

# FEDERAL TRADE COMMISSION DECISIONS

## FINDING, OPINIONS, AND ORDERS

PUBLISHED BY THE COMMISSION

### VOLUME 156



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**MEMBERS OF THE FEDERAL TRADE COMMISSION  
DURING THE PERIOD  
JULY 1, 2013 TO DECEMBER 31, 2013**

EDITH RAMIREZ, *Chairwoman*  
Took oath of office April 5, 2010.

JULIE BRILL, *Commissioner*  
Took oath of office April 6, 2010.

MAUREEN K. OHLHAUSEN, *Commissioner*  
Took oath of office April 4, 2012.

JOSHUA D. WRIGHT, *Commissioner*  
Took oath of office January 3, 2013.

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

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# FEDERAL TRADE COMMISSION DECISIONS

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FINDINGS, OPINIONS, AND ORDERS  
JULY 1, 2013, TO DECEMBER 31, 2013

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IN THE MATTER OF

## HERTZ GLOBAL HOLDINGS, INC.

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

*Docket No. C-4376; File No. 101 0137  
Complaint, November 15, 2012 – Decision, July 10, 2013*

This order relates to the \$2.3 billion acquisition by Hertz Global Holdings, Inc. (“Hertz”) of Dollar Thrifty Automotive Group, Inc. (“Dollar Thrifty”). Prior to the acquisition, the two companies aggressively competed in the airport car rental market. The complaint alleges that the acquisition significantly lessens competition in the U.S. airport car rental market. Specifically, the acquisition enables Hertz to raise prices and decrease service to customers at more than 70 individual airport locations within the United States. The consent order requires Hertz to divest its low-priced Advantage brand, which is similarly positioned to Dollar Thrifty in terms of price, features, and customer service, as well as 16 other on-airport locations, to Franchise Services of North America/U-Save Car & Truck Rental. Hertz must also divest 13 additional airport concession agreements and related assets to a Commission-approved buyer within 60 days of the acquisition. The consent order appoints a monitor to oversee the divestiture of the assets and requires the parties to file periodic reports with the Commission until the divestiture is accomplished. If Hertz fails to comply fully with its obligations under the order, the Commission may seek civil penalties to ensure Hertz remains in compliance.

### *Participants*

For the *Commission*: *Paul Frangie, Anne Schenof, Christine E. Tasso, and James R. Weiss.*

For the *Respondent*: *John M. Allen and Jonathan E. Levitsky, Debevoise and Plimpton LLP; and Michael H. Knight and Joe Sims, Jones Day.*

## Complaint

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Hertz Global Holdings, Inc. (“Hertz”) and Dollar Thrifty Automotive Group, Inc. (“Dollar Thrifty”), having executed an agreement and plan of merger, which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**I. RESPONDENT**

1. Respondent Hertz is a corporation 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 225 Brae Boulevard, Park Ridge, New Jersey 07656. Among other industries, Hertz is engaged in the car rental business.

2. Respondent is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and are companies whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

**II. THE PROPOSED ACQUISITION**

3. Under the terms of an agreement and plan of merger (“Agreement”) signed on August 26, 2012, Hertz will acquire all shares of Dollar Thrifty’s common stock through a cash tender offer of \$87.50 per share, valued at a total of approximately \$2.3 billion (the “Acquisition”).



## Complaint

**III. THE RELEVANT PRODUCT MARKET**

4. For the purposes of this Complaint, the relevant line of commerce in which to analyze the effects of the Acquisition is airport car rentals. Airport car rentals include all car rentals at airport locations. A narrower alternative relevant product market is non-contracted airport car rentals, which excludes rentals made at pre negotiated rates and terms.

**IV. THE RELEVANT GEOGRAPHIC MARKETS**

5. For the purposes of this Complaint, the relevant geographic markets in which to assess the competitive effects of the Acquisition are individual airports serving the following destinations:

- a. Albuquerque, New Mexico (Albuquerque International Sunport Airport)
- b. Atlanta, Georgia (Hartsfield-Jackson International Airport)
- c. Austin, Texas (Austin-Bergstrom International Airport)
- d. Baltimore, Maryland (Baltimore/Washington International Thurgood Marshall Airport)
- e. Boston, Massachusetts (Logan International Airport)
- f. Burbank, California (Burbank Bob Hope Airport)
- g. Burlington, Vermont (Burlington International Airport)
- h. Charleston, South Carolina (Charleston International Airport)

## Complaint

- i. Charlotte, North Carolina (Charlotte Douglas International Airport)
- j. Chicago, Illinois (Chicago Midway International Airport)
- k. Chicago, Illinois (Chicago O'Hare International Airport)
- l. Cincinnati, Ohio (Cincinnati/Northern Kentucky International Airport)
- m. Cleveland, Ohio (Cleveland Hopkins International Airport)
- n. Colorado Springs, Colorado (Colorado Springs Airport)
- o. Dallas, Texas (Dallas Love Field Airport)
- p. Dallas, Texas (Dallas/Fort Worth International Airport)
- q. Detroit, Michigan (Detroit Metro Airport)
- r. Denver, Colorado (Denver International Airport)
- s. Des Moines, Iowa (Des Moines Airport)
- t. El Paso, Texas (El Paso Airport)
- u. Fort Lauderdale, Florida (Fort Lauderdale-Hollywood Airport)
- v. Fort Myers, Florida (Southwest Florida International Airport)

## Complaint

- w. Fort Walton Beach, Florida (Fort Walton Beach Regional Airport)
- x. Harlingen, Texas (Valley International Airport)
- y. Hartford, Connecticut (Bradley International Airport)
- z. Hilo, Hawaii (Hilo International Airport)
- aa. Honolulu, Hawaii (Honolulu International Airport)
- bb. Houston, Texas (George Bush Intercontinental Airport)
- cc. Houston, Texas (William P. Hobby Airport)
- dd. Jacksonville, Florida (Jacksonville International Airport)
- ee. Kahului, Hawaii (Kahului Airport)
- ff. Las Vegas, Nevada (McCarran International Airport)
- gg. Lihue, Hawaii (Lihue Airport)
- hh. Los Angeles, California (Los Angeles International Airport)
- ii. Louisville, Kentucky (Louisville International Airport)
- jj. Manchester, New Hampshire (Manchester-Boston Regional Airport)
- kk. Miami, Florida (Miami International Airport)

## Complaint

- ll. Milwaukee, Wisconsin (Milwaukee International Airport)
- mm. Minneapolis-St. Paul, Minnesota (Minneapolis-St. Paul International Airport)
- nn. Nashville, Tennessee (Nashville International Airport)
- oo. New York, New York (LaGuardia Airport)
- pp. New York, New York (John F. Kennedy International Airport)
- qq. Newark, New Jersey (Newark Liberty International Airport)
- rr. Norfolk, Virginia (Norfolk International Airport)
- ss. Oakland, California (Oakland International Airport)
- tt. Oklahoma City, Oklahoma (Will Rogers World Airport)
- uu. Omaha, Nebraska (Omaha Airport)
- vv. Los Angeles, California (Ontario International Airport)
- ww. Orange County, California (John Wayne Airport)
- xx. Orlando, Florida (Orlando International Airport)
- yy. Pensacola, Florida (Pensacola International Airport)
- zz. Phoenix, Arizona (Sky Harbor Airport)

## Complaint

- aaa. Pittsburgh, Pennsylvania (Pittsburgh International Airport)
- bbb. Portland, Oregon (Portland International Airport)
- ccc. Providence, Rhode Island (T.F. Green Airport)
- ddd. Raleigh-Durham, North Carolina (Raleigh Durham International Airport)
- eee. Reno, Nevada (Reno Tahoe International Airport)
- fff. Richmond, Virginia (Richmond International Airport)
- ggg. Sacramento, California (Sacramento International Airport)
- hhh. Salt Lake City, Utah (Salt Lake City International Airport)
- iii. San Antonio, Texas (San Antonio International Airport)
- jjj. San Diego, California (San Diego International Airport)
- kkk. Sanford, Florida (Orlando-Sanford International Airport)
- lll. San Francisco, California (San Francisco International Airport)
- mmm. San Jose, California (Norman Y. Mineta San Jose International Airport)
- nnn. Sarasota, Florida (Sarasota Bradenton International Airport)

## Complaint

- ooo. Seattle, Washington (Seattle-Tacoma International Airport)
- ppp. Tampa, Florida (Tampa International Airport)
- qqq. Tulsa, Oklahoma (Tulsa International Airport)
- rrr. Washington, District of Columbia (Ronald Reagan National Airport)
- sss. Washington, District of Columbia (Washington Dulles International Airport)
- ttt. West Palm Beach, Florida (Palm Beach International Airport)

**IV. ENTRY CONDITIONS**

6. Entry or expansion into the relevant markets described in Paragraphs 5 and 6 will not occur in a timely, likely or sufficient manner to avert the anticompetitive effects that likely will result from the Acquisition. In order to compete most effectively for airport car rentals, a firm must have on-airport concession locations, a recognized brand, relationships with online travel agencies and other distribution channels, and be of a sufficient size to achieve economies of scale.

**V. EFFECTS OF THE ACQUISITION**

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

- a. by eliminating actual, direct, and substantial competition between Hertz and Dollar Thrifty for

## Complaint

the sale of the relevant products in each of the relevant markets;

- b. by eliminating future competition between Hertz's Advantage brand and Dollar Thrifty for the sale of the relevant products in several of the relevant markets;
- c. by increasing the likelihood that Respondent Hertz would unilaterally exercise market power in each of the relevant markets for the relevant products;
- d. by increasing the likelihood and degree of coordinated interaction between or among suppliers of the relevant products in each of the relevant markets;
- e. by increasing the likelihood that U.S. customers would be forced to pay higher prices for the relevant products in each of the relevant markets.

**VI. VIOLATIONS CHARGED**

8. The Acquisition Agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this fifteenth day of November, 2012, issues its Complaint against said Respondent.

By the Commission, Commissioner Rosch dissenting.

## Decision and Order

**DECISION AND ORDER**

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

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

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



## Decision and Order

1. Respondent Hertz is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 225 Brae Boulevard, Park Ridge, NJ 07656 1888.
2. Macquarie is a limited liability company that is an indirect subsidiary of Macquarie Group Limited and is 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 125 West 55th Street, New York, NY 10019.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent Hertz, and the proceeding is in the public interest.

**ORDER****I.**

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

- A. “Hertz” means Hertz Global Holdings, Inc., its directors, officers, employees, agents, attorneys, representatives, successors, and assigns; and its joint ventures, subsidiaries (including, but not limited to Advantage), divisions, groups and affiliates controlled by Hertz Global Holdings, Inc. (including, after the Effective Date, DTAG), and the respective directors, officers, employees, agents, attorneys, representatives, successors, and assigns of each.
- B. “Advantage” means Simply Wheelz LLC, dba Advantage Rent A Car, its divisions, groups, and affiliates controlled by Simply Wheelz LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “DTAG” means Dollar Thrifty Automotive Group, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of

## Decision and Order

Delaware, with its principal place of business located at 5330 E. 31st Street, Tulsa, OK 74135.

- D. “FSNA” means Franchise Services of North America Inc., a corporation organized, existing and doing business under and by virtue of the laws of Canada, with its principal place of business located at 1052 Highland Colony Parkway, Suite 204, Jackson, Mississippi 39157, and includes its directors, officers, employees, agents, attorneys, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates controlled by Franchise Services of North America Inc., and the respective directors, officers, employees, agents, attorneys, representatives, successors, and assigns of each.
- E. “FSNA/Macquarie” means, after FSNA is re-domiciled as a Delaware corporation and the consummation of the Adreca/FSNA Merger, FSNA as the owner of an Acquirer of all or a portion of the Assets To Be Divested.
- F. “Macquarie” means MIHI LLC, an indirect subsidiary of Macquarie Group Limited, and includes its directors, officers, employees, agents, representatives, successors, and assigns of each.
- G. “Commission” means the Federal Trade Commission.
- H. “Acquirer” means Adreca (including Advantage after the First Closing) and any other Person that receives the prior approval of the Commission to acquire any or all of the Appendix A Airport Concessions, the Appendix B Airport Concessions, the Additional Assets To Be Divested and, as applicable, the Substitute Airport Concessions pursuant to Paragraphs II or IV of this Order.
- I. “Additional Assets To Be Divested” means Airport Concession Agreements with respect to the locations listed in Confidential Appendix C (“Appendix C Airport Concessions”) to this Order and any assets

## Decision and Order

identified on Confidential Appendix C to this Order, to the extent assigned or allocated by the Airport Authority under the applicable Airport Concession Agreements; *provided, however*, if the Commission designates the confidential Airport X Concession Agreements as a Substitute Airport Concession for the confidential Airport Y Concessions, then the Additional Assets To Be Divested shall no longer include the confidential Airport Y Concessions; *provided further* that Additional Assets to Be Divested shall not include any assets identified on Confidential Appendix C that the Acquirer declines to acquire.

- J. “Adreca” means Adreca Holdings Corp., a Delaware corporation incorporated for the purpose of acquiring Advantage from Respondent Hertz, initially wholly owned by Macquarie and, following the re-domiciliation of FSNA as a Delaware corporation and the consummation of the Adreca/FSNA Merger, a wholly owned subsidiary of FSNA.
- K. “Adreca/FSNA Merger” means the merger of Advantage Company Holdings, Inc., a Delaware corporation wholly owned by FSNA, with and into Adreca, pursuant to the Agreement and Plan of Merger, dated as of July 13, 2012, attached as Confidential Appendix F to this Order.
- L. “Advantage Airport Concessions” means the Appendix A Airport Concessions and any other Airport Concession pursuant to an Airport Concession Agreement entered into by Advantage and any Airport Authority prior to the Effective Date.
- M. “Advantage Assets To Be Divested” means Advantage, including, but not limited to all Appendix A Airport Concessions and all of Advantage’s right, title, and interest in and to the Assets and Assets Associated with the Advantage Car Rental Facilities; *provided, however*, if the Commission designates one or more Substitute Airport Concessions and all of DTAG’s rights, titles, and interests in and to the Assets

## Decision and Order

and Assets Associated with such Substitute Airport Concession(s) as an Advantage Asset To Be Divested, then the Advantage Assets To Be Divested shall no longer include such Appendix A Airport Concession(s).

- N. “Airport Authority” means the Person with the authority, whatever the basis (i.e. regulatory, statutory, or contractual), to enter into an Airport Concession Agreement.
- O. “Airport Authority Approvals” means any permissions or sanctions issued by any Airport Authority, including, but not limited to, licenses, permits, authorizations, registrations, certifications, certificates of occupancy, and certificates of need that are required for the Operation Of The Airport Concession, including but not limited to approvals that an Acquirer must have to operate as a new operator of an Advantage Airport Concession acquired prior to the Time of Divestiture, an Appendix B Airport Concession, an Appendix C Airport Concession and, as applicable, a Substitute Airport Concession, or to continue to operate an Appendix A Airport Concession.
- P. “Airport Concession” means a Car Rental Facility serving an airport pursuant to an Airport Concession Agreement between a Person and an Airport Authority.
- Q. “Airport Concession Agreement” means the agreement between a Person and an Airport Authority setting forth the terms and conditions for operating an Airport Concession.
- R. “Airport X Concession Agreements” means the Airport Concession Agreements with respect to the airport listed in Confidential Appendix C-1 and any assets identified in Confidential Appendix C-1 to the extent assigned or allocated by the Airport Authority

## Decision and Order

under the applicable Airport Concession Agreements listed in Confidential Appendix C-1 to this Order.

- S. “Airport Y Concessions” means the Additional Assets To Be Divested relating to the airports listed in Confidential Appendix C as Airport Y.
- T. “Appendix A Airport Concessions” means the Advantage Airport Concessions listed in Confidential Appendix A to this Order, all Advantage’s rights, titles, and interests in and to the Advantage Assets, and the Advantage Assets Associated with each.
- U. “Appendix B Airport Concessions” means the DTAG Airport Concessions listed in Confidential Appendix B to this Order, all DTAG’s rights, titles, and interests in and to the DTAG Assets, and the DTAG Assets Associated with each.
- V. “Assets” means all the assets used in the Operation Of A Car Rental Facility, whether real or personal, tangible and intangible, including, but not limited to:
  - 1. furniture;
  - 2. counter space and products;
  - 3. improvements;
  - 4. fixtures;
  - 5. machinery/equipment including, but not limited to, vehicle moving equipment, floor jacks, stanchions, car washes, etc.;
  - 6. IT equipment including, but not limited to, telephones, printers, computers, etc.;
  - 7. vehicles, including, but not limited to, automobiles available for rental and buses to transport customers from an airport terminal to a Car Rental Facility;
  - 8. infant/child seats;

## Decision and Order

9. signage;
10. telephone numbers;
11. marketing materials;
12. customer lists;
13. GDS Chain Codes;
14. E-toll and tracking devices; and
15. GPS devices.

*Provided, however,* that “Assets” does not include any Excluded Assets.

- W. “Assets Associated” means the following assets Relating To the Operation Of A Car Rental Facility:
1. all rights, including, but not limited to Airport Authority Approvals, to operate at an Airport Concession pursuant to an Airport Concession Agreement;
  2. leases for the Real Property of the Car Rental Facility, including but not limited to
    - a. ready return parking spaces;
    - b. overflow parking spaces; and
    - c. Quick Turn-Around Areas;
  3. consumable or disposable inventory, including, but not limited to, products used to maintain and prepare the applicable Acquirer’s cars being leased from that facility for use as rental cars;
  4. all rights, title and interest of Respondent Hertz or DTAG in any tangible property (except for consumable or disposable inventory) that has been on the premises of a Car Rental Facility at any time since January 1, 2012, including, but not limited to, all

## Decision and Order

equipment, furnishings, fixtures, improvements, and appurtenances;

5. books, records, files, correspondence, manuals, computer printouts, databases, and other documents Relating To the Operation Of The Car Rental Facility located on the premises of the Car Rental Facility or in the possession of the Regional Manager responsible for such Car Rental Facility (or copies thereof where Respondent Hertz or DTAG has a legal obligation to maintain the original document), including, but not limited to:

- a. financial records;
- b. personnel files;
- c. maintenance records;
- d. documents Relating To policies and procedures;
- e. documents Relating To quality control;

except, upon a showing to the satisfaction of the Commission, and only to the extent that a document provides, according to its terms or pursuant to the terms of other binding agreements with such applicable Insurer or Supplier, that it cannot be disclosed to third parties even with the permission of Respondent Hertz to make such disclosure:

- i. documents Relating To Insurers;
  - ii. documents Relating To Suppliers; and
  - iii. copies of contracts with Insurers and Suppliers;
6. all permits and licenses, to the extent transferable;
7. Intangible Property; and

## Decision and Order

8. assets that are used in, or necessary for, the Operation Of The Car Rental Facility.

*Provided, however,* that “Assets Associated” does not include Excluded Assets.

- X. “Assets To Be Divested” means the Advantage Assets To Be Divested, the DTAG Assets To Be Divested and the Additional Assets To Be Divested.
- Y. “Boketo LLC” means the Delaware limited liability company wholly owned by Macquarie that is initially the sole shareholder of Adreca and, following the consummation of the Adreca/FSNA Merger, an equity investor in FSNA.
- Z. “Car Rental Facility” or “Car Rental Facilities” means a facility or facilities at which a rental vehicle is picked up and/or returned.
- AA. “Confidential Business Information” means competitively sensitive, proprietary, and all other information that is not in the public domain owned by or pertaining to a Person or a Person’s business, and includes, but is not limited to, all customer lists, price lists, contracts, cost information, marketing methods, patents, technologies, processes, or other trade secrets.
- BB. “Divestiture Agreement” and “Divestiture Agreements” means:
1. the “Divestiture Agreements,” including but not limited to the Purchase Agreement dated as of July 13, 2012, by and between Adreca and The Hertz Corporation, and all attachments and exhibits (and amendments approved by the Commission), thereto once executed and effective included in Confidential Appendix H to this Order (the “Purchase Agreement”), *provided, however,* that, in the event Adreca is the Acquirer of the Appendix C Airport Concessions, the Divestiture Agreements shall include amendments to the Hertz Senior Note Credit Agreement, the Vehicle



## Decision and Order

Sublease Agreement, the Hawaii Vehicle Lease Agreement and any other exhibits to the Purchase Agreement to remove any impediment to or limitation on Advantage's obtaining financing from a Person other than Respondent Hertz sufficient to acquire additional fleet up to the number of vehicles specified in Confidential Appendix I to this Order, and of additional working capital up to the amount specified in Confidential Appendix I to this Order; and

2. any other agreement pursuant to which Respondent Hertz or a Divestiture Trustee divests all or a portion of the Assets To Be Divested pursuant to this Order and with the prior approval of the Commission.
- CC. "Divestiture Trustee" means the Person appointed to act as trustee by the Commission pursuant to Paragraph IV of this Order.
- DD. "DTAG Assets To Be Divested" means the Appendix B Airport Concessions, and all of DTAG's rights, titles, and interests in and to the Assets and Assets Associated with the Appendix B Airport Concessions; *provided, however*, if the Commission designates one or more Substitute Airport Concessions as a DTAG Asset To Be Divested, then the DTAG Assets To Be Divested shall no longer include such Appendix B Airport Concession(s).
- EE. "DTAG Shares" means the issued and outstanding voting securities of DTAG.
- FF. "Effective Date" means the date on which Respondent Hertz acquires, directly or indirectly, a majority of the DTAG Shares.
- GG. "Employee" means any individual, whether employed by Advantage or Hertz, and any individual, excluding any DTAG regional manager who has had direct supervisory responsibility for a DTAG Asset To Be

## Decision and Order

Divested or any individual to whom any such regional manager reports, directly or indirectly, and who has been employed part-time or full-time for Advantage Rent A Car or an Appendix B Airport Concession at any time since July 13, 2012, regardless of whether the individual has also worked on the premises of any other Car Rental Facility.

HH. “Excluded Assets” means, unless otherwise specifically included in the Purchase Agreement:

1. all cash, cash equivalents, and short term investments of cash;
2. accounts receivable;
3. income tax refunds and tax deposits due Respondent Hertz or DTAG;
4. unbilled costs and fees arising before an Advantage Car Rental Facility, an Appendix B Airport Concession, an Appendix C Airport Concession and, as applicable, a Substitute Airport Concession is divested to an Acquirer;
5. rights to the names “Hertz” and “DTAG” any variations of those names, and any names, phrases, marks, trade names, trademarks, and other Intangible Property, except to the extent to be directly or indirectly sold and conveyed by Respondent Hertz and purchased and acquired by an Acquirer pursuant to the Divestiture Agreements;
6. insurance policies and all claims thereunder;
7. prepaid items or rebates;
8. minute books, tax returns, and other corporate books and records;
9. any inter-company balances due to or from Respondent Hertz and DTAG or their affiliates;

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10. all employee benefits plans;
11. all writings and other items that are protected by the attorney-client privilege, the attorney work product doctrine or any other cognizable privilege or protection, except to the extent such information is necessary to the Operation Of The Car Rental Facility;
12. telecommunication systems equipment and applications, and information systems equipment including, but not limited to computer hardware, not physically located at an Car Rental Facility, but shared with such Car Rental Facility through local and/or wide area networking systems;
13. e-mail addresses and telephone numbers of Respondent Hertz's and DTAG's Employees;
14. Software;
15. computer hardware used in the Operation Of The Car Rental Facility that is (a) not located at the Car Rental Facility, and (b) not otherwise to be divested pursuant to a Divestiture Agreement;
16. all Supplier or provider numbers issued to Respondent Hertz or DTAG by a Supplier or Insurer with respect to any Car Rental Facility;
17. rights under agreements with Insurers and Suppliers that are not assignable even if Respondent Hertz and DTAG approve such assignment;
18. office equipment and furniture that (a) is not, in the Ordinary Course Of Business, physically located at a Car Rental Facility, (b) is shared with Car Rental Facilities other than as Asset To Be Divested, and (c) is not necessary to the Operation Of The Car Rental Facility constituting the Asset To Be Divested;

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19. Licensed Intangible Property;
  20. strategic planning documents that relate to the Operation Of The Car Rental Facility other than an Asset To Be Divested; and are not located on the premises of the Car Rental Facility; and
  21. any other Assets or Assets Associated not assumed or acquired by the applicable Acquirer pursuant to the applicable Divestiture Agreements.
- II. “Expiration Date” means the date one (1) year from the date the Commission accepts the Consent Agreement for public comment.
- JJ. “First Closing” means the date on which Respondent Hertz divests Advantage to an Acquirer pursuant to applicable Divestiture Agreements.
- KK. “GDS Chain Code” means, for a car rental brand, the unique two letter code used by travel agents, online reservation sites, and large corporations in a worldwide computerized reservation network that enables reservation messages to be identified and delivered to the appropriate car rental brand and to facilitate distribution. The GDS Chain Code for Advantage and Simply Wheelz, respectively, is “AD” and “ZH”.
- LL. “Insurer(s)” means any Person(s) that is subject to regulation by a state insurance regulator authority as a result of its payment for losses.
- MM. “Intangible Property” means intangible property Relating To the Operation Of The Car Rental Facility including, but not limited to, intellectual property, Software, computer programs, patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, protocols, quality control information, trademarks, trade names, including, but not limited to the Advantage brand name, service marks, logos, and the modifications or improvements to such intangible property..

