company, or parts of it, may be sold, merged, or otherwise transferred. If such a transaction occurs, Personally Identifiable Information may be one of the transferred assets. PGW may assign its rights and duties under these Terms and Conditions to any party at any time without notice to you. In the event PGW assigns or transfers your Personally Identifiable Information and its rights hereunder to a third party, you agree that PGW may do so, on the condition that any such third party agrees to abide by our Privacy Policy as it applies to any Personally Identifiable Information the third party may receive in the course of such assignment or transfer. **PGW, HOWEVER, CANNOT GUARANTEE OR WARRANT THAT SUCH THIRD PARTY WILL IN FACT ABIDE BY OUR PRIVACY POLICY, AND PGW EXPRESSLY DISCLAIMS ANY SUCH OBLIGATIONS.**

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Complaint

XV. Links to Other Websites

Our site may contain links to other sites ("Third Party Sites"). We do not necessarily endorse, sanction, or verify any of these Third Party Sites or anything posted on these sites, and we provide such links merely for the convenience of our users. Once you access a Third Party Site through a link on our site, you are subject to the privacy policy and terms and conditions of use of the Third Party Site. We have no control and bear no responsibility for any action or policy associated with any Third Party Site. Concerns regarding these sites should be directed to the Third Party Sites.

XVI. Ownership of Site Contents; Downloading

Unless otherwise noted, all text, images, illustrations, designs, icons, photographs, video clips, and other materials that are part of our site (collectively the "Materials") are copyrighted works, trademarks, trade dress, or other intellectual properties owned, controlled, or licensed by PGW or used under principles of "fair use." The Materials of our site and the site as a whole are intended solely for your personal use. You may download or copy the Materials for such personal use, provided that you do not remove any copyright or other proprietary notices contained on the Materials. By allowing you to download these Materials for personal use, we expressly do not transfer to you any right, title, or interest in the Materials.

XVII. User Comments

All comments, feedback, postcards, suggestions, ideas, and other submissions disclosed, submitted, or offered to PGW through our site or otherwise disclosed, submitted, or offered in connection with your use of our site (collectively "User Comments") shall be and remain the property of PGW. You agree that PGW may use or disclose User Comments in any manner consistent with our Privacy Policy. PGW shall be free to use, without restriction and without compensation to you, any ideas, concepts, know-how, suggestions, or techniques contained in any User Comments you send to us for any purpose whatsoever. PGW has no obligation to respond to any User Comments, and we reserve the right, but undertake no duty, to review, edit, move, or delete any User Comments, in our sole discretion and without notice.

XVIII. Content of User-Posted Information; Other Use of Our Site

You are prohibited from posting or transmitting any advertising, "spam," unlawful material, or other material we deem otherwise inappropriate for our site. **PGW DISCLAIMS ANY AND ALL RESPONSIBILITY OR LIABILITY ARISING FROM, CONNECTED TO, OR ASSOCIATED WITH THE CONTENT OF ANY USER POSTINGS.** You agree to refrain from undertaking any activity that imposes an unreasonable or disproportionate burden on our site. PGW reserves the sole discretion to deny, revoke, or otherwise restrict the access privileges of any user who at any time fails to comply with these Terms and Conditions.

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Complaint

Designated Agent: Sheila M. Heidmiller, Esq.
Machelski Baker & Heidmiller LLP
Las Sendas Suites
7248 E. Tatum Street
Mesa, AZ 85207
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Email: sheilab@mbh-law.com

XX. Disclaimer and Limitation of Liability

A. *Disclaimer.* While we use reasonable efforts to include accurate and up-to-date information on our site, we make no warranties or representations as to its accuracy. PGW assumes no liability or responsibility for any errors or omissions in the content on our site. **OUR SITE AND ALL CONTENTS OF OUR SITE ARE PROVIDED ON AN "AS IS" BASIS WITHOUT WARRANTIES OF ANY KIND, EITHER EXPRESS OR IMPLIED, INCLUDING WITHOUT LIMITATION WARRANTIES OF TITLE OR IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. YOU ACKNOWLEDGE THAT YOUR USE OF OUR SITE IS AT YOUR SOLE RISK, THAT YOU ASSUME FULL RESPONSIBILITY FOR ALL COSTS ASSOCIATED WITH ALL NECESSARY SERVICING OR REPAIRS OF ANY EQUIPMENT YOU USE IN CONNECTION WITH YOUR USE OF OUR SITE, AND THAT PGW SHALL NOT BE LIABLE FOR ANY DAMAGES OF ANY KIND RELATED TO YOUR USE OF OUR SITE.** Please note that some jurisdictions may not allow the exclusion of implied warranties, so some of the above exclusions may not apply to you. Check your local laws for any restrictions or limitations regarding the exclusion of implied warranties.