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- NN. “Key Employee” means the following full-time positions within FSNA/Macquarie or its Advantage subsidiary encompassing the functions of: President of Advantage; Chief Operating Officer; Chief Financial Officer; Fleet Manager; Pricing Manager; VP Advantage; VP of Marketing; Director of Airport Relations; Director of Operations Systems (TSD Manager); Financial Planning and Analysis Manager; Insurance Subrogation Manager; Yield/Upsell Manager; and Controller/Advantage
- OO. “Licensed Intangible Property” means intangible property licensed to Respondent Hertz from a third party, including intangible property licensed to Respondent Hertz pursuant to its acquisition of DTAG, Relating To the Operation Of The Car Rental Facility including, but not limited to, intellectual property, Software, computer programs, patents, know-how, goodwill, technology, trade secrets, technical information, marketing information, protocols, quality control information, trademarks, trade names, service marks, logos, and the modifications or improvements to such intangible property that are licensed to Respondent Hertz. (“Licensed Intangible Property” does not mean modifications and improvements to intangible property that are not licensed to Respondent Hertz).
- PP. “Management Services Agreement” means the Management Services Agreement, dated as of July 13, 2012, pursuant to which FSNA will, until it is re-domiciled as a Delaware corporation and the consummation of the Adreca/FSNA Merger, manage Advantage upon its divestiture by Respondent Hertz to Adreca. (The Management Services Agreement is attached as Confidential Appendix G to this Order.)
- QQ. “Monitor” means the Person appointed to act as monitor, including any substitute monitor(s) by the Commission pursuant to Paragraph III of this Order.

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- RR. “Monitor Agreement” means the Monitor Agreement dated as of October 15, 2012, between Hertz and Roger H. Ballou. (The Monitor Agreement is attached as Appendix D to this Order. The Monitor Compensation Agreement is attached as Confidential Appendix D-1 to this Order.)
- SS. “Obtain For The Acquirer All The Necessary Airport Authority Approvals” means that Respondent Hertz has, at no cost to an Acquirer, obtained for such Acquirer all Airport Authority Approvals necessary for such Acquirer to operate an Airport Concession.
- TT. “Operation Of A Car Rental Facility” and “Operation Of The Car Rental Facility” mean all activities Relating To the business of a Car Rental Facility, including, but not limited to:
1. owning or leasing and maintaining a fleet of vehicles at the Car Rental Facility;
  2. attracting customers to rent vehicles at the Car Rental Facility;
  3. providing service related to providing a rental vehicle to a customer at the Car Rental Facility;
  4. maintaining, cleaning, and otherwise servicing the cars rented to customers at the Car Rental Facility;
  5. purchasing supplies and equipment for the Car Rental Facility;
  6. negotiating leases for the premises of the Car Rental Facility;
  7. dealing with Insurers of vehicles offered for rent at the Car Rental Facility; and
  8. dealing with Airport Authority Approvals Relating To the Car Rental Facility or that otherwise regulate the Car Rental Facility.

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- UU. “Ordinary Course Of Business” means actions taken by any Person in the ordinary course of the normal day-to-day Operation Of The Car Rental Facility that is consistent with past practices of such Person in the Operation Of The Car Rental Facility, including, but not limited to past practice with respect to amount, timing, and frequency.
- VV. “Other Contracts Of Each Car Rental Facility” means all contracts entered into by Advantage Relating To the Operation Of A Car Rental Facility, where such Car Rental Facility is an Asset To Be Divested, including, but not limited to, contracts for goods and services provided to the Car Rental Facility and contracts with Insurers, and all other contracts Relating To the Operation Of A Car Rental Facility, where such Car Rental Facility is an Asset To Be Divested, to be acquired and assumed by Acquirer under the Divestiture Agreements, but does not mean any lease for the Real Property Of The Car Rental Facility or any contract or agreement with an Airport Authority.
- WW. “Person” means any natural person, partnership, corporation, association, trust, joint venture, government, government agency, or other business or legal entity.
- XX. “Quick Turn-Around Area” means the location on an airport where a rental automobile that has been returned, upon the conclusion of a rental, is washed, cleaned, fueled, and otherwise prepared for the next rental.
- YY. “Real Property Of The Car Rental Facility” means real property on which, or in which, the Car Rental Facility is located, including real property used for ready return parking space, overflow parking spaces, the Quick Turn Around Area, and for other functions Relating To the Operation Of The Car Rental Facility; *provided, however,* that, (i) if an Acquirer is Adreca, the applicable Real Property Of The Car Rental Facility means the real property identified at Schedules 2.9(e)

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and 5.25(a), (b) and (c) of the Seller Disclosure Letter under the Purchase Agreement and (ii) if the applicable Car Rental Facility is conveyed pursuant to any Additional Assets To Be Divested, the applicable Real Property Of The Car Rental Facility means the real property, if any, conveyed by the applicable Airport Concession Agreements.

- ZZ. “Relating To” means pertaining in any way to, and is not limited to that which pertains exclusively to or primarily to.
- AAA. “Software” means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.
- BBB. “Substitute Airport Concession” means any Airport Concession, and all of DTAG’s rights, titles, and interests in and to the Assets and Assets Associated with such Airport Concession, required to be divested pursuant to Paragraph II.A of this Order in lieu of and as a substitute for any Appendix A Airport Concession, any Appendix B Airport Concession or the Appendix Y Airport Concessions for which, at the Time of Divestiture, Respondent Hertz is unable to receive, as necessary, Airport Authority Approvals; *provided, however*, that, in the case of the Airport Y Concessions, “Substitute Airport Concession” shall mean the Airport X Concession Agreements.
- CCC. “Supplier” means any Person that has sold or leased to Respondent Hertz or DTAG any goods or services for use in the Operation Of A Car Rental Facility; *provided, however*, that “Supplier” does not mean an employee of Respondent Hertz or DTAG.
- DDD. “Support Payments” means, with respect to any Airport Concession included in the Additional Assets To Be Divested, the payment by Respondent Hertz to the Acquirer thereof of the “Aggregate Support Payments” listed opposite the name of such Airport Concession in Confidential Appendix C or, if the



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Airport X Concession Agreement, is included in the Additional Assets To Be Divested, Confidential Appendix C-1 to this Order, as follows: one half of such Support Payment at the date of such divestiture and one half of such Support Payment on the first anniversary of the date of such divestiture.

EEE. "Time Of Divestiture" means the date upon which an Asset To Be Divested is required to be divested to an Acquirer pursuant to this Order.

**II.**

**IT IS FURTHER ORDERED** that:

- A. Respondent Hertz shall:
1. no later than the later of fifteen (15) days after the Effective Date or December 12, 2012, divest Advantage and the Advantage Assets To Be Divested to an Acquirer, absolutely, and in good faith, pursuant to and in accordance with the applicable Divestiture Agreements as an on-going business;
  2. divest, absolutely, and in good faith, pursuant to and in accordance with the applicable Divestiture Agreements as on-going businesses the DTAG Assets To Be Divested;
  3. within sixty (60) days after the date Respondent Hertz signed the Agreement Containing Consent Orders in this matter submit for the Commission's prior approval a proposed Divestiture Agreement, signed by Respondent Hertz and the proposed Acquirer, to divest the Additional Assets To Be Divested;
  4. within six (6) months or, in the case of the Airport Y Concessions, nine (9) months after the Effective Date, divest the Additional Assets To Be Divested to one or more Acquirers, absolutely, and in good

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faith, pursuant to and in accordance with the applicable Divestiture Agreements and subject to the Commission's prior approval; and

5. Make all Support Payments to the Acquirer of the Additional Assets To Be Divested according to the timing provided in Paragraph I.CCC.

*Provided, however,* that Respondent Hertz may, at the Time of Divestiture substitute for any Appendix B Airport Concession and the DTAG Assets and Assets Associated therewith an Advantage Airport Concession and the Advantage Assets and Assets Associated therewith serving that airport or, in the case of any Additional Assets To Be Divested, substitute for the applicable Appendix C Airport Concession, an Airport Concession Agreement sufficient to permit the Acquirer to conduct the Operation Of A Car Rental Facility at the applicable airport location in a manner substantially similar to the on-airport operation of either DTAG brand at such airport prior to the applicable divestiture date.

*Provided, however,* that if, within 180 days after the date the Order becomes final, Respondent Hertz has not acquired a majority of the DTAG Shares, the Commission may, in its discretion, notify Respondent Hertz that it shall divest the Assets To Be Divested only pursuant to the following terms:

- B. Respondent Hertz shall not acquire a majority of the DTAG Shares until it receives the Commission's prior approval of (i) any Acquirer(s), including, but not limited to Adreca, Boketo, Macquarie or FSNA/Macquarie; and (ii) the manner of divestiture, including, but not limited to the Divestiture Agreements (for avoidance of doubt, the provisions of Paragraphs II.A.1 and 2 do not constitute "prior approval" if the foregoing proviso in this Paragraph II.A. becomes applicable); and

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- C. Upon obtaining the Commission's prior approval and after acquiring a majority of the DTAG Shares, Respondent Hertz shall divest the Assets To Be Divested at no minimum price, absolutely and in good faith, as an on-going business, no later than ten (10) days from the Effective Date.

*Provided, however,* that, upon notification and the divestiture of the DTAG Shares pursuant to Paragraph II.C of this Order, the foregoing proviso to Paragraph II.A shall be of no further force or effect.

*Provided further,* that, on or before each applicable Time of Divestiture, if Respondent Hertz has demonstrated, to the satisfaction of the Commission after consultation with the Monitor, that Respondent Hertz has not been able to Obtain For The Acquirer All The Necessary Airport Authority Approvals, then for each of the Appendix A Airport Concessions and each of the Appendix B Airport Concessions for which such approval was not obtained, for a period of six (6) months from the date of each applicable Time of Divestiture, the Commission in its sole discretion after consultation with the Monitor may select, consistent with the purpose of this Order as stated at Paragraph II.N, one or more Substitute Airport Concessions for Respondent Hertz to divest to the applicable Acquirer, within ninety (90) days of each such selection and in accordance with Paragraph II.D of this Order, absolutely, and in good faith, pursuant to and in accordance with the Divestiture Agreements as on-going businesses;

*Provided further,* that, on or before the applicable Time of Divestiture, if Respondent Hertz has demonstrated, to the satisfaction of the Commission after consultation with the Monitor, that Respondent Hertz has not been able to Obtain For The Acquirer All The Necessary Airport Authority Approvals for the Airport Y Concessions, then for a period of six (6) months from the date of such Time of Divestiture, the Commission in its sole discretion after consultation

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with the Monitor may designate the Airport X Concession Agreements for Respondent Hertz to divest to the applicable Acquirer, within six (6) months of such designation, absolutely, and in good faith, pursuant to and in accordance with the Divestiture Agreements;

*Provided further*, that if, at the time the Commission determines to make this Order final, the Commission notifies Respondent Hertz that Adreca or FSNA/Macquarie or another Acquirer is not an acceptable Acquirer then, after receipt of such written notification: (1) Respondent Hertz shall immediately notify Macquarie and FSNA or such other Acquirer of the notice received from the Commission and shall as soon as practicable, but no later than within five (5) business days, effect the rescission of the applicable Divestiture Agreements; and (2) Respondent Hertz shall, as a condition to Respondent Hertz's acquisition of a majority of the DTAG Shares: within six (6) months of the date Respondent Hertz receives notice of such determination from the Commission, divest the Assets To Be Divested, absolutely and in good faith, at no minimum price, as on-going businesses to an Acquirer or Acquirers that receive the prior approval of the Commission and only in a manner, including pursuant to a Divestiture Agreement, that receives the prior approval of the Commission;

*Provided further*, that if, at the time the Commission determines to make this Order final, the Commission notifies Respondent Hertz that the manner the divestiture is to be accomplished is not acceptable, the Commission may direct Respondent Hertz or appoint the Divestiture Trustee, to effect such modifications to the manner of divestiture including, but not limited to, entering into additional agreements or arrangements, as the Commission may determine are necessary to satisfy the requirements of this Order;

*Provided further*, that during the thirty (30) days immediately following the Effective Date, Respondent

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Hertz shall not seek to divest the Additional Assets To Be Divested in accordance with Paragraph II.A.3 of this Order to any Acquirer other than Adreca; and

*Provided further*, that, in the Divestiture Agreements with respect to any Additional Assets To Be Divested, Respondent Hertz shall agree to make the Support Payments applicable to such Additional Assets To Be Divested.

- D. The Divestiture Agreements are incorporated by reference into this Order and made a part hereof as Confidential Appendix H. Any failure by Respondent Hertz to comply with the Divestiture Agreements shall constitute a failure to comply with the Order. The Divestiture Agreements shall not vary or contradict, or be construed to vary or contradict, the terms of this Order. Nothing in this Order shall reduce, or be construed to reduce, any rights or benefits of Adreca, Boketo, Macquarie and FSNA/Macquarie or any other Acquirer, or any obligations of Respondent Hertz, under the Divestiture Agreements.
- E. If Respondent Hertz has not acquired a majority of the DTAG Shares as of the Expiration Date, or if within 180 days after the date the Order becomes final Respondent Hertz does not have a letter of intent or agreement to purchase DTAG, Respondent Hertz shall:
1. notify the Commission thereof within five (5) days (“Withdrawal Date”); and
  2. shall divest on the New York Stock Exchange absolutely and in good faith all its interest in DTAG Shares within six (6) months from the earlier of the (i) Expiration Date or (ii) Withdrawal Date.
- F. Respondent Hertz shall:
1. place no restrictions on the use by any Acquirer of any of the Assets To Be Divested that would prohibit their use as a Car Rental Facility;

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2. no later than the applicable Time of Divestiture, Obtain For The Acquirer All The Necessary Airport Authority Approvals for each Appendix A Airport Concession, for each Appendix B Airport Concession and for any Appendix C Airport Concessions. If, by the Time of Divestiture, as applicable, Respondent Hertz has demonstrated, to the satisfaction of the Commission after consultation with the Monitor, that Respondent Hertz is not able to Obtain For The Acquirer All The Necessary Airport Authority Approvals for one or more Appendix A Airport Concession, any Appendix B Airport Concession or the Airport Y Concessions, then for a period of six (6) months after each applicable Time Of Divestiture, Respondent Hertz shall Obtain For The Acquirer All The Airport Authority Approvals for each Substitute Airport Concession that the Commission, pursuant to Paragraph II.A of this Order, requires Respondent Hertz to divest; *provided, however*, that, if after six (6) months after each such applicable Time of Divestiture, Respondent Hertz is, to the satisfaction of the Commission after consultation with the Monitor, not able to Obtain For The Acquirer All The Necessary Airport Authority Approvals for one or more Airport Concessions, including any Substitute Airport Concession Respondent Hertz may request the Commission, pursuant to its Rules of Practice, to relieve Respondent Hertz from any further obligation to divest such Airport Concession(s);
3. at the Time Of Divestiture of each applicable Car Rental Facility assign to the applicable Acquirer all Respondent Hertz's rights, title, and interest to leases for the Real Property Of The Car Rental Facilities, and shall assist such Acquirer to obtain all approvals necessary for such assignments; *provided, however*, that (1) if such Acquirer obtains all rights, title, and interest to a lease for an Car Rental Facility before the Assets To Be

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Divested are divested pursuant to Paragraph II.A of this Order, and (2) such Acquirer acknowledges its receipt of such lease as part of the Divestiture Agreements, then Respondent Hertz shall not be required to make the assignments for such Car Rental Facility as required by this Paragraph; and

4. with respect to all Other Contracts Of Each Car Rental Facility, at the applicable Acquirer's option and at the Time Of Divestiture of each Car Rental Facility:
    - a. if such contract can be assigned without third party approval, assign its rights under the contract to such Acquirer; and
    - b. if such contract can be assigned to such Acquirer only with third party approval, assist and cooperate with such Acquirer in obtaining:
      - i. such third party approval and in assigning the contract to such Acquirer; or
      - ii. a new contract.
- G. Respondent Hertz shall, with regard to each Car Rental Facility to be divested:
1. no later than the Time Of Divestiture of each such Car Rental Facility, provide to the applicable Acquirer contact information about Insurers and Suppliers for such Car Rental Facility, and
  2. not object to the sharing of Insurer and Supplier contract terms required for the Operation of A Car Rental Facility: (i) if the Insurer or Supplier consents in writing to such disclosure upon a request by the applicable Acquirer, and (ii) if such Acquirer enters into a confidentiality agreement with Respondent Hertz not to disclose the information to any third party.

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- H. With regard to the Advantage Employees, from the time Respondent Hertz signs the Consent Agreement and, with regard to the DTAG Employees, from the Effective Date, until sixty (60) days after the Time Of Divestiture of each Car Rental Facility, including, as applicable, each Substitute Airport Concession, Respondent Hertz shall:
1. if requested by the applicable Acquirer, facilitate interviews between each Employee and such Acquirer, and shall not discourage such Employee from participating in such interviews;
  2. not interfere in employment negotiations between each Employee and the applicable Acquirer;
  3. not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict any Employee from being employed by the applicable Acquirer, and shall not offer any incentive to any such Employee to decline employment with such Acquirer;
  4. cooperate with the applicable Acquirer in effecting transfer of the Employee to the employ of such Acquirer, if that Employee accepts such offer of employment from such Acquirer;
  5. eliminate or waive any contractual rights or other restrictions of Respondent Hertz that would otherwise prevent the Employee from being employed by the applicable Acquirer;
  6. eliminate or waive any confidentiality restrictions of Respondent Hertz that would prevent the Employee who accepts employment with the applicable Acquirer from using or transferring to such Acquirer any information Relating To the Operation Of The Car Rental Facility; and
  7. pay, for the benefit of any Employee who accepts employment with the applicable Acquirer, all accrued bonuses, vested pensions and other accrued benefits consistent with the terms of any



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applicable benefit plans except to the extent assumed by such Acquirer under the Divestiture Agreements.

- I. For a period of two (2) years following the Time Of Divestiture of each Asset To Be Divested, Respondent Hertz shall not directly or indirectly, solicit, induce, or attempt to solicit or induce any Employee who is employed by an Acquirer to terminate his or her employment relationship with such Acquirer, unless that employment relationship has already been terminated by such Acquirer; *provided, however*, Respondent Hertz may make general advertisements for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at such Acquirer's Employees; *provided further* that Respondent Hertz may hire employees who apply for employment with Respondent Hertz, as long as such employees were not solicited by Respondent Hertz in violation of this Paragraph; *provided further* that Respondent Hertz may offer employment to any Employee who is employed by an Acquirer in only a part-time capacity, if the employment offered by Respondent Hertz would not, in any way, interfere with the Employee's ability to fulfill his or her employment responsibilities to the applicable Acquirer; *provided further* that Respondent Hertz may offer employment to any Employee who is not a salaried managerial Employee.
- J. For a period of eighteen (18) months following the Time Of Divestiture of each DTAG Airport Concession listed in Confidential Appendix E, Respondent Hertz shall not directly or indirectly attempt to obtain an Airport Concession Agreement for the DTAG brand or brands identified at those airports; *provided, however*, that, with regard to any airport listed in Confidential Appendix E this Paragraph II.H prohibition shall not prohibit Respondent Hertz from (1) seeking to obtain a single Airport Concession Agreement for both the Hertz and one or more DTAG brands at any such airport; (2) if prior to the Time of

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Divestiture, DTAG operates more than one Airport Concession pursuant to separate Airport Concession Agreements for its brands at that airport, from attempting to obtain one Airport Concession Agreement for such DTAG brand or brands; (3) attempting to obtain an Airport Concession Agreement with an airport that is soliciting bids for a new or modified facility scheduled to open at least eighteen (18) months following the Time Of Divestiture at that airport; or (4) seeking to obtain an Airport Concession Agreement for a DTAG brand or brands, if Respondent Hertz submits thirty (30) days prior written notification to Commission staff that such airport has, since the Order became final, increased the number of available Airport Concessions.

- K. Respondent Hertz shall:
1. not, except to the extent required by applicable law or otherwise by any Airport Authority, disclose Confidential Business Information relating exclusively to any of the Assets To Be Divested to any Person other than the applicable Acquirer;
  2. after the Time Of Divestiture of such Asset To Be Divested:
    - a. not use Confidential Business Information relating exclusively to any of the Assets To Be Divested for any purpose other than complying with the terms of this Order or with any law; and
    - b. destroy all records of Confidential Business Information relating exclusively to any of the Assets To Be Divested, except to the extent that: (1) Respondent Hertz is required by law to retain such information or requires such information for financial or regulatory reporting purposes; (2) Respondent Hertz may require such information to perform its obligations under the Divestiture Agreements;

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(3) Respondent Hertz may retain tax and employment records in a manner consistent with its general corporate policies; and (4) Respondent Hertz's inside or outside attorneys may keep one copy solely for archival purposes, but may not disclose such copy to the rest of Respondent Hertz.

3. At the Time Of Divestiture of each Asset To Be Divested, Respondent Hertz shall provide the applicable Acquirer with manuals, instructions, and specifications sufficient for such Acquirer to access and use any information:
  - a. divested to such Acquirer pursuant to this Order, or
  - b. in the possession of such Acquirer, and previously used by Respondent Hertz in the Operation Of The Car Rental Facility.
- L. Respondent Hertz shall convey to the applicable Acquirer the non-exclusive right to use any Licensed Intangible Property (to the extent permitted by the third-party licensor and at such Acquirer's cost and expense), if such right is required for the Operation Of The Car Rental Facility by such Acquirer and if such Acquirer is unable, using commercially reasonable efforts, to obtain equivalent rights from other third parties on commercially reasonable terms and conditions.
- M. Respondent Hertz shall do nothing to prevent or discourage Suppliers that, prior to the Time Of Divestiture of any Car Rental Facility, supplied goods and services for use in such Car Rental Facility from continuing to supply goods and services for use in such Car Rental Facility.
- N. Respondent Hertz shall not terminate the Transition Services Agreement attached to the Purchase Agreement as Exhibit D, or, if Adreca or

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FSNA/Macquarie are not the applicable Acquirer, any transition services agreement that is a part of the Divestiture Agreements before the end of the term approved by the Commission without:

1. the written agreement of the applicable Acquirer and thirty (30) days prior notice to the Commission; or,
  2. in the case of a proposed unilateral termination or declaration of default by Respondent Hertz due to an alleged breach of an agreement by the applicable Acquirer, sixty (60) days notice of such termination or default; *provided however*, that such sixty (60) days notice shall be given only after the parties have:
    - a. attempted to settle the dispute between themselves, and
    - b. engaged in arbitration and received an arbitrator's decision, or
    - c. received a final court decision after all appeals.
- O. The purpose of Paragraph II of this Order is to ensure the continuation of the Assets To Be Divested as ongoing viable enterprises engaged in the same business in which such assets were engaged at the time of the announcement of the acquisition by Respondent Hertz of DTAG, to ensure that the Assets To Be Divested are operated independently of, and in competition with, Respondent Hertz, and to remedy the lessening of competition alleged in the Commission's Complaint.

**III.**

**IT IS FURTHER ORDERED** that:

- A. Roger H. Ballou, shall be appointed Monitor to assure that Respondent Hertz expeditiously complies with all of its

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obligations and performs all of its responsibilities as required by this Order.

- B. No later than one (1) day after the Effective Date, Respondent Hertz shall, pursuant to the Monitor Agreement, attached as Appendix D and Confidential Appendix D-1, and to this Order, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform its duties and responsibilities in a manner consistent with the purposes of this Order.
- C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondent Hertz, which consent shall not be unreasonably withheld. If Respondent Hertz has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Hertz of the identity of any proposed Monitor, Respondent Hertz shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondent Hertz shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent Hertz's compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements in a manner consistent with the purposes of this Order.
- D. Respondent Hertz shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
  - 1. The Monitor shall have the power and authority to monitor Respondent Hertz's compliance with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner

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consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:

- a. assuring that Respondent Hertz expeditiously complies with all of its obligations and performs all of its responsibilities, including, but not limited to the responsibility to Obtain For The Acquirer All The Necessary Airport Authority Approvals as required by this Order, the Order to Maintain Assets, and the Divestiture Agreements;
  - b. monitoring any transition services agreements; and
  - c. assuring that Confidential Business Information is not received or used by Respondent Hertz or the applicable Acquirer, except as allowed in this Order and in the Order to Maintain Assets, in this matter.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
  3. The Monitor shall serve for such time as is necessary to monitor Respondent Hertz's compliance with the provisions of this Order, the Order to Maintain Assets, and the Divestiture Agreements.
  4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Hertz's personnel, books, documents, records kept in the Ordinary Course Of Business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent Hertz's compliance with its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements. Respondent Hertz shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the

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Monitor's ability to monitor Respondent Hertz's compliance with this Order, the Order to Maintain Assets, and the Divestiture Agreements.