B. *Limitation of Liability.* **NEITHER PGW NOR ANY OTHER PARTY INVOLVED IN CREATING, PRODUCING, HOSTING, OR DEVELOPING OUR SITE SHALL BE LIABLE FOR ANY DIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, INDIRECT, OR PUNITIVE DAMAGES ARISING OUT OF YOUR ACCESS TO OR USE OF OUR SITE. THE USE OF THE SERVICES OR THE DOWNLOADING OR OTHER USE OF ANY MATERIALS THROUGH OUR SITE IS DONE AT YOUR OWN DISCRETION AND RISK AND WITH YOUR AGREEMENT THAT YOU WILL BE SOLELY RESPONSIBLE FOR ANY DAMAGE TO YOUR COMPUTER SYSTEM, LOSS OF DATA, OR OTHER HARM THAT RESULTS FROM SUCH ACTIVITIES. PGW ASSUMES NO LIABILITY FOR ANY COMPUTER VIRUS, WORM, OR OTHER SIMILAR SOFTWARE CODE THAT MAY BE DOWNLOADED TO YOUR COMPUTER FROM OUR SITE OR IN CONNECTION WITH ANY SERVICES OR MATERIALS OFFERED THROUGH OUR SITE. PGW WILL NOT BE LIABLE FOR ANY DAMAGES OF ANY KIND ARISING FROM THE USE OF OUR SITE, INCLUDING, BUT NOT LIMITED TO DIRECT, INDIRECT, INCIDENTAL, PUNITIVE, OR CONSEQUENTIAL DAMAGES, WHETHER IN AN ACTION OF CONTRACT OR NEGLIGENCE OR OTHER TORTIOUS ACTION. Some jurisdictions prohibit the exclusion or limitation of liability for consequential or incidental damages. Accordingly, some of the limitations and exclusions set forth above may not apply to you.**

XXI. Indemnification

You agree to defend, indemnify and hold PGW harmless from and against any and all claims, damages, costs, and expenses, including attorney's fees, arising from or in any way related to your failure to comply with these Terms and Conditions or your use of our site.

XXII. Choice of Law and Jurisdiction

Unless otherwise specified, our site and the Contents thereof are displayed solely for the purpose of promoting the mission of PGW. Subject to Section XIV, these Terms and Conditions shall be construed in accordance with the laws of the State of Colorado, without regard to any conflict of law provisions. Subject to Section XIV, any dispute

Complaint

arising under these Terms and Conditions shall be resolved exclusively by the state or federal courts sitting in Colorado.

XXIII. Headings

The headings in these Terms and Conditions are included solely for convenience and will not limit or otherwise affect this Privacy Policy or any interpretation thereof.

XXIV. Severability

If for any reason a court of competent jurisdiction finds any provision of these Terms and Conditions, or any portion thereof, to be unenforceable, that provision shall be enforced to the maximum extent permissible so as to affect the intent of these Terms & Conditions, and the remainder of these Terms and Conditions shall continue in full force and effect.

XXV. Non-Transferability

Your right to use our site and your duties and obligations under these Terms and Conditions are NOT transferable.

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Effective Date: May 1, 2007

Decision and Order

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of Complaint, which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued, would charge the Respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, 16 C.F.R. § 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Progressive Gaitways LLC is a Colorado company with its principal office or place of business at 305 Society Drive, #C-3, Telluride, Colorado 81435.
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 Progressive Gaitways LLC and its subsidiaries, divisions, affiliates, successors and assigns.
- B. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

I.

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

II.

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

- A. all advertisements, promotional materials, and any other statements containing any representations covered by this order, with all materials relied upon in disseminating the representation; and

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- B. any documents, whether prepared by or on behalf of respondent, that calls into question respondent's compliance with this order.

III.

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

IV.

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

V.

IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after service of this order, and at such other times as the Commission may require, file with the Commission a

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report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VI.

This order will terminate on November 9, 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 fewer 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 as to such respondent will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

Analysis to Aid Public Comment

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

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

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

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

Progressive Gaitways sells medical equipment, including through two websites (www.theratogs.com and www.gaitways.com). According to the Commission’s complaint, from at least December 2008 until June 2009, Progressive Gaitways’ www.theratogs.com website set forth privacy policies and statements about its practices, including statements related to its participation in the Safe Harbor. From at least June 2007 until June 2009, respondent has set forth on its website, www.gaitways.com, the same privacy policies and statements,

Analysis to Aid Public Comment

including the statements related to participation in the Safe Harbor.

The Commission's complaint alleges that until June 2009, Progressive Gaitways falsely represented that it was a current participant in the Safe Harbor when, in fact, Progressive Gaitways has not been a current participant in the Safe Harbor since November 2006 for its www.theratogs.com website, and had never been a participant in the Safe Harbor for its www.gaitways.com website. The Commission's complaint alleges that Progressive Gaitways submitted a Safe Harbor self-certification on behalf of its www.theratogs.com website in November 2004 and renewed it in November 2005. It did not renew the self-certification in November 2006, at which point Commerce updated its status to "not current" on the Commerce public website. To date, Progressive Gaitways has not renewed its self-certification to the Safe Harbor on behalf of www.theratogs.com. The Commission's proposed complaint also alleges that Progressive Gaitways has never filed a Safe Harbor self-certification on behalf of its www.gaitways.com website.

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

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

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

Analysis to Aid Public Comment

is a provision “sunsetting” the order after twenty (20) years, with certain exceptions.

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