5. The Monitor shall serve, without bond or other security, at the expense of Respondent Hertz on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Hertz, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.
6. Respondent Hertz shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.
7. Respondent Hertz shall report to the Monitor in accordance with the requirements of this Order and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondent Hertz, and any reports submitted by the applicable Acquirer with respect to the performance of Respondent Hertz's obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements.

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8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondent Hertz of its obligations under this Order, the Order to Maintain Assets, and the Divestiture Agreements.
  9. Respondent Hertz may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph III.
- 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 this Order, the Order to Maintain Assets, and the Divestiture Agreements.
- H. A Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to Paragraph IV of this Order and may be the same Person appointed as Monitor under the Order to Maintain Assets.



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

- A. If Respondent Hertz has not divested, absolutely and in good faith and with the Commission's prior approval, all of the Assets To Be Divested pursuant to Paragraph II.A. of this Order, the Commission may appoint a Divestiture Trustee to divest any of the Assets To Be Divested that have not been divested pursuant to Paragraph II.A of this Order in a manner that satisfies the requirements of Paragraph II of this Order to one or more Acquirers, which may include negotiations with Airport Authorities regarding Airport Authority Approvals for such Assets To Be Divested. In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent Hertz shall consent to the appointment of a trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph IV shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court appointed trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent Hertz to comply with this Order.
- B. If Respondent Hertz has not submitted for the Commission's prior approval a proposed Divestiture Agreement with an Acquirer for the divestiture of the Additional Assets To Be Divested within sixty (60) days of the date Respondent Hertz signed the Agreement Containing Consent Orders, as required by Paragraph II.A.3, or if the Commission denies its approval for any such proposed Divestiture Agreement

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or Acquirer, the Commission may appoint a Divestiture Trustee (i) to enter into a Divestiture Agreement with an Acquirer for the Additional Assets To Be Divested, and (ii) to divest the Additional Assets To Be Divested to such Acquirer in a manner that satisfies the requirements of Paragraph II of this Order and that receives the prior approval of the Commission.

- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Hertz, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a Person with experience and expertise in acquisitions and divestitures. If Respondent Hertz has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after receipt of notice by the staff of the Commission to Respondent Hertz of the identity of any proposed Divestiture Trustee, Respondent Hertz shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- D. Within ten (10) days after appointment of a Divestiture Trustee, Respondent Hertz shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestitures required by this Order.
- E. If a trustee is appointed by the Commission or a court pursuant to this Order, Respondent Hertz shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
  - 1. Subject to the prior approval of the Commission, the trustee shall have the exclusive power and authority to divest any of the Assets To Be Divested that have not been divested pursuant to Paragraph II.A of this Order.

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2. The trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month period, the trustee has submitted an application for divestiture approval, or if the Commission believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission to review pending applications for divestiture approval and to complete any approved divestitures.
3. Subject to any demonstrated legally recognized privilege, the trustee shall have full and complete access to the personnel, books, records, and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the trustee may request. Respondent Hertz shall develop such financial or other information as the trustee may request and shall cooperate with the trustee. Respondent Hertz shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Hertz shall extend the time for divestiture under this Paragraph IV in an amount equal to the delay, as determined by the Commission or, for a court appointed trustee, by the court.
4. The trustee shall use commercially reasonable best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Hertz's absolute and unconditional obligation to divest expeditiously and at no minimum price; *provided, however,* the trustee may obligate Respondent Hertz to make certain payments with regard to airport concession minimum annual guarantees similar to the obligations in the Purchase

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Agreement and Support Payments (for the Additional Assets To Be Divested); *provided further*, that Respondent Hertz shall not be required to make any other payment pursuant to any such contract or to divest any assets or provide any services other than the Assets To Be Divested; *provided further*, that any such contract shall include provisions that ensure that Respondent Hertz shall not have any continuing liability or financial exposure in the event the Acquirer fails to perform its obligations under any divested Airport Concession Agreement. The divestiture shall be made in the manner and to an Acquirer or Acquirers that receives the prior approval of the Commission, as required by this Order; *provided further*, that if the trustee receives bona fide offers for particular assets from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity for such assets, the trustee shall divest the assets to the acquiring entity selected by Respondent Hertz from among those approved by the Commission; *provided further* that Respondent Hertz shall select such entity within five (5) days of receiving notification of the Commission's approval.

5. The trustee shall serve, without bond or other security, at the cost and expense of Respondent Hertz, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondent Hertz, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the court, of the account of the trustee, including fees for the trustee's services, all remaining monies shall be

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paid at the direction of Respondent Hertz, and the trustee's power shall be terminated. The compensation of the trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondent Hertz shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
  7. The trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
  8. The trustee shall report in writing to Respondent Hertz and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.
  9. Respondent Hertz may require the trustee and each of the trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the trustee from providing any information to the Commission.
- F. If the Commission determines that a trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute trustee in the same manner as provided in this Paragraph IV.

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- G. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.
- H. The trustee appointed pursuant to this Paragraph may be the same Person appointed as the Monitor pursuant to the relevant provisions of this Order or the Order to Maintain Assets.

**V.**

**IT IS FURTHER ORDERED** that if Adreca acquires any or all of the Assets To Be Divested pursuant to Paragraph II.A. of this Order:

- A. Adreca shall, for a period of the shorter of one (1) year from the date this Order becomes final or until the consummation of the Adreca/FSNA Merger, and pursuant to any material failure by FSNA under the Management Services Agreement to meet and sustain the Service Criteria as enumerated therein, notify the Commission: (i) within two (2) days of notifying FSNA of such failure; (ii) thirty (30) days prior to exercising any right to obtain such services from a Person other than FSNA; and (iii) thirty (30) days prior to terminating the Management Services Agreement.
- B. FSNA/Macquarie shall not, for a period of three (3) years from the date this Order becomes final, sell or otherwise convey, directly or indirectly, to any Person without the prior approval of the Commission, any Assets To Be Divested (excluding transactions in the ordinary course of business), including, without limitation, the sale or assignment of any Airport Concession or Airport Concession Agreement; *provided, however*, that this Paragraph V.B shall not apply to the consummation of the Adreca/FSNA Merger or to a sale or conveyance of the Assets To Be Divested through a public placement of shares.

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- C. For a period of three (3) years from the date this Order becomes final, or until any sale of all or substantially all of the Assets To Be Divested as provided in this Paragraph V.B., FSNA/Macquarie:
1. Shall maintain and staff all Key Employee positions, and shall provide thirty (30) days prior notice, or such prior notice as is practicable under the circumstance, to the Commission in the event any Key Employee is removed or otherwise ceases his or her employment; and
  2. Shall replace any Key Employee within thirty (30) days of the date of such Key Employee's removal or cessation of employment.

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

- A. Beginning thirty (30) days after the date this Order becomes final, and every thirty (30) days thereafter until Respondent Hertz has fully complied with Paragraphs II.A through II.K of this Order, Respondent Hertz shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with the terms of this Order, the Order to Maintain Assets, and the Divestiture Agreements. Respondent Hertz shall submit at the same time a copy of these reports to the Monitor.
- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order becomes final, for the next four (4) years, Respondent Hertz shall submit to the Commission verified written reports setting forth in detail the manner and form in which it is complying and has complied with this Order, the Order to Maintain Assets, and the Divestiture Agreements.

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Respondent Hertz shall submit at the same time a copy of these reports to the Monitor.

**VII.**

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

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

**VIII.**

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent Hertz, Respondent Hertz shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Hertz and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondent Hertz related to compliance with this Order, which copying services shall be provided by Respondent Hertz at the request of the authorized representative(s) of the Commission and at the expense of Respondent Hertz; and
- B. Upon five (5) days' notice to Hertz and without restraint or interference from Hertz, to interview officers, directors, or employees of Hertz, who may have counsel present, regarding such matters.



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**IX.**

**IT IS FURTHER ORDERED** that this Order shall terminate on July 10, 2023.

By the Commission, Commissioner Wright not participating.

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**CONFIDENTIAL APPENDIX A**  
**Airport Concessions**

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

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**CONFIDENTIAL APPENDIX B  
DTAG Airport Concessions**

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

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**CONFIDENTIAL APPENDIX C**  
**Additional Assets to be Divested**

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

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**CONFIDENTIAL APPENDIX C-1**  
**Airport X Assets to be Divested**

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

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**APPENDIX D**  
**Monitor Agreement**

MONITOR AGREEMENT

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Between

HERTZ GLOBAL HOLDINGS, INC.

- and -

ROGER H. BALLOU

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Dated as of October 15, 2012

## Decision and Order

## MONITOR AGREEMENT

This Monitor Agreement ("Monitor Agreement"), is made and entered into as of [•], 2012 by and between Roger H. Ballou, an adult individual residing at 301 Via Linda, Palm Beach, FL 33480, and Hertz Global Holdings, Inc., a Delaware corporation ("Hertz" or "Respondent").

## WITNESSETH:

WHEREAS, Hertz may enter into an Agreement Containing Consent Order ("Consent Agreement") with the United States Federal Trade Commission (the "Commission"), which would incorporate a Decision and Order ("Order"), which, among other things, would require Respondent to sell all of its limited liability company interests in Simply Wheelz, LLC ("Simply Wheelz") along with certain other assets in connection with Hertz's acquisition of Dollar Thrifty Automotive Group, Inc., and maintain those assets pending such transfer, and also provide for the appointment of a Monitor to ensure that Respondent complies with its obligations under the Order;

WHEREAS, the Commission may appoint Roger H. Ballou as such monitor (the "Monitor") pursuant to the Order to monitor Respondent's compliance with the terms of the Order and with the pending Order to Maintain Assets to be approved by the Commission in the pending proceeding involving the Respondent (the "Order to Maintain Assets" and, together with the Order, the "Orders"), and to monitor the efforts of the Commission-approved Acquirer (as defined in the Order) to acquire and operate the Assets To Be Divested (as defined in the Order) and take measures to obtain all necessary third-party approvals, as applicable and as defined in the Order, and Roger H. Ballou has consented to such appointment;

WHEREAS, this Monitor Agreement shall conform with the requirements of the Orders and not contradict the Orders;

WHEREAS, this Monitor Agreement, although subject to Commission approval, is effective for any purpose, including but not limited to imposing rights and responsibilities on Respondent or the Monitor under the Orders, upon execution by the parties; and

WHEREAS, the parties to this Monitor Agreement intend to be legally bound;

NOW THEREFORE, in consideration of the mutual covenants and agreements set forth herein and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto hereby covenant and agree as follows:

1. Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Orders.

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2. The Monitor shall have all of the powers, responsibilities and protections conferred upon the Monitor by the Orders. The Orders are hereby attached as Exhibit A to this Monitor Agreement, the terms of which are incorporated herein by reference.

3. Respondent hereby agrees that, upon execution by both parties of this Monitor Agreement, Respondent will fully comply with all terms of the Orders requiring it to confer all rights, powers and authorities upon the Monitor, or to impose upon itself any duties or obligations with respect to the Monitor, to enable the Monitor to perform the duties and responsibilities of the Monitor consistent with the purposes thereunder.

4. Respondent further agrees that:

(a) no later than five (5) Business Days after the Commission approves this Monitor Agreement, it will provide the Monitor with:

(i) a complete description of the Advantage Assets To Be Divested, identifying, in particular, those Advantage Assets To Be Divested which may require actions to maintain their viability and marketability, and the person(s) responsible for taking those actions, and

(ii) a complete list of all Airport Authority Approvals that relate to the transfer of the Advantage Assets To Be Divested, and which relate to Respondent's compliance with the Orders, identifying the person(s) responsible for maintaining or pursuing such activities and giving relevant records relating to such activities;

(b) no later than ten (10) Business Days after the Effective Date, it will provide the Monitor with:

(i) a complete description of the DTAG Assets To Be Divested, identifying, in particular, those DTAG Assets To Be Divested which may require actions to maintain their viability and marketability, and the person(s) responsible for taking those actions, and

(ii) a complete list of all Airport Authority Approvals that relate to the transfer of the DTAG Assets To Be Divested, and which relate to Respondent's compliance with the Orders, identifying the person(s) responsible for maintaining or pursuing such activities and giving relevant records relating to such activities;

(c) it will designate a senior individual as a primary contact for the Monitor and provide a written list of the principal individuals involved in the transfer of the Advantage Assets To Be Divested (and, subsequent to the Effective Date, it will provide a written list of the principal individuals involved in the transfer of the DTAG Assets To Be Divested) to the Commission-approved Acquirer, together with their location, telephone numbers, electronic mail address (if available), and responsibilities, and will provide the Monitor with written notice of any changes in such personnel occurring



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thereafter;

(d) it will provide the Monitor with prompt notification of significant meetings with any third parties, including date, time and venue, scheduled after the execution of this Monitor Agreement, relating to the operation and divestiture of the Advantage Assets To Be Divested (and, subsequent to the Effective Date, relating to the operation and divestiture of the DTAG Assets To Be Divested), and such meetings may be attended by the Monitor or its representative, at the Monitor's option or at the request of the Commission or staff of the Commission;

(e) it will provide the Monitor any minutes of the above-referenced meetings as soon as practicable and, in any event, not later than those minutes are available to any employee of the Respondent;

(f) it will provide the Monitor with electronic or hard copies, as may be appropriate, of all reports submitted to the Commission pursuant to the Consent Agreement and the Orders, simultaneous with the submission of such reports to the Commission;

(g) it will comply with the Monitor's requests for onsite visits and audits of the Advantage Assets To Be Divested (and, subsequent to the Effective Date, of the DTAG Assets To Be Divested);

(h) it will comply with the Monitor's requests for follow-up discussions or supplementary information concerning any reports provided to or requested by the Monitor pursuant to this Monitor Agreement or in connection with any matters the Monitor deems reasonably necessary to perform its responsibilities under the Orders, including, without limitation, meetings and discussions with the principal staff involved in any activities relating to the operation of the Assets To Be Divested and, further including, actions necessary to Obtain For The Acquirer All The Necessary Airport Authority Approvals to operate any of the Assets To Be Divested, to maintain the viability, competitiveness and marketability of the Assets To Be Divested, and to maintain in a manner consistent with the Purchase Agreement the Assets To Be Divested, and will provide the Monitor with access to and hard and electronic copies of all other data, records or other information that the Monitor believes are necessary to the proper discharge of its responsibilities under the Orders; provided, that Respondent's obligations under this paragraph with respect to the DTAG Assets To Be Divested shall not commence until after the Effective Date;

(i) it will provide prompt notice of any significant third party meetings or activities or other events affecting or likely to affect the maintenance of the Advantage Assets To Be Divested (and, subsequent to the Effective Date, the DTAG Assets To Be Divested);

(j) it will report to the Monitor in accordance with Section III.D.7 of the Order;  
and

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(k) it will provide the Monitor with such other information, documents and the like requested by the Monitor in order to carry out its responsibilities under this Monitor Agreement.

5. Except as prohibited by the Commission, Respondent shall promptly notify the Monitor of any significant written or oral communication that occurs after the date of this Monitor Agreement between the Commission and Respondent related to the Orders or this Monitor Agreement, together with electronic or hard copies (or, in the case of oral communications, summaries), as may be requested by the Monitor, of such communications.

6. Respondent agrees that, to the extent authorized by the Orders, the Monitor shall have the authority to employ, at the expense of the Respondent, such consultants, accountants, attorneys and other representatives and assistants (collectively, "Monitor Representatives") as are reasonably necessary to carry out the Monitor's duties and responsibilities, as defined in the Orders, related to the Assets To Be Divested.

7. Respondent and the Monitor understand and agree that the Commission or its staff may request pursuant to and consistent with the Orders, that the Monitor investigate and/or audit the Respondent's compliance with the Respondent's obligations to maintain the Assets To Be Divested pursuant to the Orders and submit such additional written or oral reports, under applicable confidentiality restrictions, to the Commission as the Commission or its staff may at any time request concerning the Respondent's compliance with the Respondent's obligations to maintain assets pursuant to the Orders.

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

(a) any Monitor Representative;

(b) any Commission-approved Acquirer to the extent that the information is of a non-privileged nature and relates to the Assets To Be Divested, *provided however*, that Respondent may redact any content not relating to the Assets To Be Divested; or

(c) persons employed at or by the Commission and working on this matter.

Notwithstanding anything herein to the contrary, Respondent shall use its best efforts to identify and/or label written information in writing it desires to treat as privileged or not to be disclosed to the Commission-approved Acquirer. However, it is understood that to the extent that Respondent fails to so identify such privileged or not to be disclosed information to the Monitor (a "Failure to Identify"), the Monitor shall not have liability for disclosure of same to the Commission-approved Acquirer, unless, notwithstanding a Failure to Identify by Respondent, the Monitor knew or should have known that information was

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privileged or not to be disclosed, and nonetheless discloses such information to the Commission-approved Acquirer.

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

10. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall promptly return to Respondent all materials provided to the Monitor by Respondent that is confidential to Respondent and shall destroy or cause to be destroyed any material prepared by the Monitor or the Monitor Representatives that contains or reflects any confidential information of Respondent provided that the Monitor provides notice to the Commission staff and the Commission staff does not require the Monitor to maintain the materials. Notwithstanding the foregoing, the Monitor shall be entitled to retain for its records, on a confidential basis, any materials or documents developed by it in furtherance of its responsibilities and obligations under this Monitor Agreement, regardless of whether such materials contain confidential information. Nothing herein shall abrogate the Monitor's duty of confidentiality, including the obligation to keep such information confidential for a period of five (5) years after the termination of this Monitor Agreement.

11. In addition and except as otherwise permitted in Section 10 above, the Monitor shall, and shall cause the Monitor Representatives to, keep confidential for a period of five (5) years after the termination of this Monitor Agreement all other aspects of the performance of its duties under this Monitor Agreement and shall not disclose any confidential or proprietary information relating thereto. To the extent that the Monitor wishes to retain any Monitor Representatives in accordance with the Orders, the Monitor shall ensure that such persons execute an appropriate confidentiality agreement with Respondent as a third party beneficiary.

For the purposes of this Section, information shall not be considered confidential or proprietary to the extent that it is or becomes part of the public domain (other than as the result of any action by the Monitor or any Monitor Representative), or to the extent that the recipient of such information can demonstrate that such information was already known to the recipient at the time of receipt from a source other than Respondent or any director, officer, employee, agent, consultant or affiliate of Respondent when such source is entitled to make such disclosure on a non-confidential basis to such recipient.

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

13. The Monitor shall not have a fiduciary responsibility to the Respondent, but, as set forth in the Orders, shall have fiduciary duties to the Commission.

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14. Each party shall be reasonably available to the other to discuss any questions or issues that either party may have concerning compliance with the Orders as it relates to Respondent.

15. Respondent will pay the Monitor in accordance with the fee schedule attached hereto as Confidential Appendix A for all time spent in the performance of the Monitor's duties including all monitoring activities related to the efforts of the Commission-approved Acquirer of the Assets To Be Divested (including any and all such activities performed prior to the date of this Monitor Agreement), all work in connection with the negotiation and preparation of this Monitor Agreement, and all reasonable and necessary travel time. Every six months such hourly rates should be reviewed and may be adjusted by agreement with Respondent.

(a) In addition, Respondent will pay (i) all reasonable out-of-pocket expenses incurred by the Monitor in the performance of the Monitor's duties, including any auto, train or air travel in the performance of the Monitor's duties, international telephone calls, and (ii) all fees and disbursements reasonably incurred by such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties.

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

(c) The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

16. Respondent hereby confirms its obligation to indemnify the Monitor and hold the Monitor harmless in accordance with and to the extent required by the Orders.

Without in any way limiting the generality of the foregoing, Respondent shall indemnify the Monitor and any Monitor Representative (the "Indemnified Parties") and hold the Indemnified Parties harmless (regardless of form of action, whether in contract, statutory law, tort or otherwise) against any losses, claims, damages, liabilities or expenses arising out of or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor or the Indemnified Parties. This section shall survive the termination or expiration of this Monitor Agreement.

17. The Monitor's maximum liability to the Respondent relating to services rendered pursuant to this Monitor Agreement (regardless of the form of the action, whether in

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contract, statutory law, tort, or otherwise) shall be limited to the total sum of the fees paid to the Monitor by Respondent. IN NO CIRCUMSTANCES WHATSOEVER SHALL MONITOR BE LIABLE TO RESPONDENT FOR ANY SPECIAL, INCIDENTAL, CONSEQUENTIAL, OR PUNITIVE DAMAGES. The Monitor is not responsible for evaluating the legal or technical sufficiency of any documents, materials or actions of Respondent or the Commission-approved Acquirer under the Order. The Monitor shall not incur any liability of any nature for the failure of Respondent, any Commission-approved Acquirer, or the Commission to perform any acts, or not perform any acts. This section shall survive the termination or expiration of this Monitor Agreement.

18. Respondent agrees that the Respondent's obligations to indemnify the Monitor and the Indemnified Parties extend to any agreement that is entered between the Monitor and any Commission-approved Acquirer and that relates to the Monitor's responsibilities under this Monitor Agreement or the Orders; provided that such indemnification is available only in respect of the Monitor's or the Indemnified Parties' actions in connection with the performance of the Monitor's duties arising out of this Monitor Agreement and the Orders. This section shall survive the termination or expiration of this Monitor Agreement.

19. Upon this Monitor Agreement and the Consent Agreement each becoming effective, the Monitor shall be permitted, and Respondent shall be required, to notify the Commission-approved Acquirer with respect to this appointment as Monitor.

20. In the event that a disagreement or dispute between Respondent and the Monitor cannot be resolved by the parties, either party may seek the assistance of the individual in charge of the Commission's Compliance Division to resolve this issue. In the event that such disagreement or dispute cannot be resolved by the parties, the parties shall submit the matter to binding arbitration in Bergen County, New Jersey before the American Arbitration Association under its Commercial Arbitration Rules, but only if the individual in charge of the Commission's Compliance Division determines within the Commission's reasonable discretion that such a matter is appropriate for submission to the American Arbitration Association. Binding arbitration shall not be available, however, to resolve any disagreement or dispute concerning the Respondent's obligations pursuant to the Orders.

21. Hertz may terminate this Monitor Agreement at any time prior to the effectiveness of the Consent Agreement. Upon effectiveness of the Consent Agreement, this Monitor Agreement shall terminate when the last obligation under the Orders has been fully performed, or the Commission has either declined to approve this Monitor Agreement or appointed a substitute monitor pursuant to the Orders, *provided however*, that the Commission may extend this Monitor Agreement as may be necessary or appropriate to accomplish the purposes of the Orders. The confidentiality and indemnity obligations of this Monitor Agreement shall survive its termination.

22. In the event that, during the term of this Monitor Agreement, the Monitor becomes aware that he has or may have a conflict of interest that may affect or could have the appearance of affecting the performance by the Monitor of any of his duties

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under this Monitor Agreement, the Monitor shall promptly inform both Respondent and the Commission of such conflict or potential conflict.

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

24. This Monitor Agreement is for the sole benefit of the Parties hereto and their permitted assigns and the Commission, and nothing herein express or implied shall give or be construed to give any other person any legal or equitable rights hereunder.

25. The Monitor shall review the reports, documents and other information provided to Monitor by, or on behalf of, Respondent pursuant to Section 4 of this Monitor Agreement and any other reports submitted by Acquirer with respect to Respondent's performance under the Orders and the Divestiture Agreements (as defined in the Order). Within thirty (30) days from the date on which Respondent signs the Consent Agreement, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondent of its obligations under the Orders.

26. Severability. It is the intent of the parties that the provisions of this Monitor Agreement shall be enforced to the fullest extent permissible under the laws of the State of New Jersey or any other applicable jurisdiction. If any provision of this Monitor Agreement shall be illegal, invalid or unenforceable in the State of New Jersey or in any jurisdiction in which enforcement is sought, then in such jurisdiction only, such provision shall be ineffective to the extent of such illegality, invalidity or unenforceability, without affecting in any way the remaining provisions hereof (and without rendering such provision or any other provision of this Monitor Agreement illegal, invalid or unenforceable in any other jurisdiction), and shall be enforced to the greatest extent permitted by law in such jurisdiction.

27. Notices. All notices, requests, demands, waivers and other communications required or permitted to be given under this Monitor Agreement shall be in writing and shall be deemed to have been duly given if (a) delivered personally, (b) mailed by first-class, registered or certified mail, return receipt requested, postage prepaid or (c) sent by next-day or overnight mail or delivery.

(i) if to Respondent, to:

Hertz Global Holdings, Inc.  
225 Brae Boulevard  
Park Ridge, NJ 07656  
Attention: J. Jeffrey Zimmerman

(ii) if to the Monitor, to:

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Roger H. Ballou  
 301 Via Linda  
 Palm Beach, FL 33480

(iii) if to the Commission, to:

Federal Trade Commission  
 Attn: Anne Schenoff  
 601 New Jersey Avenue, N.W.  
 Washington, DC 20580

or, in each case, at such other address as may be specified in writing to the other parties hereto.

All such notices, requests, demands, waivers and other communications shall be deemed to have been received (x) if by personal delivery, on the day of such delivery, (y) if by certified or registered mail, on the third Business Day after the mailing thereof or (z) if by next-day or overnight mail or delivery, on the day delivered.

28. This Monitor Agreement shall become binding upon execution, although it will be subject to approval by the Commission.

29. The Monitor may terminate this Monitor Agreement upon advance written notice to Respondent and the Commission due to illness or inability to perform the duties required under this Monitor Agreement, *provided however*, that the Monitor agrees to continue to perform the duties as Monitor until the Commission has approved a replacement in accordance with the Order.

30. Miscellaneous.

(a) Entire Agreement. This Monitor Agreement constitutes the entire agreement and supersedes all prior agreements and understandings, both written and oral, between the parties with respect to the subject matter hereof.

(b) Counterparts. This Monitor Agreement may be executed in several counterparts, each of which shall be deemed an original and all of which shall together constitute one and the same instrument.

(c) Governing Law, etc. This Monitor Agreement shall be governed in all respects, including as to validity, interpretation and effect, by the internal laws of the State of New Jersey, without giving effect to the conflict of laws rules thereof to the extent that the application of the law of another jurisdiction would be required thereby. In the event of a disagreement or dispute which the individual in charge of the Commission's Compliance Division determines is not appropriate for submission to the American Arbitration Association in accordance with Section 20, Respondent and Monitor hereby (j) irrevocably submit to the exclusive jurisdiction of the federal or state courts located in the State of New Jersey, solely in respect of the interpretation and

## Decision and Order

enforcement of the provisions of this Monitor Agreement and of the documents referred to in this Monitor Agreement, (ii) waive, and agree not to assert, as a defense in any action, suit or proceeding for the interpretation or enforcement hereof or of any such document, that it is not subject thereto or that such action, suit or proceeding may not be brought or is not maintainable in said court or that the venue thereof may not be appropriate or that this Monitor Agreement or any of such documents may not be enforced in or by said court, (iii) irrevocably agree that all claims with respect to such action or proceeding shall be heard and determined in the federal or state courts located in the State of New Jersey and (iv) consent to and grant said court jurisdiction over the person of such parties and over the subject matter of any such dispute and agree that mailing of process or other papers in connection with any such action or proceeding in the manner provided in Section 27, or in such other manner as may be permitted by law, shall be valid and sufficient service thereof.

(d) Binding Effect. This Monitor Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and permitted assigns.

(e) Assignment. This Monitor Agreement shall not be assignable or otherwise transferable by any party hereto without the prior written consent of the other party hereto.

(f) Amendment; Waivers, etc. No amendment, modification or discharge of this Monitor Agreement, and no waiver hereunder, shall be valid or binding unless set forth in writing and duly executed by the party against whom enforcement of the amendment, modification, discharge or waiver is sought. No waiver of any provision of this Monitor Agreement shall be implied from any course of dealing between the parties hereto or from any failure by either party hereto to assert its rights hereunder on any occasion or series of occasions and no waiver of any right hereunder shall operate as a continuing waiver or as a waiver of any right or of the same or a similar right on another occasion. The rights and remedies herein provided are cumulative and are not exclusive of any rights or remedies that any party may otherwise have at law or in equity.

(g) Construction. Unless the context otherwise requires, as used in this Monitor Agreement (a) "or" is not exclusive, (b) "including" and its variants mean "including, without limitation" and its variants, (c) words defined in the singular have the parallel meaning in the plural and vice versa, (d) words of one gender shall be construed to apply to each gender, (e) the terms "hereof", "herein", "hereby", "hereto", and derivative or similar words refer to this entire Monitor Agreement, (f) the term "Section" refers to the specified Section of this Monitor Agreement, (g) any grammatical form or variant of a term defined in this Monitor Agreement shall be construed to have a meaning corresponding to the definition of the term set forth herein or therein, and (h) a reference to any person includes such person's successors and permitted assigns.

The parties hereto have participated jointly in the negotiation and drafting of this Monitor Agreement. In the event of an ambiguity or question of intent or interpretation arises, this Monitor Agreement shall be construed as if drafted jointly by the parties



Decision and Order

hereto and no presumption or burden of proof shall arise in favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Monitor Agreement.

*signature page immediately follows*

Decision and Order

IN WITNESS OF WHICH the parties have executed this Monitor Agreement as a deed on the date first set out above.

HERTZ GLOBAL HOLDINGS, INC.

By: J. Jeffrey Zimmerman  
J. Jeffrey Zimmerman  
Sr. Vice President, General Counsel  
and Secretary

MONITOR

By: Roger H. Ballou  
Roger H. Ballou

Decision and Order

**CONFIDENTIAL APPENDIX D-1  
Monitor Compensation Agreement**

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

Decision and Order

**CONFIDENTIAL APPENDIX E**  
**Paragraph II.H. Airport Concessions**

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

Decision and Order

**CONFIDENTIAL APPENDIX F**  
**Agreement and Plan of Merger**

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

## Order to Maintain Assets

**ORDER TO MAINTAIN ASSETS**

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

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

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

1. Respondent Hertz is a corporation organized, existing and doing business under the laws of the State of Delaware with its office and principal place of

## Order to Maintain Assets

business located at 225 Brae Boulevard, Park Ridge, NJ 07656-1888.

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

**I. ORDER**

**IT IS ORDERED** that all capitalized terms used in this Order to Maintain Assets, but not defined herein, shall have the meanings attributed to such terms in the Decision and Order contained in the Consent Agreement. In addition to the definitions in Paragraph I of the Decision and Order attached to the Agreement Containing Consent Orders, the following definitions shall apply:

- A. “Acquisition” means the acquisition of DTAG by Hertz.
- B. “Decision and Order” means:
  1. the Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and
  2. the Final Decision and Order issued and served by the Commission.
- C. “Divestiture Date” means the earliest date on which the divestiture of the Advantage Assets To Be Divested required by the Decision and Order has been completed.
- D. “Monitor” means any monitor appointed pursuant to Paragraph VI of this Hold Separate Order.
- E. “Orders” means the Decision and Order and this Order to Maintain Assets.

## Order to Maintain Assets

**II. (Advantage Asset Maintenance)****IT IS FURTHER ORDERED** that:

- A. From the date Respondent Hertz signs the Consent Agreement until the Divestiture Date, Respondent Hertz shall:
1. Maintain in a manner consistent with the Purchase Agreement each of the Advantage Assets To Be Divested in substantially the same condition (except for normal wear and tear) existing at the time Respondent Hertz signs the Consent Agreement;
  2. Take such actions that are consistent with the past practices of Respondent Hertz in connection with each of the Advantage Assets To Be Divested and that are taken in the Ordinary Course Of Business and in the normal day-to-day operations of Respondent Hertz;
  3. Keep available the services of the current officers, employees, and agents of Respondent Hertz necessary for the operation of the Advantage Assets To Be Divested; and maintain the relations and good will with, as applicable, Airport Authorities, Suppliers, customers, landlords, employees, agents, and others having business relations with the Advantage Assets To Be Divested with them in the Ordinary Course Of Business;
  4. Preserve in a manner consistent with the Purchase Agreement the Advantage Assets To Be Divested as ongoing businesses and not take any affirmative action, or fail to take any action within Respondent Hertz's control, as a result of which the viability, competitiveness, and marketability of the Advantage Assets To Be Divested would be diminished.



## Order to Maintain Assets

- B. From the date Respondent Hertz signs the Consent Agreement until the Divestiture Date, Respondent Hertz shall:
1. Not object to the sharing with the applicable Acquirer the Supplier contract terms necessary to the Operation of a Car Rental Facility: (i) if the Supplier consents in writing to such disclosure upon a request by the applicable Acquirer, and (ii) if such Acquirer enters into a confidentiality agreement with Respondent Hertz not to disclose the information to any third party; and
  2. Cooperate with the applicable Acquirer and assist such Acquirer, at no cost to such Acquirer and for each Advantage Airport Concession to be divested, in obtaining all Airport Authority Approvals required for the Operation Of The Airport Concessions.
- C. The purposes of this Paragraph II are to: (1) preserve the Advantage Assets To Be Divested as viable, competitive, and ongoing businesses until the divestitures required by the Decision and Order are achieved; (2) prevent interim harm to competition pending the relevant divestitures and other relief; and (3) help remedy any anticompetitive effects of the proposed Acquisition as alleged in the Commission's Complaint.

**III. (DTAG Asset Maintenance)****IT IS FURTHER ORDERED** that:

- A. For each of the DTAG Assets To Be Divested, from the Effective Date until the date each such asset is divested, Respondent Hertz shall:
1. Maintain in a manner consistent with the Purchase Agreement each of the DTAG Assets To Be Divested in substantially the same condition (except for normal wear and tear) existing at the Effective Date;

## Order to Maintain Assets

2. Take such actions in connection with each of the DTAG Assets To Be Divested that are consistent with those taken in the Ordinary Course Of Business and in the normal day-to-day operations of Respondent Hertz;
  3. Keep available the services of the current officers, employees, and agents of DTAG necessary for the operation of the DTAG Assets To Be Divested; and maintain the relations and good will with, as applicable, Airport Authorities, Suppliers, customers, landlords, employees, agents, and others having business relations with the DTAG Assets To Be Divested with them in the Ordinary Course Of Business;
  4. Preserve in a manner consistent with the Purchase Agreement the DTAG Assets To Be Divested as ongoing businesses and not take any affirmative action, or fail to take any action within Respondent Hertz's control, as a result of which the viability, competitiveness, and marketability of the DTAG Assets To Be Divested would be diminished.
- B. From the Effective Date until the applicable Time of Divestiture, Respondent Hertz shall:
1. Not object to the sharing with the applicable Acquirer the Supplier contract terms necessary to the Operation of a Car Rental Facility: (i) if the Supplier consents in writing to such disclosure upon a request by the applicable Acquirer, and (ii) if such Acquirer enters into a confidentiality agreement with Respondent Hertz not to disclose the information to any third party; and
  2. Cooperate with the applicable Acquirer and assist such Acquirer, at no cost to such Acquirer and for each DTAG Airport Concession to be divested, in obtaining all Airport Authority Approvals required for the Operation Of The Airport Concessions.

## Order to Maintain Assets

- C. The purposes of this Paragraph III are to: (1) preserve the DTAG Assets To Be Divested as viable, competitive, and ongoing businesses until the divestitures required by the Decision and Order are achieved; (2) prevent interim harm to competition pending the relevant divestitures and other relief; and (3) help remedy any anticompetitive effects of the proposed Acquisition as alleged in the Commission's Complaint.

**IV. (Additional Asset Maintenance)****IT IS FURTHER ORDERED** that:

- A. For each of the Additional Assets To Be Divested, from the Effective Date until each such asset is divested, Respondent Hertz shall:
1. Maintain in a manner consistent with the applicable Divestiture Agreement each of the Additional Assets To Be Divested in substantially the same condition (except for normal wear and tear) existing at the Effective Date;
  2. Take such actions that are consistent with the past practices of Respondent Hertz in connection with each of the Additional Assets To Be Divested and that are taken in the Ordinary Course of Business and in the normal day-to-day operations of Respondent Hertz;
  3. Keep available the services of the current officers, employees, and agents of the Additional Assets To Be Divested necessary for the operation of the Additional Assets To Be Divested; and maintain the relations and good will with, as applicable, Airport Authorities, Suppliers, customers, landlords, employees, agents, and others having business relations with the Additional Assets To Be Divested with them in the Ordinary Course Of Business; and

## Order to Maintain Assets

4. Preserve in a manner consistent with the applicable Divestiture Agreement, if any, the Additional Assets To Be Divested and not take any affirmative action, or fail to take any action within Respondent Hertz's control, as a result of which the viability, competitiveness, and marketability of the Additional Assets To Be Divested would be diminished.
- B. From the Effective Date until the applicable Time of Divestiture, Respondent Hertz shall:
1. Not object to the sharing with the applicable Acquirer the Supplier contract terms necessary to the Operation of a Car Rental Facility: (i) if the Supplier consents in writing to such disclosure upon a request by such Acquirer, and (ii) if such Acquirer enters into a confidentiality agreement with Respondent Hertz not to disclose the information to any third party; and
  2. Cooperate with the applicable Acquirer and assist such Acquirer, at no cost to such Acquirer and for all Additional Assets To Be Divested to be divested, in obtaining all Airport Authority Approvals required for the Operation Of The Airport Concessions.
- C. The purposes of this Paragraph IV are to: (i) preserve the Additional Assets To Be Divested until the divestitures required by the Decision and Order are achieved; (2) prevent interim harm to competition pending the relevant divestitures and other relief; and (3) help remedy any anticompetitive effects of the proposed Acquisition as alleged in the Commission's Complaint.

**V. (Divestiture Requirements)**

**IT IS FURTHER ORDERED** that at the Time Of Divestiture of each Appendix A Airport Concession or, if required, each Substitute Airport Concession required to be divested in lieu of such Appendix A Airport Concession,

## Order to Maintain Assets

Respondent Hertz shall assign to the applicable Acquirer all rights, title, and interest to that Airport Concession, and shall obtain all necessary Airport Authority Approvals, subject to Paragraph II of the Decision and Order; *provided, however*, that (1) if such Acquirer obtains all rights, title, and interest to an Appendix A Airport Concession, or a Substitute Airport Concession, before the Advantage Assets To Be Divested are divested pursuant to Paragraph II.A.2 of the Decision and Order, and (2) such Acquirer certifies its receipt of such Airport Authority Approval and attaches it as part of the Divestiture Agreement, then Respondent Hertz shall not be required to make the assignments for such Airport Concessions as required by this Paragraph.

**VI. (Facilitate Hiring)**

**IT IS FURTHER ORDERED** that, with regard to Advantage Employees, from the time Respondent Hertz signs the Consent Agreement and, with regard to DTAG Employees, from the Effective Date until sixty (60) days after the Time Of Divestiture of each Car Rental Facility, including any Substitute Airport Concession designated by the Commission in lieu of any such Car Rental Facility, whichever is later:

- A. Respondent Hertz shall, if requested by the applicable Acquirer, facilitate interviews between each Employee and such Acquirer, and shall not discourage such Employee from participating in such interviews;
- B. Respondent Hertz shall not interfere in employment negotiations between any Employee and the applicable Acquirer;
- C. Respondent Hertz shall not prevent, prohibit or restrict or threaten to prevent, prohibit or restrict any Employee from being employed by the applicable Acquirer, and shall not offer any incentive to any such Employee to decline employment with such Acquirer;
- D. Respondent Hertz shall cooperate with the applicable Acquirer in effecting transfer of the Employee to the

## Order to Maintain Assets

employ of such Acquirer, if that Employee accepts such offer of employment from such Acquirer;

- E. Respondent Hertz shall eliminate any contractual provisions or other restrictions that would otherwise prevent the Employee from being employed by the applicable Acquirer;
- F. Respondent Hertz shall eliminate or waive any confidentiality restrictions of Respondent Hertz that would prevent the Employee who accepts employment with the applicable Acquirer from using or transferring to such Acquirer any information Relating To the Operation Of The Car Rental Facility; and
- G. Respondent Hertz shall pay, for the benefit of any Employee who accepts employment with the applicable Acquirer, all accrued bonuses, vested pensions and other accrued benefits consistent with the terms of any applicable benefit plans except to the extent assumed by such Acquirer under the applicable Divestiture Agreements.

**VII. (Monitor)**

**IT IS FURTHER ORDERED** that:

- A. Roger Ballou shall be appointed Monitor to assure that Respondent Hertz expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order to Maintain Assets and the Decision and Order.
- B. No later than one (1) day after the Effective Date, Respondent Hertz shall, pursuant to the Monitor Agreement, attached as Appendix A and Confidential Appendix A-1, and to this Order to Maintain Assets, transfer to the Monitor all the rights, powers, and authorities necessary to permit the Monitor to perform its duties and responsibilities in a manner consistent with the purposes of this Order to Maintain Assets.

## Order to Maintain Assets

- C. In the event a substitute Monitor is required, the Commission shall select the Monitor, subject to the consent of Respondent Hertz, which consent shall not be unreasonably withheld. If Respondent Hertz has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent Hertz of the identity of any proposed Monitor, Respondent Hertz shall be deemed to have consented to the selection of the proposed Monitor. Not later than ten (10) days after appointment of a substitute Monitor, Respondent Hertz shall execute an agreement that, subject to the prior approval of the Commission, confers on the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent Hertz's compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements in a manner consistent with the purposes of this Order to Maintain Assets and the Decision and Order.
- D. Respondent Hertz shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
1. The Monitor shall have the power and authority to monitor Respondent Hertz's compliance with the terms of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to:
    - a. Assuring that Respondent Hertz expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements;

## Order to Maintain Assets

- b. Monitoring any transition services agreements;  
and
  - c. Assuring that Confidential Business Information is not received or used by Respondent Hertz or the applicable Acquirer, except as allowed in the Decision and Order, in this matter.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
  3. The Monitor shall serve for such time as is necessary to monitor Respondent Hertz's compliance with the provisions of this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements.
  4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Hertz's personnel, books, documents, records kept in the Ordinary Course Of Business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent Hertz's compliance with its obligations under this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements. Respondent Hertz shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Hertz's compliance with this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements.
  5. The Monitor shall serve, without bond or other security, at the expense of Respondent Hertz on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Hertz, such consultants, accountants, attorneys and other representatives



## Order to Maintain Assets

and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

6. Respondent Hertz shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor.
7. Respondent Hertz shall report to the Monitor in accordance with the requirements of this Order to Maintain Assets and/or as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondent Hertz, and any reports submitted by the applicable Acquirer with respect to the performance of Respondent Hertz's obligations under this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements.
8. Within one (1) month from the date the Monitor is appointed pursuant to this paragraph, every sixty (60) days thereafter, and otherwise as requested by the Commission, the Monitor shall report in writing to the Commission concerning performance by Respondent Hertz of its obligations under this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements.

## Order to Maintain Assets

9. Respondent Hertz may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Monitor from providing any information to the Commission.
- E. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement Relating To Commission materials and information received in connection with the performance of the Monitor's duties.
- F. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph VII.
- 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 this Order to Maintain Assets, the Decision and Order, and the Divestiture Agreements.
- H. The Monitor appointed pursuant to this Order may be the same Person appointed as Monitor or Divestiture Trustee under the Decision and Order.

**VIII. (Compliance Reports)**

**IT IS FURTHER ORDERED** that within thirty (30) days after the date this Order to Maintain Assets becomes final, and every sixty (60) days thereafter until the Order to Maintain Assets terminates, Respondent Hertz shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order to Maintain Assets and the related Decision and Order; provided, however, that, after the Decision and Order in this matter becomes final, the reports due under this Order to

## Order to Maintain Assets

Maintain Assets shall be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondent Hertz pursuant to the Decision and Order.

**IX. (Change in Hertz)**

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

- A. Any proposed dissolution of Respondent Hertz,
- B. Any proposed acquisition, merger or consolidation of Respondent Hertz, other than the acquisition of the DTAG shares or any merger of Respondent Hertz and DTAG, or
- C. Any other change in Respondent Hertz 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 Hertz.

**X. (Access)**

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondent Hertz, Hertz shall permit any duly authorized representative of the Commission:

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

## Analysis to Aid Public Comment

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

**XI. (Termination)**

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

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The latter of:
1. the day after the Divestiture Date; or
  2. the day after the Commission otherwise directs that this Order to Maintain Assets is terminated.

By the Commission, Commissioner Rosch dissenting.

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

The Federal Trade Commission ("Commission") has accepted from Hertz Global Holdings, Inc. ("Hertz"), subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement"), which is designed to remedy the anticompetitive effects resulting from Hertz's proposed acquisition of Dollar Thrifty Automotive Group, Inc. ("Dollar Thrifty"). Under the terms of the Consent Agreement, Hertz will divest its Advantage Rent A Car ("Advantage") business as well as the right to operate

Analysis to Aid Public Comment

at 16 additional Dollar Thrifty on-airport locations at which Advantage does not yet operate to Franchise Services of North America, Inc. (“FSNA”) and Macquarie Capital USA Inc. (“Macquarie”) (collectively “FSNA/Macquarie”). Hertz will also divest 13 additional Dollar Thrifty on-airport locations to FSNA/Macquarie or another buyer, subject to the approval of the Commission, following the closing of its acquisition of Dollar Thrifty.

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

Pursuant to an Agreement and Plan of Merger dated August 26, 2012, Hertz plans to acquire Dollar Thrifty for approximately \$2.3 billion. The Commission’s Complaint alleges that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in the market for airport car rentals.

## **II. The Parties**

Hertz, headquartered in Park Ridge, New Jersey, is a global supplier of automobile and equipment rentals and related products and services. The company provides car rentals to consumers at virtually every large or medium-sized commercial airport in the United States.

Dollar Thrifty is headquartered in Tulsa, Oklahoma, and supplies automobile rentals to customers throughout the United States and Canada. In the United States, Dollar Thrifty is present at most major airports, and it operates 86 company-owned airport locations.

## Analysis to Aid Public Comment

**III. The Relevant Product and Structure of the Markets**

The acquisition threatens to harm competition in the airport car rental market. Airport car rentals consist of car rentals made to consumers at airport locations. Airport car rentals are a distinct relevant market because alternative modes of transportation, such as a taxis or buses, are not reasonable substitutes. Other forms of transportation do not provide the convenience, autonomy, or cost efficiency of renting a car, and, as a practical matter, customers are unlikely to turn to these alternative forms of transportation in response to a small but significant increase in airport car rental prices. There are two categories of airport car rentals: those made to individual customers; and contracted rentals that are available only to volume purchasers, such as corporate or government customers who have pre-negotiated car rental contracts and tour operators offering vacation packages. The competitive concerns associated with the proposed transaction are similar whether the market is viewed as an overall airport car rental market, or as a narrower one excluding rentals made pursuant to pre-negotiated rates and terms.

There are four major competitors operating in the airport car rental market: Hertz, which operates the Advantage and Hertz brands; Dollar Thrifty, which operates the Dollar and Thrifty brands; Avis Budget Group, Inc., which operates the Avis and Budget brands; and Enterprise Holdings, Inc., which operates the National, Alamo, and Enterprise brands. Market shares vary by individual airport, but on a national level these four firms account for approximately 98% of all U.S. airport car rentals.

The relevant geographic markets in which to evaluate the competitive effects of the acquisition are 72 individual airport locations:

- a. Albuquerque, New Mexico (Albuquerque International Sunport Airport)
- b. Atlanta, Georgia (Hartsfield-Jackson International Airport)
- c. Austin, Texas (Austin-Bergstrom International Airport)
- d. Baltimore, Maryland (Baltimore/Washington International Thurgood Marshall Airport)

## Analysis to Aid Public Comment

- e. Boston, Massachusetts (Logan International Airport)
- f. Burbank, California (Burbank Bob Hope Airport)
- g. Burlington, Vermont (Burlington International Airport)
- h. Charleston, South Carolina (Charleston International Airport)
- i. Charlotte, North Carolina (Charlotte Douglas International Airport)
- j. Chicago, Illinois (Chicago Midway International Airport)
- k. Chicago, Illinois (Chicago O'Hare International Airport)
- l. Cincinnati, Ohio (Cincinnati/Northern Kentucky International Airport)
- m. Cleveland, Ohio (Cleveland Hopkins International Airport)
- n. Colorado Springs, Colorado (Colorado Springs Airport)
- o. Dallas, Texas (Dallas Love Field Airport)
- p. Dallas, Texas (Dallas/Fort Worth International Airport)
- q. Detroit, Michigan (Detroit Metro Airport)
- r. Denver, Colorado (Denver International Airport)
- s. Des Moines, Iowa (Des Moines Airport)
- t. El Paso, Texas (El Paso Airport)
- u. Fort Lauderdale, Florida (Fort Lauderdale-Hollywood Airport)
- v. Fort Myers, Florida (Southwest Florida International Airport)
- w. Fort Walton Beach, Florida (Fort Walton Beach Regional Airport)
- x. Harlingen, Texas (Valley International Airport)
- y. Hartford, Connecticut (Bradley International Airport)
- z. Hilo, Hawaii (Hilo International Airport)
- aa. Honolulu, Hawaii (Honolulu International Airport)
- bb. Houston, Texas (George Bush Intercontinental Airport)
- cc. Houston, Texas (William P. Hobby Airport)
- dd. Jacksonville, Florida (Jacksonville International Airport)
- ee. Kahului, Hawaii (Kahului Airport)
- ff. Las Vegas, Nevada (McCarran International Airport)

## Analysis to Aid Public Comment

- gg. Lihue, Hawaii (Lihue Airport)
- hh. Los Angeles, California (Los Angeles International Airport)
- ii. Louisville, Kentucky (Louisville International Airport)
- jj. Manchester, New Hampshire (Manchester-Boston Regional Airport)
- kk. Miami, Florida (Miami International Airport)
- ll. Milwaukee, Wisconsin (Milwaukee International Airport)
- mm. Minneapolis-St. Paul, Minnesota (Minneapolis-St. Paul International Airport)
- nn. Nashville, Tennessee (Nashville International Airport)
- oo. New York, New York (LaGuardia Airport)
- pp. New York, New York (John F. Kennedy International Airport)
- qq. Newark, New Jersey (Newark Liberty International Airport)
- rr. Norfolk, Virginia (Norfolk International Airport)
- ss. Oakland, California (Oakland International Airport)
- tt. Oklahoma City, Oklahoma (Will Rogers World Airport)
- uu. Omaha, Nebraska (Omaha Airport)
- vv. Los Angeles, California (Ontario International Airport)
- ww. Orange County, California (John Wayne Airport)
- xx. Orlando, Florida (Orlando International Airport)
- yy. Pensacola, Florida (Pensacola International Airport)
- zz. Phoenix, Arizona (Sky Harbor Airport)
- aaa. Pittsburgh, Pennsylvania (Pittsburgh International Airport)
- bbb. Portland, Oregon (Portland International Airport)
- ccc. Providence, Rhode Island (T.F. Green Airport)
- ddd. Raleigh-Durham, North Carolina (Raleigh-Durham International Airport)
- eee. Reno, Nevada (Reno-Tahoe International Airport)
- fff. Richmond, Virginia (Richmond International Airport)
- ggg. Sacramento, California (Sacramento International Airport)
- hhh. Salt Lake City, Utah (Salt Lake City International Airport)
- iii. San Antonio, Texas (San Antonio International Airport)



## Analysis to Aid Public Comment

- jjj. San Diego, California (San Diego International Airport)
- kkk. Sanford, Florida (Orlando-Sanford International Airport)
- lll. San Francisco, California (San Francisco International Airport)
- mmm. San Jose, California (Norman Y. Mineta San Jose International Airport)
- nnn. Sarasota, Florida (Sarasota Bradenton International Airport)
- ooo. Seattle, Washington (Seattle-Tacoma International Airport)
- ppp. Tampa, Florida (Tampa International Airport)
- qqq. Tulsa, Oklahoma (Tulsa International Airport)
- rrr. Washington, District of Columbia (Ronald Reagan National Airport)
- sss. Washington, District of Columbia (Washington Dulles International Airport)
- ttt. West Palm Beach, Florida (Palm Beach International Airport)

**IV. Entry**

Neither new entry nor repositioning and expansion sufficient to deter or counteract the anticompetitive effects of the proposed acquisition is likely to occur within two years. A new entrant to the airport car rental market would face significant obstacles, as entering the airport car rental business on an efficient scale is both expensive and time-consuming. In order to compete effectively across geographic markets, a new entrant must have concession contracts in place that allow it to operate at each individual airport, establish brand identity, gain access to online travel agencies and other distribution channels, and be of a size sufficient to achieve economies of scale. Further, in order to draw customers, a new entrant would have to develop a reputation for quality and reliability, and it would take at least several years to acquire a reputation on par with the existing national firms. These entry barriers have limited existing fringe firms from expanding beyond their regional footprints and collective low single-digit market share. Accordingly, new entry would not be timely, likely, or sufficient to counteract the anticompetitive effects that would arise as a result of the acquisition.

## Analysis to Aid Public Comment

**V. Effects of the Acquisition**

Hertz and Dollar Thrifty are two of four major competitors in markets for airport car rentals. By eliminating the substantial competition between Hertz and Dollar Thrifty, the proposed acquisition would cause consumers of airport car rentals to pay higher prices and experience reduced levels of service and slower innovation rates.

With only four suppliers of national significance, the markets for airport car rentals are already highly concentrated. In many instances, Hertz and Dollar Thrifty compete head-to-head for the sale of airport car rentals in each relevant market. Among other ways of competing with Dollar Thrifty, Hertz's low-priced Advantage brand is positioned similarly to Dollar Thrifty in terms of price, features, and customer service, and Hertz's incentive to continue to expand Advantage would be reduced significantly post-acquisition. The elimination of the direct current and future competition between Hertz and Dollar Thrifty would allow Hertz to increase prices, slow the pace of innovation, and/or decrease service levels. In addition, the fact that only three firms would own all of the most competitively significant brands after the proposed acquisition leads to an increased likelihood of coordination among the remaining competitors.

**VI. The Consent Agreement**

The proposed Consent Agreement resolves the acquisition's anticompetitive effects by requiring Hertz to divest its entire Advantage business as well as 16 additional on-airport locations to FSNA/Macquarie. This divestiture will effectively replicate the loss of current and future competition that would occur if Hertz acquires Dollar Thrifty. Also, by creating a new independently-owned competitor with a national footprint, the Consent Agreement effectively addresses the threat of increased coordinated interaction among the remaining competitors. The Consent Agreement also requires that Hertz divest 13 additional Dollar Thrifty airport concession agreements and related assets to a Commission-approved buyer, whether FSNA/Macquarie or another acquirer, within 60 days of the closing of the acquisition.

## Analysis to Aid Public Comment

This requirement further ensures that the acquisition will not harm competition in the airport car rental market.

FSNA/Macquarie possesses the resources and capability to acquire the divested assets and replace Dollar Thrifty as an effective competitor in the affected geographic markets. FSNA has existing relationships with the major online travel agencies, has the IT infrastructure necessary to support the divested assets, and managers experienced in running a national airport car rental company. Macquarie is a global provider of banking, financial, advisory, investment and funds management services. Macquarie has committed substantial financial resources to the Advantage transaction, and it expects to provide additional growth capital as needed. FSNA/Macquarie's resources and expertise, together with the initial rental car fleet and other support terms contained in the Consent Agreement, will enable FSNA/Macquarie to compete effectively as the fourth largest rental car company in the country.

Pursuant to the Consent Agreement, FSNA/Macquarie will receive the assets necessary to replicate Advantage's airport car rental business, and this, coupled with the divestiture of the additional Dollar Thrifty airport concession agreements and related assets, remedies the unilateral and coordinated anticompetitive effects of the transaction. In addition to ensuring that employees of the businesses have the incentive to continue their employment with the acquirers, the Consent Agreement requires Hertz to provide FSNA/Macquarie with access to an initial rental car fleet and related support until FSNA/Macquarie can independently obtain its own fleet of cars. Combined, the Consent Agreement provisions ensure the benefits of competition that would otherwise have been lost through the acquisition will be maintained.

The Commission has appointed an interim monitor to oversee the divestiture of the assets after the Consent Agreement has been signed. In order to ensure that the Commission remains informed about the status of the proposed divestitures, the proposed Consent Agreement requires the parties to file periodic reports with the Commission until the divestiture is accomplished. If the Commission determines that Hertz has not fully complied with its obligations under the Decision and Order within ten days after the

## Analysis to Aid Public Comment

date the Decision and Order becomes final, the Commission may seek civil penalties to ensure that Hertz remains in compliance.

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

## Complaint

## IN THE MATTER OF

**THE NEIMAN MARCUS GROUP, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE FUR  
PRODUCTS LABELING ACT

*Docket No. C-4407; File No. 082 3199*  
*Complaint, July 18, 2013 – Decision, July 18, 2013*

The consent order addresses allegations that The Neiman Marcus Group, Inc. (“Neiman Marcus”) violated the Fur Products Labeling Act and the Federal Trade Commission Act by failing to provide accurate information regarding the fur content of three products sold on its company website and in its catalog: (a) the Outerwear Jacket; (b) the Ballerina Flat by Stuart Weitzman; and (c) the Kyah Faux Fur-Collar Coat (“Products”). The complaint alleges Neiman Marcus advertised that the Products contained “faux fur” when, in fact, they contained real fur. Additionally, Neiman Marcus falsely represented that the fur on the Ballerina Flat was mink when in fact it was rabbit. Neiman Marcus also failed to disclose the country of origin for each of the Products, in compliance with the Fur Products Labeling Act requirements. The consent order bars Neiman Marcus from misrepresenting the fur content in its mail, catalog, or Internet advertisements. Neiman Marcus is further required to maintain copies of advertisements and materials relied upon in disseminating any representation covered by the orders, as well as to provide certain notices and compliance reports to the Commission.

*Participants*

For the *Commission*: *Randall David Marks* and *Matthew Wilshire*.

For the *Respondent*: *Daniel C. Schwartz* and *David Zetoony*,  
*Bryan Cave, LLP*.

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Neiman Marcus Group, Inc. (“Neiman Marcus” or “respondent”) has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, the Fur Products Labeling Act, 15 U.S.C. § 69 *et seq.*, and

## Complaint

the Rules and Regulations Under the Fur Products Labeling Act, 16 C.F.R. Part 301, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent is a Delaware corporation with its principal office or place of business at 1618 Main St., Dallas, TX 75201.

2. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as commerce is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and Section 2(j) of the Fur Products Labeling Act, 15 U.S.C. § 69(j).

3. Respondent has advertised, offered for sale, sold, and distributed fur products, as that term is defined in Section 2(d) of the Fur Products Labeling Act, 15 U.S.C. § 69(d). Respondent advertises and offers fur products for sale through the Internet sites [www.neimanmarcus.com](http://www.neimanmarcus.com) and [www.bergdorfgoodman.com](http://www.bergdorfgoodman.com).

4. In May 2009, Commission staff closed an investigation into whether respondent Neiman Marcus had falsely advertised coats as having faux fur that in fact contained real fur. In closing the investigation, staff relied in part on respondent's assurances that it had reached an agreement with a third-party vendor to label products as containing either real fur or other material.

**Conduct**

5. From approximately October 5, 2009, until approximately November 16, 2012, respondent disseminated, or caused to be disseminated, advertisements for fur products, including, but not limited to, a Burberry Outerwear Jacket ("Outerwear Jacket"), a Stuart Weitzman Ballerina Flat ("Ballerina Flat"), and an Alice + Olivia Kyah Faux-Fur Collar Coat ("Kyah Coat").

**Outerwear Jacket False Advertising**

6. From approximately October 5, 2009, until October 30, 2009, respondent disseminated, or caused to be disseminated, the advertisement attached as Exhibit A. This advertisement from [www.neimanmarcus.com](http://www.neimanmarcus.com) contained the following statements (emphasis added):

## Complaint

## Outerwear Jacket

Cardinal red. Allover quilted topstitching. Black faux-fur hood with snap-tab detail; zip/snap front. Long sleeves with zip cuff detail. Tonal belt at natural waist. Zip pockets. A-line. Polyester/polyamide. Made in Italy of imported material.

7. The Outerwear Jacket had an attached label disclosing that it in fact contained “real fur.”

8. From October 5, 2009, until October 30, 2009, respondent sold at least five Outerwear Jackets via its website for a total revenue of at least \$6,475.

**Ballerina Flat False Advertising**

9. From approximately August 3, 2011, until approximately December 1, 2011, respondent disseminated, or caused to be disseminated, the advertisement attached as Exhibit B. This advertisement from [www.neimanmarcus.com](http://www.neimanmarcus.com) contained the following statements (emphasis added):

A cute fur ornament decorates the toe of this basic ballerina flat by Stuart Weitzman.

Sport suede upper.

Faux fur (cotton/viscose) pom on round toe.

Imported of Spanish and Italian material.

Respondent’s [www.bergdorfgoodman.com](http://www.bergdorfgoodman.com) internet site carried a similar advertisement beginning on August 20, 2011.

10. From approximately August 14, 2011, until approximately December 1, 2011, respondent disseminated, or caused to be disseminated, the catalog advertisement for the Ballerina Flat attached as Exhibit C, which contained the following statements (emphasis added):

Black or cola “Furball” ballet flat with dyed mink (Spain) pouf, rubber sole, and 1/2” wedge heel.

## Complaint

11. From approximately November 27, 2011, until approximately December 1, 2011, respondent mailed to its customers a “stuffer” attached as Exhibit D that described the product as containing a “dyed mink (Spain) pouf” (emphasis added).

12. The vendor of the Ballerina Flat had notified respondent that the product contained real rabbit fur before July 25, 2011.

13. From approximately August 3 to December 1, 2011, respondent sold at least 292 Ballerina Flats via its websites, catalog, and mailers for a total revenue of at least \$85,000.

**Kyah Coat False Advertising**

14. From approximately August 9, 2012, until approximately November 16, 2012, respondent disseminated, or caused to be disseminated, the advertisement attached as Exhibit E. This advertisement from [www.neimanmarcus.com](http://www.neimanmarcus.com) contained the following statements (emphasis added):

Kyah Faux Fur-Collar Coat: Glam up your professional looks with the Alice + Olivia Kyah coat, which features a plush faux-fur collar.

Crepe with faux-fur (polyester/viscose) collar.

Self-tie waist.

Long sleeves.

Arched hem falls below hip.

Virgin wool/cashmere/polyester.

Dry clean.

Imported.

15. The Kyah Coat had an attached label disclosing that its collar was in fact “real fur.”

16. From approximately August 9, 2012, until approximately November 16, 2012, respondent sold at least 19 Kyah Coats via its website for a total revenue of at least \$15,162.



## Complaint

**COUNT I**

17. Through the means described in Paragraphs 6, 9, and 14, respondent represented, expressly or by implication, that the fur in the Outerwear Jacket, Ballerina Flat, and Kyah Coat was faux or fake. In truth and in fact, those products contained real fur. Therefore, the representations set forth in Paragraphs 6, 9, and 14 were false, deceptive, or misleading.

18. Through the means described in Paragraphs 10 and 11, respondent represented, expressly or by implication, that the fur in the Ballerina Flat was mink fur. In truth and in fact, the Ballerina Flat contained rabbit fur. Therefore, the representations set forth in Paragraphs 10 and 11 were false, deceptive, or misleading.

19. Respondent's practices, 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, 15 U.S.C. § 45(a), and false advertising in violation of Section 5(a)(5) of the Fur Products Labeling Act, 15 U.S.C. § 69c(a)(5), and Sections 301.2(c) and 301.49 of the Rules and Regulations Under the Fur Products Labeling Act, 16 C.F.R. §§ 301.2(c) and 301.49. Pursuant to Sections 3(a) and 3(c) of the Fur Products Labeling Act, 15 U.S.C. §§ 69a(a) and 69a(c), the false advertising of fur products, within the meaning of the Fur Products Labeling Act and the Rules and Regulations Under Fur Products Labeling Act, is unlawful and an unfair and deceptive act or practice, in commerce, under the Federal Trade Commission Act, 15 U.S.C. § 41, *et seq.*

**COUNT II**

20. Through the means described in paragraphs 6, 9-11, and 14, respondent did not disclose the name of the animal that produced the fur in the Outerwear Jacket, Ballerina Flat, and Kyah Coat as set forth in the Fur Products Name Guide, 16 C.F.R. § 301.0.

21. Through the means described in paragraphs 6, 9, and 14, respondent did not disclose the country of origin for the fur in the Outerwear Jacket, Ballerina Flat, and Kyah Coat.

## Complaint

22. Respondent's practices, 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, 15 U.S.C. § 45(a), and false advertising in violation of Sections 5(a)(1), 5(a)(5), and 5(a)(6) of the Fur Products Labeling Act, 15 U.S.C. §§ 69c(a)(1),(5), and (6), and Sections 301.2(c) and 301.49 of the Rules and Regulations Under the Fur Products Labeling Act, 16 C.F.R. §§ 301.2(c) and 301.49. Pursuant to Sections 3(a) and 3(c) of the Fur Products Labeling Act, 15 U.S.C. § 69a(a) and 69a(c), the false advertising of fur products, within the meaning of the Fur Products Labeling Act and the Rules and Regulations Under Fur Products Labeling Act, is unlawful and an unfair and deceptive act or practice, in commerce, under the Federal Trade Commission Act, 15 U.S.C. § 41, *et seq.*

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission has caused this Complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this eighteenth day of July, 2013.

By the Commission.

Complaint

EXHIBIT A

The screenshot shows a web browser window displaying the Neiman Marcus website. The browser's address bar shows the URL: [http://www.neimanmarcus.com/store/catalog/bred\\_?htmlItemId=prod92740075&parentId=cat21370731&masterId=cat000122&index=13&cmCat=cat000](http://www.neimanmarcus.com/store/catalog/bred_?htmlItemId=prod92740075&parentId=cat21370731&masterId=cat000122&index=13&cmCat=cat000). The page title is "Burberry - Outerwear Jacket - Neiman Marcus - Mozilla Firefox".

The website header features the Neiman Marcus logo, a search bar, and navigation links: "DESIGNERS", "INSIDE", "APPAREL FOR HER", "CONTEMPORARY", "SHOES & HANDBAGS", "JEWELRY & ACCESSORIES", "BEAUTY", "MEN'S SHOP", "NM KIDS", "HOME", "GIFTS", "SALE & VALUES". A secondary navigation bar includes "APPAREL FOR HER", "CATEGORIES: OUTERWEAR SHOP COATS", and "See our complete Burberry collection."

The main content area is titled "Outerwear Jacket" and features a large image of a dark fur-lined jacket. To the right of the image, the product description reads: "Cardinal red. Allover quilted topstitching. Black faux-fur hood with snap-tab detail, zip-up front. Long sleeves with zip cuff detail. Tonal belt at natural waist. Zip pockets. A-line. Polyester/polyamide. Made in Italy of imported material." Below the description are links for "Modern Size Guide" and "Email to a friend".

The pricing section shows "Items Available" and "Quantity" (set to 1). The product name is "Burberry Outerwear Jacket" with a price of "\$1,295.00" and a product code "HW210\_B0XSC". There are buttons for "ADD TO WISH LIST" and "ADD TO SHOPPING BAG".

A "YOU MAY ALSO LIKE" section displays five product thumbnails with their names and prices: "Burberry Quilted Puffer Jacket" (\$400.00), "Burberry Extra-Light Down Jacket" (\$700.00), "Burberry Long Down Jacket" (\$900.00), "Burberry Quilted Down Jacket" (\$700.00), and "Burberry Textured Lined Down Jacket" (\$600.00). Each item has a "Details" link.

At the bottom, a "COMPLETE THE LOOK" section suggests "Burberry Tech Stretch Pants".

The browser's taskbar at the bottom shows the Start button, several open applications (Microsoft Office, Burberry - Outerwear, Microsoft Office Pictu...), and the system tray with the time 6:35 PM.

Complaint

EXHIBIT B

**Neiman Marcus** EXTRA SAVINGS! Online only. Save up to 75% off! **YOUR ONLINE ACCOUNT** 800-779-8869

See our complete [SHOE](#) collection.

**Fur-Ornament Ballerina Flat**  
A ode for ornament decorated the toe of this basic ballerina flat by Stuart Weitzman:

- Spot-stain resistant.
- Flap fur (color/Weitzman) pen on round toe.
- Imported of Spanish and Italian materials.

**About Stuart Weitzman**  
New York native Stuart Weitzman likes to say that his designs show a love for the women he's trying to please, and he has been succeeding at that goal since introducing the line in 1980. The Stuart Weitzman collection runs the gamut from glamorous evening heels to flats for day, and every design is created with attention to detail by skilled craftsmen in Italy, Spain,

**sign up for email**  
GET IN THE KNOW

Size:  Quantity:

Stuart Weitzman  
Fur-Ornament Ballerina Flat  
Price: \$228.00  
SKU: JNF12\_HD1WV  
In Stock

Right now, the official U.S. time is:  
**13:14:25**  
Wednesday, August 10, 2011  
Accurate within 0.2 seconds

INVESTOR RELATIONS CAREERS SITE MAP RM CREDIT CARD {NMdaily} FOR FASHION AND SALE NEWS

Support disaster relief

Complaint

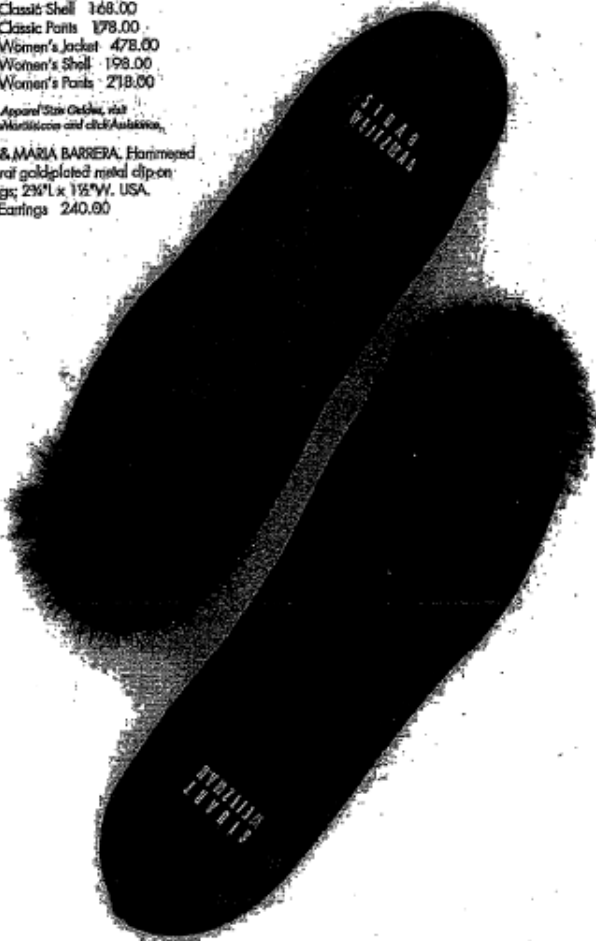
EXHIBIT C

STUART WEITZMAN: Black or color suede "Furball" ballet flat with dyed milk (Spain) paint, rubber sole, and 1/2" wedge heel. Full and half sizes 5-10B, 11B, 12B, 7-10AA, Spain.  
 30 FurTrim Ballet Flat 325.00

ADRIENNE VITTADINI: Upstick (real) wool and cashmere ribbed jacket and sleeveless shell. Black/pants: pairs of rayon, nylon, and spandex. Classic sizes S(4-6), M(8-10), L(12-14), XL(16) and Women's sizes 1X(18W-20W), 2X(22W), 3X(24W). Imported.  
 31A Classic Jacket 398.00  
 31B Classic Shell 168.00  
 31C Classic Pants 178.00  
 31D Women's Jacket 478.00  
 31E Women's Shell 198.00  
 31F Women's Pants 218.00

For our Apparel Size Guide, visit [NeimanMarcus.com](http://NeimanMarcus.com) and click Assistance.

JOSÉ & MARÍA BARRERA: Hammered 24karat goldplated metal clip-on earrings; 2 3/4" x 1 1/2" W. USA.  
 31G Earrings 240.00



## Complaint

**EXHIBIT D**

STUART WEITZMAN. Cola or black lycra® and leather "Flex Mode" bootie with 3 1/2" wedge heel. Full and half sizes 5-10B, 11B. Spain.  
3A Bootie Orig. 365.00  
**NOW 215.00\***



STUART WEITZMAN. Black or cola suede "Furball" ballet flat with dyed mink (Spain) pouf, rubber sole, and 1/2" wedge heel. Black, full and half sizes 5-7 1/2B, 9 1/2-12B, 7AA, 8-10AA. Cola, full and half sizes 5-10B, 11B, 12B, 7AA, 9 1/2-10AA. Spain.  
3C Black Fur-trim Ballet Flat Orig. 325.00  
**NOW 195.00\***  
3D Cola Fur-trim Ballet Flat Orig. 325.00  
**NOW 195.00\***

STUART WEITZMAN. Black suede "Forever" boot with cotton and viscose faux-fur cuff and rubber sole. Full and half sizes 5-10B, 11B, 12B, 7-10AA. Spain.  
3B Boot Orig. 345.00  
**NOW 205.00\***



STUART WEITZMAN. Black water-resistant Gore-Tex® and patent leather ankle boot with leather sole and 2" wedge heel. Full and half sizes 5-10B, 11B, 12B, 7-10AA. Spain.  
3E Boot Orig. 450.00  
**NOW 270.00\***



Complaint

EXHIBIT E

**Neiman Marcus** - FREE SHIPPING with code FALL15

DESIGNERS WOMEN'S APPAREL SHOES HANDBAGS JEWELRY ACCESSORIES BEAUTY MEN'S

(29 of 83) < PREV | NEXT >

**Alice + Olivia Kyah Faux-Fur-Collar Coat, Edie Printed Top & Shiny Leather-Front Leggings**

This all-black Alice + Olivia look boasts upturn and downturn leather parts and a glamorous faux-fur collar.

**Edie Printed Top:** Punch up your favorite looks with the graphic Edie top.

- Printed georgette.
- Spread collar, placket front.
- Three-quarter sleeves.
- Loose silhouette.
- Acroch hem falls below hip.
- Silksuspender.
- Dry clean.
- Imported.

**Shiny Leather-Front Leggings:** Shiny leather puts your going-out looks on trend in this Alice + Olivia leggings.

- Size at hips.
- Slimmy legs.
- Full length.
- As front.
- Lycre®.
- Dry clean.
- Imported.

**Kyah Faux-Fur-Collar Coat:** Open up your professional looks with the Alice + Olivia Kyah coat, which features a plush faux-fur collar.

- Crane with faux-fur (polyester/viscose) collar.
- Selfie waist.
- Long sleeves.
- Acroch hem falls below hip.
- Virgin wool/bamboo/boycoster.
- Dry clean.
- Imported.

**About Alice + Olivia:** Its fall collection of low-rise, well-fit pants in vibrant shades and prints made Alice + Olivia famous. Designer Sherry Ripstein expanded this and since then to include a full collection of pieces cherished for their perfect fit and eye-catching flair.

Here sorry, but we are unable to ship one or more of these items to Canada.

Right now, the official U.S. time is: **11:47:06** Wednesday, October 10, 2012

ADD TO WISH LIST ADD TO SHOPPING BAG

**Neiman Marcus** - FREE SHIPPING with code FALL15

DESIGNERS WOMEN'S APPAREL SHOES HANDBAGS JEWELRY ACCESSORIES BEAUTY MEN'S SHOP NM KIDS HOME GIFTS SALE

(29 of 83) < PREV | NEXT >

**Alice + Olivia Kyah Faux-Fur-Collar Coat, Edie Printed Top & Shiny Leather-Front Leggings**

The all-black Alice + Olivia look boasts upturn and downturn inspiration with shiny leather parts and a glamorous faux-fur collar.

**Edie Printed Top:** Punch up your favorite looks with the graphic Alice + Olivia Edie top.

- Printed georgette.
- Spread collar, placket front.
- Three-quarter sleeves.
- Loose silhouette.
- Acroch hem falls below hip.
- Silksuspender.
- Dry clean.
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- Size at hips.
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- Full length.
- As front.
- Lycre®.
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- Crane with faux-fur (polyester/viscose) collar.
- Selfie waist.
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- Acroch hem falls below hip.
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**About Alice + Olivia:** Its fall collection of low-rise, well-fit pants in vibrant shades and prints made Alice + Olivia famous. Designer Sherry Ripstein expanded this and since then to include a full collection of pieces cherished for their perfect fit and eye-catching flair.

Here sorry, but we are unable to ship one or more of these items to Canada.

Right now, the official U.S. time is: **11:45:09** Wednesday, October 10, 2012

ADD TO SHOPPING BAG

**TODAY ONLY! 25% OFF dresses!**

**Need Help?** Call 1.888.366.4757 Email Us Online Chat Shipping Information Return Policy Size Guides:

## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of a 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 violations of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), which includes: a statement by Respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; and waivers and other provisions as required by the Commission’s Rules; and

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

1. Respondent The Neiman Marcus Group, Inc., is a Delaware corporation with its principal office or place of business at 1618 Main St., Dallas, TX 75201.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the



## Decision and Order

Respondent, and the proceeding is in the public interest.

**ORDER****DEFINITIONS**

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

1. “Respondent” shall mean The Neiman Marcus Group, Inc., its successors and assigns, subsidiaries and divisions, and their officers, agents, representatives, and employees.
2. “Commerce” shall mean commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.
3. “Covered product” shall mean any article of clothing or covering for any part of the body that (a) is made in whole or in part of fur or used fur or (b) respondent advertises as containing fake or faux fur.
4. “Fur” shall mean any animal skin or part thereof with hair, fleece, or fur fibers attached thereto, either in its raw or processed state, but shall not include such skins as are to be converted into leather or which in processing shall have the hair, fleece, or fur fiber completely removed.
5. “Fur product” shall mean any article of clothing or covering for any part of the body made in whole or in part of fur or used fur.

## Decision and Order

**I.**

**IT IS ORDERED** that, subject to the guaranty provisions of the Fur Products Labeling Act (“Fur Act”), 15 U.S.C. § 69 *et seq.*, and the Rules and Regulations Under the Fur Products Labeling Act (“Fur Rules”), 16 C.F.R. Part 301, Respondent, directly or through any person, partnership, corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any fur product in any advertisement disseminated through the mail, on any website, or in any catalog, in or affecting commerce, is hereby permanently restrained and enjoined from engaging in, causing other persons to engage in, or assisting other persons to engage in, violations of the Fur Act and the Fur Rules, including, but not limited to, falsely or deceptively advertising any fur product by misrepresenting or failing to disclose:

- A. That the fur in any fur product is faux or fake;
- B. The name or names (as set forth in the Fur Products Name Guide, 16 C.F.R. § 301.0) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to 15 U.S.C. § 69e(c);
- C. That the fur is used fur or that the fur product contains used fur when such is the fact;
- D. That the fur product or fur is bleached, dyed, or otherwise artificially colored fur when such is the fact;
- E. That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur when such is the fact; and
- F. The name of the country of origin of any imported furs or those contained in the fur product.

*Provided that*, in the event the Fur Act or Fur Rules are amended or modified:

## Decision and Order

1. Respondent shall comply fully and completely with all applicable requirements thereof, on and after the effective date of any such act or rule; and
2. That nothing in this Paragraph shall impose upon Respondent obligations beyond what is required under the amended or modified version of the Fur Act or Rules.

*Provided further* that if Respondent (1) cannot legally obtain a guaranty when it takes an ownership interest in a fur product, (2) does not embellish or misrepresent claims provided by the manufacturer about that product, and (3) does not sell the product as a private label product, then Respondent shall be liable for a violation of this Paragraph only if it knew or should have known that the marketing or sale of the product would violate this Paragraph.

**II.**

**IT IS FURTHER ORDERED** that Respondent shall maintain and, upon request, make available to the Commission, for inspection and copying, all records that will demonstrate compliance with the requirements of this order, including, but not limited to:

- A. All acknowledgments of receipt of order obtained pursuant to Paragraph III.B.
- B. For three (3) years after the last date of dissemination of any representation by Respondent about any covered product in any advertisement disseminated through the mail, on any website, or in any catalog;
  1. All advertisements and promotional materials containing the representation;
  2. All materials that were relied upon in disseminating the representation;
  3. All tests, reports, studies, surveys, demonstrations, or other evidence in the possession or control of

## Decision and Order

any of the persons covered by Paragraph III.A that contradict, qualify, or call into question the representation, or the basis relied upon for the representation; and

4. All complaints and other communications with consumers that call into question the representation, or the basis relied upon for the representation, in connection with a specific product purchased by a specific consumer, and all communications with governmental or consumer protection organizations that contradict, qualify, or call into question the representation, or the basis relied upon for the representation.

**III.**

**IT IS FURTHER ORDERED** that Respondent shall:

- A. For a period of three (3) years, deliver a copy of this order to all employees, agents, and representatives having responsibilities with respect to Respondent's marketing or advertising of any covered product in any advertisement disseminated through the mail, on any website, or in any catalog and to any manager or officer in the chain of command of such employees, agents, and representatives, within thirty (30) days after (1) the date of service of this order, or (2) the person assumes a position covered by this paragraph.
- B. Secure from each person receiving this order pursuant to this paragraph a signed and dated statement acknowledging receipt of this order.

**IV.**

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission in connection with compliance with this order as follows:

- A. At least thirty (30) days prior to any change in the corporation that may affect compliance obligations

## Decision and Order

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 that*, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

- B. Within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.
- C. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: FTC v. The Neiman Marcus Group, Inc., File Number 0823199, Docket Number C-4407.

**V.**

**IT IS FURTHER ORDERED** that this order will terminate on July 18, 2033, 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 that* the filing of such a complaint will not affect the duration of:

## Decision and Order

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order, if such complaint is filed after the order has terminated pursuant to this Part. *Provided, further*, that if such complaint is dismissed, or a federal court rules that the Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, agreements containing consent orders from The Neiman Marcus Group, Inc. (“Neiman Marcus”), DrJays.com, Inc. (“DrJays”), and Eminent, Inc., doing business as Revolve Clothing (“Revolve”).

The proposed consent orders have 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 agreements and the comments received, and decide whether it should withdraw from the agreements or make the proposed orders final.

**Proposed Complaints**

These matters involve violations of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (“FTC Act”), Section 5(a)(5) of the Fur Products Labeling Act, 15 U.S.C. § 69c(a)(5) (“Fur Act”), and Sections 301.2(c) and 301.49 of the Rules and Regulations Under Fur Products Labeling Act, 16 C.F.R §§ 301.2(c) and 301.49 (“Fur Rules”). In 2010, Congress enacted the Truth in Fur Labeling Act, which amended the Fur Act by, among other things, eliminating an exemption for items containing fur valued at no more than \$150. As a result, the Fur Act now requires disclosure of any fur content in wearing apparel.

The proposed complaints allege that Neiman Marcus, DrJays, and Revolve each advertised products containing real fur as containing “faux fur” on its Internet site. The proposed complaints further allege that the advertisements failed to disclose the names, as set forth in the Fur Products Name Guide, 16 C.F.R. § 301.0, of the animals that produced the fur in each product. They also allege that most of the products had labels correctly identifying the fur content.

The proposed complaint against Neiman Marcus alleges that the company’s website misrepresented the fur content and failed to disclose the animal name for three products: an Outerwear

## Analysis to Aid Public Comment

Jacket, a Ballerina Flat by Stuart Weitzman, and a Kyah Faux Fur-Collar Coat. In addition to falsely advertising the Ballerina Flat online as “faux” fur, Neiman Marcus’ catalog and mail advertising falsely represented that the product’s fur was mink when it was in fact rabbit. The proposed complaint further alleges that Neiman Marcus sold at least 316 units of the three products. Finally, it alleges that Neiman Marcus failed to disclose the country of origin of each product.

The proposed complaint against DrJays alleges that the company misrepresented the fur content and failed to disclose the animal name for three products: a Snorkel Jacket by Crown Holder; a Fur/Leather Vest by Knoles & Carter; and a New York Subway Leather Bomber Jacket by United Face. It further alleges that DrJays sold at least 241 units.

The proposed complaint against Revolve alleges that the company misrepresented the fur content and failed to disclose the animal name for four products: an Australia Luxe Collective Nordic Angel Short Boot; a Marc Jacobs Runway Roebing Coat; a Dakota Xan Fur Poncho; and an Eryn Brinie Belted Faux Fur Vest. It further alleges that Revolve sold at least 158 units of the products.

**Proposed Orders**

The proposed orders are designed to prevent Neiman Marcus, DrJays, and Revolve from engaging in similar acts and practices in the future.

Paragraph I bars each proposed respondent from violating the Fur Act and Rules by, among other things, misrepresenting in mail, catalog, or Internet advertisements that the fur in any product is faux or fake or misrepresenting the type of fur. Paragraph I also contains a proviso incorporating the Enforcement Policy Statement that the Commission announced on January 3, 2013. The proviso and Statement provide a safe harbor when a retailer cannot legally obtain a guaranty, as long as the retailer meets certain requirements, including that it neither knew nor should have known of the violation.



Analysis to Aid Public Comment

Paragraphs II through IV will help the Commission ensure that the proposed respondents comply with Part I by requiring them to keep copies of advertisements and materials relied upon in disseminating any representation covered by the orders (Paragraph II); provide copies of the orders to certain personnel having responsibility for the advertising or sale of fur and fake fur products (Paragraph III); and provide certain notices and compliance reports to the Commission (Paragraph IV).

Finally, Part V provides that the orders will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the complaints or the proposed orders, or to modify the proposed orders' terms in any way.

Complaint

IN THE MATTER OF

**DRJAYS.COM, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE FUR  
PRODUCTS LABELING ACT*Docket No. C-4408; File No. 122 3063*  
*Complaint, July 18, 2013 – Decision, July 18, 2013*

The consent order addresses allegations that DrJays.com, Inc. (“DrJays”) violated the Fur Products Labeling Act and the Federal Trade Commission Act by misrepresenting the fur content and failing to disclose the animal name for three of its products: (a) the Snorkel Jacket by Crown Holder; (b) the Fur/Leather Vest by Knoles & Carter; and (c) the New York Subway Leather Bomber Jacket by United Face (“Products”). The complaint alleges DrJays advertised that the Products contained “faux fur” when, in fact, they contained real fur. Further, DrJays failed to disclose the names of the animals that produced the fur used in the Products. The consent order bars DrJays from misrepresenting the fur content in its mail, catalog, or Internet advertisements. DrJays is further required to maintain copies of advertisements and materials relied upon in disseminating any representation covered by the orders, as well as to provide certain notices and compliance reports to the Commission.

*Participants*

For the *Commission*: *Randall David Marks and Matthew Wilshire.*

For the *Respondent*: *Abbe Kadish, Lifshutz, Lifshutz & Associates.*

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that DrJays.com, Inc. (“respondent”), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, the Fur Products Labeling Act, 15 U.S.C. § 69 *et seq.*, and the Rules and Regulations Under the Fur Products Labeling Act, 16 C.F.R. Part 301, and it appearing to the Commission that this proceeding is in the public interest, alleges:

## Complaint

1. Respondent DrJays.com, Inc., is a New York corporation with its principal office or place of business at 853 Broadway, Suite 1900, New York, NY 10003.

2. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as commerce is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and Section 2(j) of the Fur Products Labeling Act, 15 U.S.C. § 69(j).

3. Respondent has advertised, offered for sale, sold, and distributed fur products, as that term is defined in Section 2(d) of the Fur Products Labeling Act, 15 U.S.C. § 69(d). Respondent advertises and offers fur products for sale through its Internet site [www.drjays.com](http://www.drjays.com).

4. From approximately January 2010 until approximately January 2012, respondent disseminated, or caused to be disseminated, advertisements for fur products, including, but not limited to, the advertisements for a Snorkel Jacket by Crown Holder (“Snorkel Jacket”), a Fur/Leather Vest by Knoles & Carter (“Fur/Leather Vest”), and a New York Subway Leather Bomber Jacket by United Face (“Bomber Jacket”) that are attached as Exhibit A. These advertisements are from respondent’s website and contained the following statements (emphasis added):

a. The Snorkel Jacket with Fur-lined hood by Crown Holder features:

- \$ Full zip-closure
- \$ 6-pocket design
- \$ 2-hidden pockets
- \$ Faux fur-lined hood
- \$ Epaulet straps on shoulders
- \$ Cut and sewn logo patch on left sleeve
- \$ Gold hardware through out [sic]
- \$ Logo applique on left chest

b. The Fur/Leather Vest by Knoles and Carter features:

- \$ Leather trims

## Complaint

- \$ Faux fur on exterior
- \$ Dual buckle closure on collar, zipper closure down front, with snap closure on bottom trim
- \$ Satin interior

c. The NY Subway Leather Bomber Jacket (Detachable Hood) by United Face features:

- \$ Full zipper closure
- \$ New York subway map embroidered throughout
- \$ Detachable Hood with faux fur lining
- \$ Multiple pockets
- \$ Ribbed hem and cuffs
- \$ True to size fit

Respondent sold at least 241 units of the above-described products via its website for a total revenue of at least \$19,062.

5. The Snorkel Jacket had an attached label stating that product contained “real raccoon fur.”

6. In May 2012, respondent’s website advertised at least one other product as containing real fur. However, this advertisement, which is attached as Exhibit B, did not disclose the name of the animal that produced the fur.

### COUNT I

7. Through the means described in Paragraph 4, respondent represented, expressly or by implication, that the fur in the Snorkel Jacket, the Fur/Leather Vest, and the Bomber Jacket was faux or fake.

8. In truth and in fact, the Snorkel Jacket, the Fur/Leather Vest, and the Bomber Jacket contained real fur. Therefore, the representations set forth in Paragraph 7 were false, deceptive, or misleading.

9. Respondent’s practices, 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, 15 U.S.C. § 45(a), and false advertising in

## Complaint

violation of Section 5(a)(5) of the Fur Products Labeling Act, 15 U.S.C. § 69c(a)(5), and Sections 301.2(c) and 301.49 of the Rules and Regulations Under the Fur Products Labeling Act, 16 C.F.R. §§ 301.2(c) and 301.49. Pursuant to Sections 3(a) and 3(c) of the Fur Products Labeling Act, 15 U.S.C. § 69a(a) and 69a(c), the false advertising of fur products, within the meaning of the Fur Products Labeling Act and the Rules and Regulations Under the Fur Products Labeling Act, is unlawful and an unfair and deceptive act or practice, in commerce, under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*

**COUNT II**

10. Through the means described in Paragraphs 4 and 6, respondent did not disclose the names, as set forth in the Fur Products Name Guide, 16 C.F.R. § 301.0, of the animals that produced the fur in the Snorkel Jacket, the Fur/Leather Vest, the Bomber Jacket, and the product advertised in Exhibit B.

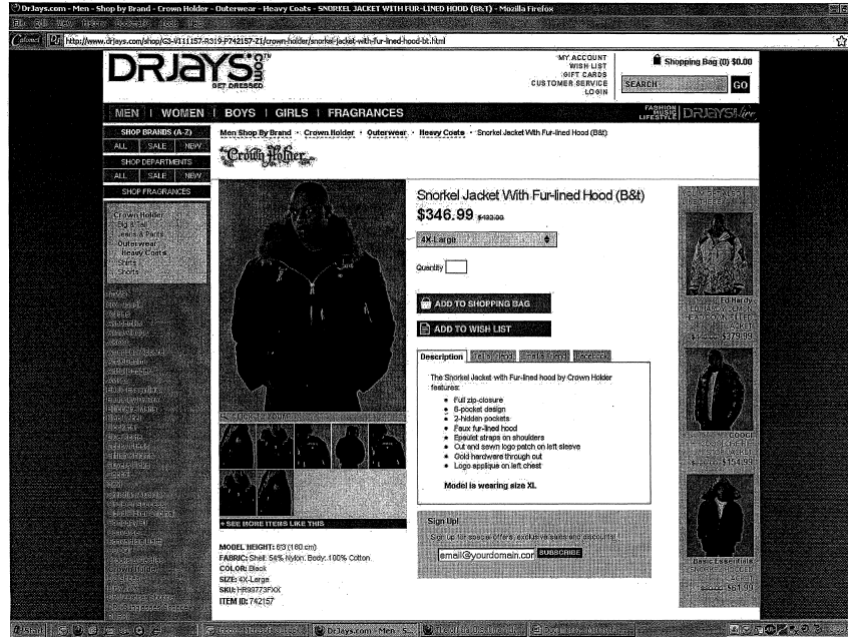
11. Respondent's practices, as alleged in this complaint, constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a), and false advertising in violation of Sections 5(a)(1) and 5(a)(5) of the Fur Products Labeling Act, 15 U.S.C. §§ 69c(a)(1) and (5), and Sections 301.2(c) and 301.49 of the Rules and Regulations Under the Fur Products Labeling Act, 16 C.F.R. §§ 301.2(c) and 301.49. Pursuant to Sections 3(a) and 3(c) of the Fur Products Labeling Act, 15 U.S.C. § 69a(a) and 69a(c), the false advertising of fur products, within the meaning of the Fur Products Labeling Act and the Rules and Regulations Under the Fur Products Labeling Act, is unlawful and an unfair and deceptive act or practice, in commerce, under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission has caused this Complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this eighteenth day of July, 2013.

By the Commission

Complaint

EXHIBIT A



Complaint

The screenshot displays a web browser window with the URL [www.drjays.com/shop/1134362/product.html](http://www.drjays.com/shop/1134362/product.html). The page is titled "DRJ LEATHER SHOPPE" and features a navigation menu on the left with categories like "SHOP BRANDS (A-Z)", "SHOP DEPARTMENTS", and "SHOP DEPARTMENTS". The main content area shows a product listing for "Ny Subway Leather Bomber Jacket (Detachable Hood), Plus". The price is listed as "\$259.99" with a crossed-out original price of "\$300.00". The product has a 4.5-star rating. Below the main image, there are smaller images showing different views of the jacket. A description box lists features: "Full zipper closure", "New York subway map embroidered throughout", "Detachable hood with fur for lining", "Multiple pockets", "Ribbed hem and cuffs", and "True to size fit". The model is wearing size 12. At the bottom of the page, there is a digital clock showing "15:21:08" on "Monday, October 17, 2011".

Complaint

EXHIBIT B

This screenshot shows the top portion of a product page on DrJays.com. The browser address bar displays 'www.drjays.com/shop/P1177350/product.html'. The page features a navigation menu with categories like 'MEN | WOMEN | BOYS | GIRLS | SALE'. The main product area is titled 'COOGI' and 'Flight-inspired Snorkel Jacket W/ Fur-lined Hood (B&T)'. The price is listed as '\$75.99' with a crossed-out original price of '\$290.00'. There are social media sharing buttons for Facebook, Twitter, and LinkedIn. A star rating of 5 stars is shown, along with a 'Read all 2 reviews' link. Below the rating is a 'Select a Size' dropdown menu and two buttons: 'ADD TO SHOPPING BAG' and 'ADD TO WISH LIST'. The left sidebar contains a 'SHOP DEPARTMENTS' menu with various clothing categories.

This screenshot shows the lower portion of the product page. It includes a 'Description' section with the following text: 'The Flight-Inspired Snorkel Jacket with Fur-Lined Hood by Coogi features:'. Below this is a bulleted list of features: 'Removable fur on hood with drawstring adjustment and sherpa lining on interior', 'Zipper with hook and button closure down front', '2-hand pockets, 1-sleeve compartment, 1-interior pocket', 'Heavily insulated material', 'Faux leather accents', 'Ribbed trim', and 'Embroidered logo on left side of chest'. A note states 'Model is wearing size 4XL'. Below the description is a 'Sign Up' section with an email input field and a 'SUBSCRIBE' button. The left sidebar continues with a list of product categories. At the bottom, there is a section titled 'OTHER CUSTOMERS ALSO LIKED THESE' with several small product thumbnails.



## Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of a 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 violations of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), which includes: a statement by Respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; and waivers and other provisions as required by the Commission’s Rules; and

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

1. Respondent DrJays.com, Inc., is a New York corporation with its principal office or place of business at 853 Broadway, Suite 1900, New York, N.Y. 10003.

## Decision and Order

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

**ORDER****DEFINITIONS**

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

1. “Respondent” shall mean DrJays.com, Inc., its successors and assigns, subsidiaries and divisions, and their officers, agents, representatives, and employees.
2. “Commerce” shall mean commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.
3. “Covered product” shall mean any article of clothing or covering for any part of the body that (a) is made in whole or in part of fur or used fur or (b) respondent advertises as containing fake or faux fur.
4. “Fur” shall mean any animal skin or part thereof with hair, fleece, or fur fibers attached thereto, either in its raw or processed state, but shall not include such skins as are to be converted into leather or which in processing shall have the hair, fleece, or fur fiber completely removed.
5. “Fur product” shall mean any article of clothing or covering for any part of the body made in whole or in part of fur or used fur.

## Decision and Order

**I.**

**IT IS ORDERED** that, subject to the guaranty provisions of the Fur Products Labeling Act (“Fur Act”), 15 U.S.C. § 69 *et seq.*, and the Rules and Regulations Under the Fur Products Labeling Act (“Fur Rules”), 16 C.F.R. Part 301, Respondent, directly or through any person, partnership, corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any fur product in any advertisement disseminated through the mail, on any website, or in any catalog, in or affecting commerce, is hereby permanently restrained and enjoined from engaging in, causing other persons to engage in, or assisting other persons to engage in, violations of the Fur Act and the Fur Rules, including, but not limited to, falsely or deceptively advertising any fur product by misrepresenting or failing to disclose:

- A. That the fur in any fur product is faux or fake;
- B. The name or names (as set forth in the Fur Products Name Guide, 16 C.F.R. § 301.0) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to 15 U.S.C. § 69e(c);
- C. That the fur is used fur or that the fur product contains used fur when such is the fact;
- D. That the fur product or fur is bleached, dyed, or otherwise artificially colored fur when such is the fact;
- E. That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur when such is the fact; and
- F. The name of the country of origin of any imported furs or those contained in the fur product.

*Provided that*, in the event the Fur Act or Fur Rules are amended or modified:

## Decision and Order

1. Respondent shall comply fully and completely with all applicable requirements thereof, on and after the effective date of any such act or rule; and
2. That nothing in this Paragraph shall impose upon Respondent obligations beyond what is required under the amended or modified version of the Fur Act or Rules.

*Provided further* that if Respondent (1) cannot legally obtain a guaranty when it takes an ownership interest in a fur product, (2) does not embellish or misrepresent claims provided by the manufacturer about that product, and (3) does not sell the product as a private label product, then Respondent shall be liable for a violation of this Paragraph only if it knew or should have known that the marketing or sale of the product would violate this Paragraph.

**II.**

**IT IS FURTHER ORDERED** that Respondent shall maintain and, upon request, make available to the Commission, for inspection and copying, all records that will demonstrate compliance with the requirements of this order, including, but not limited to:

- A. All acknowledgments of receipt of order obtained pursuant to Paragraph III.B.
- B. For three (3) years after the last date of dissemination of any representation by Respondent about any covered product in any advertisement disseminated through the mail, on any website, or in any catalog;
  1. All advertisements and promotional materials containing the representation;
  2. All materials that were relied upon in disseminating the representation;

## Decision and Order

3. All tests, reports, studies, surveys, demonstrations, or other evidence in the possession or control of any of the persons covered by Paragraph III.A that contradict, qualify, or call into question the representation, or the basis relied upon for the representation; and
4. All complaints and other communications with consumers that call into question the representation, or the basis relied upon for the representation, in connection with a specific product purchased by a specific consumer, and all communications with governmental or consumer protection organizations that contradict, qualify, or call into question the representation, or the basis relied upon for the representation.

**III.**

**IT IS FURTHER ORDERED** that Respondent shall:

- A. For a period of three (3) years, deliver a copy of this order to all employees, agents, and representatives having responsibilities with respect to Respondent's marketing or advertising of any covered product in any advertisement disseminated through the mail, on any website, or in any catalog and to any manager or officer in the chain of command of such employees, agents, and representatives, within thirty (30) days after (1) the date of service of this order, or (2) the person assumes a position covered by this paragraph.
- B. Secure from each person receiving this order pursuant to this paragraph a signed and dated statement acknowledging receipt of this order.

**IV.**

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission in connection with compliance with this order as follows:

## Decision and Order

- A. At least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action, that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.
- B. Within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.
- C. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: FTC v. DrJays.com, Inc., File Number 1223063, Docket Number C-4408.

**V.**

**IT IS FURTHER ORDERED** that this order will terminate on July 18, 2033, 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.

## Analysis to Aid Public Comment

*Provided that* the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order, if such complaint is filed after the order has terminated pursuant to this Part. Provided, further, that if such complaint is dismissed, or a federal court rules that the Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, agreements containing consent orders from The Neiman Marcus Group, Inc. (“Neiman Marcus”), DrJays.com, Inc. (“DrJays”), and Eminent, Inc., doing business as Revolve Clothing (“Revolve”).

The proposed consent orders have 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 agreements and the comments received, and decide whether it should withdraw from the agreements or make the proposed orders final.

## Analysis to Aid Public Comment

**Proposed Complaints**

These matters involve violations of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (“FTC Act”), Section 5(a)(5) of the Fur Products Labeling Act, 15 U.S.C. § 69c(a)(5) (“Fur Act”), and Sections 301.2(c) and 301.49 of the Rules and Regulations Under Fur Products Labeling Act, 16 C.F.R. §§ 301.2(c) and 301.49 (“Fur Rules”). In 2010, Congress enacted the Truth in Fur Labeling Act, which amended the Fur Act by, among other things, eliminating an exemption for items containing fur valued at no more than \$150. As a result, the Fur Act now requires disclosure of any fur content in wearing apparel.

The proposed complaints allege that Neiman Marcus, DrJays, and Revolve each advertised products containing real fur as containing “faux fur” on its Internet site. The proposed complaints further allege that the advertisements failed to disclose the names, as set forth in the Fur Products Name Guide, 16 C.F.R. § 301.0, of the animals that produced the fur in each product. They also allege that most of the products had labels correctly identifying the fur content.

The proposed complaint against Neiman Marcus alleges that the company’s website misrepresented the fur content and failed to disclose the animal name for three products: an Outerwear Jacket, a Ballerina Flat by Stuart Weitzman, and a Kyah Faux Fur-Collar Coat. In addition to falsely advertising the Ballerina Flat online as “faux” fur, Neiman Marcus’ catalog and mail advertising falsely represented that the product’s fur was mink when it was in fact rabbit. The proposed complaint further alleges that Neiman Marcus sold at least 316 units of the three products. Finally, it alleges that Neiman Marcus failed to disclose the country of origin of each product.

The proposed complaint against DrJays alleges that the company misrepresented the fur content and failed to disclose the animal name for three products: a Snorkel Jacket by Crown Holder; a Fur/Leather Vest by Knoles & Carter; and a New York Subway Leather Bomber Jacket by United Face. It further alleges that DrJays sold at least 241 units.



### Analysis to Aid Public Comment

The proposed complaint against Revolve alleges that the company misrepresented the fur content and failed to disclose the animal name for four products: an Australia Luxe Collective Nordic Angel Short Boot; a Marc Jacobs Runway Roebling Coat; a Dakota Xan Fur Poncho; and an Eryn Brinie Belted Faux Fur Vest. It further alleges that Revolve sold at least 158 units of the products.

### **Proposed Orders**

The proposed orders are designed to prevent Neiman Marcus, DrJays, and Revolve from engaging in similar acts and practices in the future.

Paragraph I bars each proposed respondent from violating the Fur Act and Rules by, among other things, misrepresenting in mail, catalog, or Internet advertisements that the fur in any product is faux or fake or misrepresenting the type of fur. Paragraph I also contains a proviso incorporating the Enforcement Policy Statement that the Commission announced on January 3, 2013. The proviso and Statement provide a safe harbor when a retailer cannot legally obtain a guaranty, as long as the retailer meets certain requirements, including that it neither knew nor should have known of the violation.

Paragraphs II through IV will help the Commission ensure that the proposed respondents comply with Part I by requiring them to keep copies of advertisements and materials relied upon in disseminating any representation covered by the orders (Paragraph II); provide copies of the orders to certain personnel having responsibility for the advertising or sale of fur and fake fur products (Paragraph III); and provide certain notices and compliance reports to the Commission (Paragraph IV).

Finally, Part V provides that the orders will terminate after twenty (20) years, with certain exceptions.

The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the complaints or the proposed orders, or to modify the proposed orders' terms in any way.

## Complaint

## IN THE MATTER OF

**EMINENT, INC. D/B/A REVOLVE CLOTHING**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE FUR  
PRODUCTS LABELING ACT

*Docket No. C-4409; File No. 122 3065*  
*Complaint, July 18, 2013 – Decision, July 18, 2013*

The consent order addresses allegations that Eminent, Inc., doing business as Revolve Clothing (“Revolve”) violated the Fur Products Labeling Act and the Federal Trade Commission Act by failing to provide accurate information regarding the fur content of four products sold on its company website: (a) an Australia Luxe Collective Nordic Angel Short Boot; (b) a Mark Jacobs Runway Roebling Cost; (c) a Dakota Xan Fur Poncho; and (d) an Eryn Brinie Belted Faux Fur Vest (“Products”). The complaint alleges that Revolve advertised that the Products contained “faux fur” when, in fact, they contained real raccoon fur. Further, Revolve failed to disclose the name of the animal that produced the fur used in the Products. The consent order bars Revolve from misrepresenting the fur content in its mail, catalog, or Internet advertisements. Revolve is further required to maintain copies of advertisements and materials relied upon in disseminating any representation covered by the orders, as well as to provide certain notices and compliance reports to the Commission.

*Participants*

For the *Commission*: *Randall David Marks and Matthew Wilshire.*

For the *Respondent*: *Abbe Kadish, Lifshutz, Lifshutz & Associates.*

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. § 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that Eminent, Inc., d/b/a Revolve Clothing (“respondent”), has violated the provisions of the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*, the Fur Products Labeling Act, 15 U.S.C. § 69 *et seq.*, and the Rules and Regulations Under the Fur Products Labeling Act,

## Complaint

16 C.F.R. Part 301, and it appearing to the Commission that this proceeding is in the public interest, alleges:

1. Respondent Eminent, Inc., is a Delaware corporation with its principal office or place of business at 16800 Edwards Rd., Cerritos, CA 90703.

2. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as commerce is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, and Section 2(j) of the Fur Products Labeling Act, 15 U.S.C. § 69(j).

3. Respondent has advertised, offered for sale, sold, and distributed fur products, as that term is defined in Section 2(d) of the Fur Products Labeling Act, 15 U.S.C. § 69(d). Respondent advertises and offers fur products for sale through its Internet site [www.revolve.com](http://www.revolve.com).

4. Since approximately January 2, 2011, respondent disseminated, or caused to be disseminated, advertisements for fur products, including, but not limited to, an Australia Luxe Collective Nordic Angel Short Boot (“Nordic Boot”) and a Marc Jacobs Runway Roebing Coat (“Runway Coat”). Respondent featured these products in the advertisements from [www.revolve.com](http://www.revolve.com) that are attached as Exhibit A. The advertisements contained the following statements (emphasis added, except where otherwise noted):

a. For the Nordic Boot:

- \$ Color [Grey, Beva, Brown, Chestnut, Black, Moon Gray]
- \$ Suede upper with rubber sole
- \$ Shell measures approx 13” in length
- \$ Faux fur trim

b. For the Runway Coat:

- \$ Color - Black Olive
- \$ Shell: 100% poly
- Lining: 100% cotton

## Complaint

- Sherpa Lining: 100% poly
- \$ Button front closure
- \$ Zippered front pockets
- \$ Front flap pockets
- \$ Front welt pockets
- \$ Cuffed sleeves
- \$ Belted vest
- \$ Faux fur trimmed hood
- \$ Styled with Free People High Waisted [sic] Patch Pocket Flare Jean in Watch Tower [Emphasis in original]
- \$ Styled with KORS Michael Kors Benet Bootie in Mushroom [Emphasis in original]

The Runway coat had an attached label stating that the product contained “real coyote fur trim.”

5. Respondent also advertised on its website a Dakota Xan Fur Poncho and an Eryn Brinie Belted Faux Fur Vest as having faux fur. These products had attached labels stating that the products contained “real raccoon fur.”

6. Respondent sold at least 158 units of the above-described products via its website for a total revenue of at least \$32,750.

**COUNT I**

7. Through the means described in Paragraphs 4 and 5, respondent represented, expressly or by implication, that the fur in the products described in those Paragraphs was faux or fake.

8. In truth and in fact, the products described in Paragraphs 4 and 5 contained real fur. Therefore, the representations set forth in Paragraph 7 were false, deceptive, or misleading.

9. Respondent’s practices, 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, 15 U.S.C. § 45(a), and false advertising in violation of Section 5(a)(5) of the Fur Products Labeling Act, 15 U.S.C. § 69c(a)(5), and Sections 301.2(c) and 301.49 of the Rules and Regulations Under the Fur Products Labeling Act, 16 C.F.R.

## Complaint

§§ 301.2(c) and 301.49. Pursuant to Sections 3(a) and 3(c) of the Fur Products Labeling Act, 15 U.S.C. § 69a(a) and 69a(c), the false advertising of fur products, within the meaning of the Fur Products Labeling Act and the Rules and Regulations Under the Fur Products Labeling Act, is unlawful and an unfair and deceptive act or practice, in commerce, under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*

**COUNT II**

10. Through the means described in Paragraphs 4 and 5, respondent did not disclose the name of the animal, as set forth in the Fur Products Name Guide, 16 C.F.R. § 301.0 that produced the fur in the products described in Paragraphs 4 and 5.

11. Respondent's practices, 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, 15 U.S.C. § 45(a), and false advertising in violation of Sections 5(a)(1) and 5(a)(5) of the Fur Products Labeling Act, 15 U.S.C. § 69c(a)(1) and (5), and Sections 301.2(c) and 301.49 of the Rules and Regulations Under the Fur Products Labeling Act, 16 C.F.R. §§ 301.2(c) and 301.49. Pursuant to Sections 3(a) and 3(c) of the Fur Products Labeling Act, 15 U.S.C. § 69a(a) and 69a(c), the false advertising of fur products, within the meaning of the Fur Products Labeling Act and the Rules and Regulations Under the Fur Products Labeling Act, is unlawful and an unfair and deceptive act or practice, in commerce, under the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission has caused this Complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this eighteenth day of July, 2013.

By the Commission.





Decision and Order

**DECISION AND ORDER**

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of a 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 violations of the Federal Trade Commission Act and the Fur Products Labeling Act; and

The Respondent and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), which includes: a statement by Respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; and waivers and other provisions as required by the Commission’s Rules; and

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

1. Respondent Eminent, Inc., is a Delaware corporation with its principal office or place of business at 16800 Edwards Rd., Cerritos, CA 90703.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the



## Decision and Order

Respondent, and the proceeding is in the public interest.

**ORDER****DEFINITIONS**

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

1. “Respondent” shall mean Eminent, Inc., its successors and assigns, subsidiaries and divisions, and their officers, agents, representatives, and employees.
2. “Commerce” shall mean commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.
3. “Covered product” shall mean any article of clothing or covering for any part of the body that (a) is made in whole or in part of fur or used fur or (b) respondent advertises as containing fake or faux fur.
4. “Fur” shall mean any animal skin or part thereof with hair, fleece, or fur fibers attached thereto, either in its raw or processed state, but shall not include such skins as are to be converted into leather or which in processing shall have the hair, fleece, or fur fiber completely removed.
5. “Fur product” shall mean any article of clothing or covering for any part of the body made in whole or in part of fur or used fur.

**I.**

## Decision and Order

**IT IS ORDERED** that, subject to the guaranty provisions of the Fur Products Labeling Act (“Fur Act”), 15 U.S.C. § 69 *et seq.*, and the Rules and Regulations Under the Fur Products Labeling Act (“Fur Rules”), 16 C.F.R. Part 301, Respondent, directly or through any person, partnership, corporation, subsidiary, division, trade name, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any fur product in any advertisement disseminated through the mail, on any website, or in any catalog, in or affecting commerce, is hereby permanently restrained and enjoined from engaging in, causing other persons to engage in, or assisting other persons to engage in, violations of the Fur Act and the Fur Rules, including, but not limited to, falsely or deceptively advertising any fur product by misrepresenting or failing to disclose:

- A. That the fur in any fur product is faux or fake;
- B. The name or names (as set forth in the Fur Products Name Guide, 16 C.F.R. § 301.0) of the animal or animals that produced the fur, and such qualifying statement as may be required pursuant to 15 U.S.C. § 69e(c);
- C. That the fur is used fur or that the fur product contains used fur when such is the fact;
- D. That the fur product or fur is bleached, dyed, or otherwise artificially colored fur when such is the fact;
- E. That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur when such is the fact; and
- F. The name of the country of origin of any imported furs or those contained in the fur product.

*Provided that*, in the event the Fur Act or Fur Rules are amended or modified:

- 1. Respondent shall comply fully and completely with all applicable requirements thereof, on and after the effective date of any such act or rule; and

## Decision and Order

2. That nothing in this Paragraph shall impose upon Respondent obligations beyond what is required under the amended or modified version of the Fur Act or Rules.

*Provided further* that if Respondent (1) cannot legally obtain a guaranty when it takes an ownership interest in a fur product, (2) does not embellish or misrepresent claims provided by the manufacturer about that product, and (3) does not sell the product as a private label product, then Respondent shall be liable for a violation of this Paragraph only if it knew or should have known that the marketing or sale of the product would violate this Paragraph.

**II.**

**IT IS FURTHER ORDERED** that Respondent shall maintain and, upon request, make available to the Commission, for inspection and copying, all records that will demonstrate compliance with the requirements of this order, including, but not limited to:

- A. All acknowledgments of receipt of order obtained pursuant to Paragraph III.B.
- B. For three (3) years after the last date of dissemination of any representation by Respondent about any covered product in any advertisement disseminated through the mail, on any website, or in any catalog:
  1. All advertisements and promotional materials containing the representation;
  2. All materials that were relied upon in disseminating the representation;
  3. All tests, reports, studies, surveys, demonstrations, or other evidence in the possession or control of any of the persons covered by Paragraph III.A that contradict, qualify, or call into question the

## Decision and Order

representation, or the basis relied upon for the representation; and

4. All complaints and other communications with consumers that call into question the representation, or the basis relied upon for the representation, in connection with a specific product purchased by a specific consumer, and all communications with governmental or consumer protection organizations that contradict, qualify, or call into question the representation, or the basis relied upon for the representation.

**III.**

**IT IS FURTHER ORDERED** that Respondent shall:

- A. For a period of three (3) years, deliver a copy of this order to all employees, agents, and representatives having responsibilities with respect to Respondent's marketing or advertising of any covered product in any advertisement disseminated through the mail, on any website, or in any catalog and to any manager or officer in the chain of command of such employees, agents, and representatives, within thirty (30) days after (1) the date of service of this order, or (2) the person assumes a position covered by this paragraph.
- B. Secure from each person receiving this order pursuant to this paragraph a signed and dated statement acknowledging receipt of this order.

**IV.**

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission in connection with compliance with this order as follows:

- A. At least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action,

## Decision and Order

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 that*, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

- B. Within sixty (60) days after the date of service of this order, file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its own compliance with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.
- C. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: FTC v. Eminent Inc., File Number 1223065, Docket Number C-4409.

**V.**

**IT IS FURTHER ORDERED** that this order will terminate on July 18, 2033, 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 that* the filing of such a complaint will not affect the duration of:

## Analysis to Aid Public Comment

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order, if such complaint is filed after the order has terminated pursuant to this Part. *Provided, further*, that if such complaint is dismissed, or a federal court rules that the Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

By the Commission.

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, agreements containing consent orders from The Neiman Marcus Group, Inc. (“Neiman Marcus”), DrJays.com, Inc. (“DrJays”), and Eminent, Inc., doing business as Revolve Clothing (“Revolve”).

The proposed consent orders have 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 agreements and the comments received, and decide whether it should withdraw from the agreements or make the proposed orders final.

**Proposed Complaints**

## Analysis to Aid Public Comment

These matters involve violations of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (“FTC Act”), Section 5(a)(5) of the Fur Products Labeling Act, 15 U.S.C. § 69c(a)(5) (“Fur Act”), and Sections 301.2(c) and 301.49 of the Rules and Regulations Under Fur Products Labeling Act, 16 C.F.R. §§ 301.2(c) and 301.49 (“Fur Rules”). In 2010, Congress enacted the Truth in Fur Labeling Act, which amended the Fur Act by, among other things, eliminating an exemption for items containing fur valued at no more than \$150. As a result, the Fur Act now requires disclosure of any fur content in wearing apparel.

The proposed complaints allege that Neiman Marcus, DrJays, and Revolve each advertised products containing real fur as containing “faux fur” on its Internet site. The proposed complaints further allege that the advertisements failed to disclose the names, as set forth in the Fur Products Name Guide, 16 C.F.R. § 301.0, of the animals that produced the fur in each product. They also allege that most of the products had labels correctly identifying the fur content.

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The proposed complaint against Revolve alleges that the company misrepresented the fur content and failed to disclose the

## Analysis to Aid Public Comment

animal name for four products: an Australia Luxe Collective Nordic Angel Short Boot; a Marc Jacobs Runway Roebling Coat; a Dakota Xan Fur Poncho; and an Eryn Brinie Belted Faux Fur Vest. It further alleges that Revolve sold at least 158 units of the products.

**Proposed Orders**

The proposed orders are designed to prevent Neiman Marcus, DrJays, and Revolve from engaging in similar acts and practices in the future. Paragraph I bars each proposed respondent from violating the Fur Act and Rules by, among other things, misrepresenting in mail, catalog, or Internet advertisements that the fur in any product is faux or fake or misrepresenting the type of fur. Paragraph I also contains a proviso incorporating the Enforcement Policy Statement that the Commission announced on January 3, 2013. The proviso and Statement provide a safe harbor when a retailer cannot legally obtain a guaranty, as long as the retailer meets certain requirements, including that it neither knew nor should have known of the violation.

Paragraphs II through IV will help the Commission ensure that the proposed respondents comply with Part I by requiring them to keep copies of advertisements and materials relied upon in disseminating any representation covered by the orders (Paragraph II); provide copies of the orders to certain personnel having responsibility for the advertising or sale of fur and fake fur products (Paragraph III); and provide certain notices and compliance reports to the Commission (Paragraph IV).

Finally, Part V provides that the orders will terminate after twenty (20) years, with certain exceptions. The purpose of this analysis is to facilitate public comment on the proposed orders. It is not intended to constitute an official interpretation of the complaints or the proposed orders, or to modify the proposed orders' terms in any way.



## Complaint

## IN THE MATTER OF

**MOTOROLA MOBILITY LLC  
AND GOOGLE INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4410; File No. 121 0120  
Complaint, July 23, 2013 – Decision, July 23, 2013*

This consent order concerns the consummated acquisition by Google, Inc. (“Google”) of Motorola Mobility LLC (“Motorola”). In June 2012, Google purchased Motorola for approximately \$12.5 billion. As part of the acquisition, Google acquired several patents necessary for compliance with cellular, video codec, and wireless LAN industry standards. The complaint alleges that, though Motorola had agreed to license these patents on fair, reasonable, and non-discriminatory (FRAND) terms, Google reneged on these FRAND commitments, sought injunctions and exclusion orders against willing licensees, filed patent infringement claims at the ITC, and sought injunctive relief in several federal district courts. The complaint alleges that Google’s conduct constituted an unfair method of competition in violation of FTC Act Section 5. Further, the complaint alleges Google’s conduct would injure consumers by impairing the efficacy of the standard-setting process and deprive consumers of lower costs, increased interoperability and rapid technological development that an open and efficient standard-setting process provides. The order requires Google to provide a FRAND license to any potential licensee before seeking an injunction on a standard-essential patent. The order also bars Google from revoking or rescinding any FRAND commitment it has made or assumed unless the relevant standard to which the patent applies no longer exists.

*Participants*

For the *Commission*: *Matthew Accornero, Gustav P. Chiarello, Peggy Bayer Femenella, Susan Huber, Rajesh James, Suzane Munck, Michael Turner, and Michelle Yost.*

For the *Respondents*: *John Harkrider, Axinn, Veltrop and Harkrider, LLP.*

**COMPLAINT**

Pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (“FTC Act”), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to

## Complaint

believe that Respondent Google Inc. (“Google” or “Respondent”) has engaged in conduct that violates the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint stating its charges in that respect as follows:

**NATURE OF THE CASE**

1. Through this action, the Commission challenges a course of conduct, whereby Google, and its predecessor in interest, Motorola Mobility, Inc. (“Motorola”), engaged in unfair methods of competition by breaching its commitments to standard-setting organizations (“SSOs”) to license its standard essential patents (“SEPs”) on fair, reasonable, and non-discriminatory (“FRAND”) terms. Google violated its FRAND commitments by seeking to enjoin and exclude willing licensees of its FRAND-encumbered SEPs.

2. Manufacturers ensure compatibility for consumer electronic devices by agreeing on standards based on shared technologies that incorporate patents. These standards encourage adoption of a common platform among rival producers, which in turn fosters competition among these producers and spurs entry of complementary products. Holders of SEPs typically agree to license their patents royalty-free or on FRAND terms before the technology becomes part of the standard. When participants breach their FRAND commitments by engaging in patent hold-up and threatening to keep products out of the market, consumers and the competitive process will likely be harmed.

3. Google’s conduct will harm consumers by either excluding products from the market entirely as a result of an injunction, or by leading to higher prices because manufacturers using Google’s SEPs would be forced, by the threat of an injunction, to pay higher royalty rates which would be passed on to consumers. This conduct will deter innovation by increasing the costs of manufacturing to a standard and undermining the integrity and value of the standard-setting process.

4. Left unchecked, such conduct may in the future cause or threaten to cause substantial injury to competition and to consumers.

## Complaint

**RESPONDENTS**

5. Respondent Motorola Mobility LLC (formerly Motorola Mobility Inc.), is a limited liability company with its principal place of business at 600 North U.S. Highway 45, Libertyville, IL 60048, and is a wholly-owned subsidiary of Respondent Google Inc.

6. Respondent Google is a Delaware corporation with its principal office or place of business at 1600 Amphitheatre Parkway, Mountain View, CA 94043.

7. Google is a global technology company. Among other things, Google owns and promotes the Android operating system for use in mobile devices such as cellular phones and tablet computers. Google also develops and sells, often through its subsidiary Motorola, mobile phones, tablet computers, and devices providing home internet access. Google owns an extensive patent portfolio, including patents that cover technologies used in wireless cellular voice and data transmission standards, standards for Wireless Local Area Networks (WLAN), and video compression standards.

8. Google actively participates in numerous SSOs, including the Institute of Electrical and Electronics Engineers (“IEEE”), the European Telecommunications Standards Institute (“ETSI”), and the International Telecommunications Union (“ITU”). Collectively, this Complaint refers to these SSOs as the Relevant SSOs.

9. At all times relevant herein, Google has been, and is now, a corporation as “corporation” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and at all times relevant herein, Google has been, and is now, engaged in commerce as “commerce” is defined in the same provision.

## Complaint

**TECHNOLOGY STANDARDS ENHANCE COMPETITION  
AND CONSUMER WELFARE**

10. Firms in the information technology and telecommunications industries frequently ensure interoperability of their products through voluntary standard setting conducted through SSOs. Interoperability standards can benefit consumers by increasing competition, innovation, product quality and choice.

11. The Relevant SSOs publish technology standards that include cellular wireless communication standards such as GSM, EDGE, CDMA, UMTS, EV-DO and LTE (published by ETSI); the 802.11 WLAN standards (published by IEEE); and the H.264 video compression standards (published by ITU Telecommunications Standardization Sector). These are collectively referred to as the “Relevant Technology Standards” throughout this Complaint.

12. Manufacturers seeking to market mobile phones, tablet computers, and “smart” devices providing internet access such as gaming systems, laptops, and set-top boxes, must typically comply with one or more of the Relevant Technology Standards.

**PATENT HOLD-UP UNDERMINES STANDARD SETTING**

13. Inclusion of a patented technology into a standard can confer substantial market power on the holder of that patent. Prior to adoption of a standard, alternative technologies often compete to be included in the standard. Once a standard is adopted, implementers begin to make investments tied to the implementation of the standard. Because all of these participants may face substantial switching costs in abandoning initial designs and substituting a different technology, an entire industry may become “locked in” to a standard, giving a SEP owner the ability to demand and obtain royalty payments based not on the market value of its patents over alternative technologies, but on the costs and delays of switching away from the standardized technology.

14. The increase in the value of the patent based on the switching costs after it becomes a SEP is known as its “hold-up” value. The owner of a SEP may have the power to engage in hold-up by extracting higher royalties or other licensing terms that

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reflect the absence of competitive alternatives. Consumers of the products using the standard would be harmed if those higher royalties were passed on in the form of higher prices. The threat of hold-up also tends to reduce the value of standard setting, leading firms to rely less on the standard-setting process and depriving consumers of the substantial procompetitive benefits of standard setting.

### **FRAND COMMITMENTS MITIGATE THE RISK OF HOLD-UP**

15. Requiring FRAND commitments is an important mechanism for SSOs and SSO participants to mitigate the risk of patent hold-up. A SEP-holder that makes a voluntary FRAND commitment promises to license its SEPs on fair and non-discriminatory terms to anyone willing to accept a license, i.e., a “willing licensee,” and thus relinquishes its right to exclude a willing licensee from using technologies covered by its SEPs to implement a standard.

16. An implementer of a SEP is a willing licensee when it manifests its willingness to accept terms that are determined to be FRAND, either because such terms have been voluntarily negotiated or have been determined to be FRAND by a court or other neutral third party.

17. The Relevant SSOs generally take into account whether patents are subject to a FRAND commitment when determining which technology to incorporate into a standard, and require a patentee to disclose whether it commits to licensing its patents on FRAND terms. If a patentee refuses to make a FRAND commitment for a patent at the time the Relevant SSOs are deciding which technologies to include in a standard, the Relevant SSOs will generally not include the technology subject to that patent.

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**THE THREAT OF INJUNCTIVE RELIEF UNDERMINES  
THE FRAND COMMITMENT, REINSTATING THE RISK  
OF PATENT HOLD-UP**

18. After a FRAND commitment is made, the patentee and the implementer typically will negotiate a royalty and other license terms or, in the event they are unable to agree, may seek determination of reasonable terms by a judge or other neutral arbiter.

19. A licensing negotiation that occurs under threat of an injunction or exclusion order, however, is weighted toward the patentee in a fashion inconsistent with the FRAND commitment. In the presence of an injunctive threat, the negotiation between a patentee and the implementer is linked to the implementer's potential lost revenues from the sales of the enjoined products, rather than to the market value of the patent as compared to alternatives. This change in the stakes raises the maximum royalty rate the potential licensee is willing to pay, tending to push that rate upwards and out of the FRAND range.

**RELEVANT MARKETS**

20. The relevant product market consists of the technology covered by any Google-owned SEP and all substitutes for that technology.

21. The inclusion of MMI's technology and the subsequent adoption of the Relevant Technology Standard by the industry eliminated viable technology alternatives for implementers and conferred monopoly power which otherwise would not have existed.

**MOTOROLA AND GOOGLE MADE IRREVOCABLE  
FRAND COMMITMENTS**

22. Motorola has been a longstanding member of the Relevant SSOs and irrevocably committed to license on FRAND terms all of its SEPs incorporated in the Relevant Technology Standards. These FRAND commitments enabled the incorporation of Motorola's patented technology into the Relevant Technology Standards.

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23. In reliance on Motorola's FRAND commitments, implementers invested billions of dollars in designing and manufacturing products compliant with the Relevant Technology Standards.

24. Upon acquiring Motorola, Google assumed the FRAND commitments made by Motorola and affirmed its obligation to abide by Motorola's FRAND commitments.

**GOOGLE VIOLATED ITS FRAND COMMITMENTS BY  
SEEKING TO ENJOIN AND EXCLUDE WILLING  
LICENSEES**

25. Motorola breached its FRAND obligations by seeking to enjoin and exclude implementers of its SEPs, including some of its competitors, from marketing products compliant with some or all of the Relevant Technology Standards. Google continued Motorola's exclusionary campaign after acquiring Motorola. Google used these threats of exclusion orders and injunctions to enhance its bargaining leverage against willing licensees and demand licensing terms that tended to exceed the FRAND range. At all times relevant to this Complaint, these implementers were willing licensees of Google's FRAND-encumbered SEPs.

26. Motorola filed, and Google prosecuted, patent infringement claims before the United States International Trade Commission ("ITC"). The only remedy for patent infringement at the ITC is an exclusion order, and filing before the ITC on a FRAND-encumbered SEP therefore significantly raises the risk of patent hold-up.

27. Motorola also filed for, and Google prosecuted, claims for injunctive relief related to its FRAND-encumbered SEPs in federal district court in parallel with its ITC filings. See Complaint, *Motorola Mobility, Inc. v. Apple, Inc.*, No. 1:10-cv-6385, slip op. at 10 (E.D. Ill. Oct. 6, 2010); Complaint for Patent Infringement, *Motorola Mobility, Inc. v. Microsoft Corp.*, No. 10-cv-699, slip op. at 8 (W.D. Wis. Nov. 10, 2010); Complaint for Patent Infringement, *Motorola Mobility, Inc. v. Microsoft Corp.*, No. 10-cv-700, slip op. at 12 (W.D. Wis. Nov. 10, 2010);

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Complaint for Patent Infringement, Motorola Mobility, Inc. v. Microsoft Corp., No. 1:10-cv-24063, slip op. at 14 (S.D. Fla. Nov. 10, 2010).

**THE LIKELY ANTICOMPETITIVE EFFECTS OF  
GOOGLE'S CONDUCT OUTWEIGH ANY POTENTIAL  
BENEFITS**

28. The likely anticompetitive effects of Google's breach of its FRAND commitments include:

- a. Depriving end consumers of competing products that comply with the Relevant Technology Standards, including mobile phones, tablet computers, and "smart" devices providing internet access such as gaming systems, laptops, and set-top boxes;
- b. Increasing costs to produce consumer devices that comply with the Relevant Technology Standards, which manufacturers will likely pass through to consumers;
- c. Undermining the integrity and efficiency of the standard-setting process and decreasing the incentives to participate in the process and adopt published standards; and
- d. Raising the costs of Google's competitors and thereby dampening competition between Google and makers of competing products, including, but not limited to, mobile phone operating systems, mobile phones, video compression technologies, and devices providing home internet access.

29. There is no legitimate efficiency justification sufficient to outweigh the harm to competition and consumers threatened by Google's conduct.

**SUBSTANTIAL CONSUMER INJURY**

30. If Google's practices are allowed to continue, many consumer electronics manufacturers will agree to pay



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unreasonable royalties simply to avoid an injunction or exclusion order. Manufacturers will likely pass on some portion of these costs to end consumers.

**VIOLATION ALLEGED**

31. Google's conduct constitutes an unfair method of competition in violation of Section 5 of the FTC Act. This conduct, or the effects thereof, will continue or recur in the absence of appropriate relief.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-third day of July, 2013, issues its Complaint against Respondent Motorola Mobility LLC and Respondent Google Inc.

By the Commission, Commissioner Ohlhausen dissenting and Commissioner Wright recused.

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**DECISION AND ORDER**

The Federal Trade Commission (“Commission”), having initiated an investigation of certain acts and practices of Google Inc. and/or Motorola Mobility, Inc. (now Motorola Mobility LLC, a wholly-owned subsidiary of Respondent Google Inc.) (hereinafter referred to as “Respondents”), and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing admissions by Respondents of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Act, and that a Complaint should issue stating its charges in that respect; and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments; and having duly considered the comments received from interested persons pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34; and having modified the Decision and Order in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”).

1. Respondent Google Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business

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at 1600 Amphitheatre Parkway, Mountain View, CA 94043.

2. Respondent Motorola Mobility LLC (formerly Motorola Mobility, Inc.), is a limited liability company with its principal place of business at 600 North U.S. Highway 45, Libertyville, IL 60048, and is a wholly-owned subsidiary of Respondent Google Inc.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

**ORDER****I.**

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

- A. “Respondents” means Google Inc. and Motorola Mobility LLC, and the directors, officers, employees, agents, representatives, successors, and assigns of each; and the joint ventures, subsidiaries, divisions, groups and affiliates controlled by Google Inc. or Motorola Mobility LLC and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. For purposes of this Order, an action by or on behalf of either Respondent Google Inc. or Respondent Motorola Mobility LLC shall satisfy an obligation imposed on “Respondents.”
- B. “AAA” means the American Arbitration Association; a not-for-profit dispute resolution organization headquartered at 1633 Broadway, New York, NY 10019, [www.adr.org](http://www.adr.org). The International Centre for Dispute Resolution (“ICDR”) is a division of the AAA.

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- C. “Action” means any proceeding whether legal, equitable, or administrative, in the United States or anywhere else in the world.
- D. “Binding Arbitration” means arbitration to establish a License Agreement that follows the procedures in Paragraph IV.B.2. of the Order and complies with the following:
1. The arbitration is administered by a Potential Licensee’s choice of Qualified Arbitration Organization, or such other arbitration organization or ad hoc group of arbitrators that Respondents and the Potential Licensee mutually agree upon; however, if the Potential Licensee does not select a Qualified Arbitration Organization within sixty (60) days after the Potential Licensee accepts the offer of Binding Arbitration, Respondent may demand arbitration through its choice of Qualified Arbitration Organization;
  2. Respondents and the Potential Licensee agree on the number and manner of selecting the arbitrators; however, if the parties cannot agree within thirty (30) days after selection of the Qualified Arbitration Organization, either party may demand that the number and manner be determined by the process stated in the rules of the selected Qualified Arbitration Organization, or if the applicable rules do not specify a selection method, that there be three arbitrators, with each party selecting one arbitrator and those arbitrators selecting the third;
  3. Respondents and the Potential Licensee agree upon the language and location for the arbitration; however, if the parties cannot agree within thirty (30) days after selection of the Qualified Arbitration Organization, either party may demand that these matters be determined pursuant to the rules of the selected Qualified Arbitration Organization;

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4. A party to the arbitration may condition its participation on the following:
    - a. The field of use for patents licensed through arbitration is limited to uses covered by the applicable FRAND Commitment(s), and
    - b. The arbitrator may require reasonable security, including an ongoing escrow of funds to be held by a Qualified Escrow Agent, if the arbitrator determines such security is necessary to ensure a party will fulfill the financial terms of an arbitrated License Agreement and the arbitrator sets forth in writing the terms and conditions for the disbursement of such funds and the duties of the escrow agent; and
  5. The arbitration is not conditioned on any terms or conditions not explicitly authorized by the Order; *provided that*, the arbitration may include any terms or conditions that are mutually agreed to by the parties.
- E. “Confirmation Letter” means the letter attached as Exhibit A to this Order, in which Respondents make a binding and irrevocable commitment, conditioned only on the Potential Licensee providing the same binding and irrevocable commitment, to (i) abide by all licensing terms set by a Final Ruling on the Potential Licensee’s Qualified Request for a FRAND Determination, (ii) to pay any royalties established through a Final Ruling on the Qualified Request for a FRAND Determination as if the relevant patents had been licensed at such royalty rates as of the date Potential Licensee filed the Qualified Request for a FRAND Determination, and (iii) identify those terms in the proposed License Agreement attached to the Confirmation Letter that (a) are being challenged through the Qualified Request for a FRAND Determination and (b) each party agrees to include in any final License Agreement between the parties that

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also includes the terms or royalty payments set by a Final Ruling in the Qualified Request for a FRAND Determination.

- F. “Court” means a judicial tribunal of appropriate jurisdiction in or outside of the United States.
- G. “Covered Injunctive Relief” means a ruling of any legal or administrative tribunal, whether in or outside of the United States, that does or would prevent any Third Party (or for the purposes of IV.F., any party) from making, using, selling, offering for sale, or importing any item based on alleged Infringement of a FRAND Patent. Covered Injunctive Relief includes, but is not limited to, an exclusion order issued by the United States International Trade Commission under Section 337 of the Tariff Act as Amended, 19 U.S.C. § 1337, or an injunction order issued by a Court.
- H. “Essential” as to a particular Standard means “essential” as defined by the rules or policies of the SSO that published such Standard. If essential is not defined by the SSO that published a Standard (or is defined solely as “needed” or “necessary”), “Essential” shall have the meaning given in Section 15 (Definitions) of the ETSI Rules of Procedure, 30 November 2011 (attached as Exhibit C).
- I. “Final Ruling” means a decision by a Court from which no further appeals or reconsideration may be made.
- J. “FRAND Commitment” means a commitment to an SSO to license one or more Patent Claims Essential to a Standard on either royalty-free or fair, reasonable and non-discriminatory terms (or reasonable and non-discriminatory terms) pursuant to the policies of such SSO. FRAND Commitments include, but are not limited to:
  - 1. An undertaking to grant irrevocable licenses on fair, reasonable, and non-discriminatory terms and

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conditions to Essential IPR pursuant to the Intellectual Property Rights Policy of the European Telecommunications Standards Institute (“ETSI”);

2. An Accepted Letter of Assurance as defined in the IEEE-SA Standards Board Bylaws of the Institute of Electrical and Electronics Engineers, Inc. (“IEEE”) to the extent the signatory of such assurance has selected option 1(a), 1(b) or 1(c) as they appear on the IEEE form Letter of Assurance posted on the IEEE website as of the date this Order is issued (or amended options substantially equivalent thereto); and
  3. A General Patent Statement and Licensing Declaration, or Patent Statement and Licensing Declaration, submitted to the Telecommunication Standardization Sector of the International Telecommunication Union (“ITU”) pursuant to the Guidelines for Implementation of the Common Patent Policy for ITU-T/ITU-R/ISO/IEC issued jointly by the International Electrotechnical Commission, the International Organization for Standardization and the International Telecommunication Union, to the extent that the declarant has selected option 1 or 2 as they appear on the form Declarations published on the ITU website as of the date this Order is issued (or amended options substantially equivalent thereto).
- K. “FRAND Patent” means a Patent Claim solely to the extent such Patent Claim is subject to a FRAND Commitment. A Patent Claim shall be considered a FRAND Patent only with respect to the practice of such claim implementing the Standard for which the relevant FRAND Commitment was made, and not with respect to the practice of such claim in any other way outside the scope of the relevant FRAND Commitment.

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- L. “FRAND Terms Letter” means the letter attached as Exhibit B to this Order, in which Respondents make a binding irrevocable commitment to license the Potential Licensee’s relevant FRAND Patents on terms that are fair, reasonable and non-discriminatory on the condition that the Potential Licensee also make a binding commitment to license Respondents’ relevant FRAND Patents on terms that are fair, reasonable and non-discriminatory.
- M. “Infringement of (or Infringing) a FRAND Patent” means a claim that a FRAND Patent is infringed based on the alleged infringer’s compliance with a Standard for which a FRAND Commitment including the FRAND Patent has been made.
- N. “JAMS” means JAMS, a private alternative dispute resolution provider with headquarters at 1920 Main Street, Suite 300, Irvine, CA 92614, [www.jamsadr.com](http://www.jamsadr.com).
- O. “License Agreement” means a complete, binding, enforceable agreement between the signatories to license the patents included in such agreement.
- P. “Offer to Arbitrate” means a binding written offer, substantially in the form of Exhibit D to this Order, delivered pursuant to the terms of Paragraph IV.B.2. of this Order to use Binding Arbitration to establish a License Agreement.
- Q. “Offer to License” means a binding written offer delivered pursuant to Paragraph IV.B.1. of this Order that contains either a proposed License Agreement or a full description of all material commercial terms Respondents propose be included in a License Agreement, including but not limited to, royalties, other financial terms, defensive suspension or termination provisions, and any limitations on the scope or field of use of any intellectual property to be included in a License Agreement.



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- R. “Patent Claim” means one or more claims in issued patents or pending patent applications issued or pending in the United States or anywhere else in the world.
- S. “Potential Licensee” means a Third Party allegedly Infringing a FRAND Patent.
- T. “Qualified Arbitration Organization” means the following organizations and rules: (i) the AAA pursuant to its Commercial Arbitration Rules, or (ii) JAMS pursuant to its Comprehensive Arbitration Rules and Procedures; or, if the dispute involves a party domiciled outside the United States, (iii) the AAA’s ICDR pursuant to its International Arbitration Rules; (iv) JAMS pursuant to its International Arbitration Rules; or (v) WIPO pursuant to its WIPO Arbitration Rules.
- U. “Qualified Escrow Agent” means a neutral Third Party selected by the party required to place funds in escrow who has prior experience as a neutral escrow agent and is not rejected by the arbitrator.
- V. “Qualified Offers” mean an Offer to License and an Offer to Arbitrate, both of which comply with the terms of Paragraphs IV.B. and IV.D. of this Order.
- W. “Qualified Recipient(s)” means (i) outside legal counsel actively representing the Potential Licensee in connection with the licensing of or litigation concerning Respondents’ FRAND Patents; or (ii) chief executive officer and, if known to Respondent, general counsel, outside legal counsel or primary contact with Respondent with respect to patent licensing.
- X. “Qualified Request for a FRAND Determination” means a Request for a FRAND Determination that (i) is the first such Request filed after the date this Order was issued by a Potential Licensee against either Respondent that includes FRAND Patents Essential to

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a particular Standard, (ii) is a Request for a FRAND Determination filed within sixty (60) days of the dismissal of a prior Request that included the same Standard, if the dismissal was on Respondent's motion for lack of personal jurisdiction or improper venue, or (iii) is a Request for a FRAND Determination filed within sixty (60) days of the dismissal of a prior Request that included the same Standard, if the dismissal was without prejudice and both Requests were filed in the same judicial district (and division, if applicable).

- Y. "Reciprocity" as to an offer to license FRAND Patents for a particular Standard or Standards means "reciprocity" as defined in the FRAND Commitment or as defined by the SSO to which a FRAND Commitment covering the Standard has been made; or if not defined in the FRAND Commitment or by the relevant SSO, Reciprocity shall mean conditioning an offer to license FRAND Patents Essential to a Standard on receiving a cross-license to the licensee's FRAND Patents Essential to the same Standard under terms and conditions consistent with the licensee's FRAND Commitments covering such patents; provided that, if the relevant FRAND Commitment of either Respondents or a Potential Licensee commits to providing a royalty-free license based on reciprocity, such term shall be interpreted as conditioning the offer of a royalty-free license on receiving a royalty-free cross-license to FRAND Patents Essential to the same Standard.
- Z. "Request for a FRAND Determination" means a request filed in any United States District Court of competent jurisdiction that the court determine at least the royalty terms of a global license for use of Respondents' FRAND Patents Essential to a Standard, to the extent the use of the relevant FRAND Patents is not covered by an existing license.
- AA. "Standard" means a standard published by an SSO, including mandatory and optional implementations

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provided in such standard. Standards include, but are not limited to, cellular wireless communication standards such as GSM, EDGE, UMTS and LTE (published by ETSI); the 802.11 WLAN standards (published by IEEE); and/or the H.264 video compression standards, CDMA2000, or EV-DO standards (published by ITU Telecommunications Standardization Sector).

- BB. “SSO” means a standard-setting organization, i.e., an organization that produces and/or maintains standards or specifications under a defined process. SSOs include but are not limited to, the European Telecommunications Standards Institute (“ETSI”), the Institute of Electrical and Electronics Engineers (“IEEE”), and the International Telecommunication Union (“ITU”).
- CC. “Third Party” means an individual, corporation, partnership, joint venture, association, unincorporated organization, or other business entity, other than Respondents, and includes in each case the direct and indirect wholly-owned subsidiaries and majority-owned and controlled subsidiaries and joint ventures of the first person or entity.
- DD. “WIPO” means the World Intellectual Property Organization Arbitration and Mediation Center, an international not-for-profit alternative dispute resolution provider based at 34 chemin des Colombettes, 1211 Geneva 20, Switzerland [www.wipo.int/amc](http://www.wipo.int/amc).

**II.**

**IT IS FURTHER ORDERED** that:

- A. Respondents shall not revoke or rescind any FRAND Commitment unless:

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1. all Standards for which such FRAND Commitment was made have been finally rejected or withdrawn; or
2. Respondents no longer have any interest in FRAND Patents covered by such FRAND Commitment and revoking or rescinding the FRAND Commitment will not interfere with Respondents' obligations under Paragraph V.B. below by inter alia altering the FRAND Commitment for any FRAND Patent sold or transferred by Respondent to a Third Party; or
3. all FRAND Patents covered by such FRAND Commitment have expired or been determined to be unenforceable by a Final Ruling of a Court;

*Provided that* nothing in this Order shall (i) restrict Respondents' exercise of an otherwise lawful right to suspend or terminate a license or covenant pursuant to its terms; (ii) require Respondents to give a FRAND Commitment with respect to any Standard or proposed Standard; or (iii) restrict Respondents' right to withdraw or modify a FRAND Commitment if such withdrawal or modification is expressly permitted by the SSO to which the FRAND Commitment was made.

- B. Respondents shall cease and desist from directly or indirectly making any future claims for Covered Injunctive Relief based on alleged Infringement of a FRAND Patent except as permitted under this Order.
- C. Respondents shall not obtain or enforce Covered Injunctive Relief based on a claim of alleged Infringement of a FRAND Patent that is pending on the date this Order is issued, unless and until Respondents have made Qualified Offers to the Potential Licensee against whom the Covered Injunctive Relief is sought. It shall be a violation of this Order if Covered Injunctive Relief based on a claim of alleged Infringement of a FRAND Patent is enforced before Respondents make the Qualified

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Offers and the time periods specified in Paragraph IV.B. of this Order have lapsed.

- D. Respondents are prohibited from obtaining or enforcing Covered Injunctive Relief (i) during the pendency of a Request for a FRAND Determination that was filed before the date this Order was accepted for public comment, (ii) during the pendency of a Qualified Request for a FRAND Determination that complies with Paragraph IV.C. of this Order, or (iii) after a Potential Licensee accepts Respondents' Offer to Arbitrate.
- E. Nothing in this Order shall prohibit Respondents from seeking Covered Injunctive Relief for alleged Infringement of a FRAND Patent against a Potential Licensee who:
1. is outside the jurisdiction of the United States District Courts; a Potential Licensee shall be considered within the jurisdiction of the United States District Courts if the Potential Licensee itself or any parent or other entity with control over such Potential Licensee is within the jurisdiction of the United States District Courts;
  2. has stated in writing or in sworn testimony that it will not license the FRAND Patent on any terms; *provided that* for the purposes of this paragraph, challenging the validity, value, Infringement or Essentiality of an alleged infringing FRAND Patent does not constitute a statement that a Potential Licensee will not license such FRAND Patent;
  3. refuses to enter a License Agreement covering the FRAND Patent on terms that have been set in the Final Ruling of a Court or through Binding Arbitration; or

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4. does not provide the written confirmation requested in a FRAND Terms Letter within thirty (30) days of when the FRAND Terms Letter was delivered to the Qualified Recipient(s) of the Potential Licensee; *provided, however*, that Respondents shall not assert in any Court that such written confirmation constitutes a specific agreement to license on any particular terms.

**III.**

**IT IS FURTHER ORDERED** that Respondents and the Potential Licensee may agree to enter into the procedure outlined in this Paragraph III, or any other mutually agreed to procedure that specifically references this Paragraph III, as the exclusive means for determining the terms of a License Agreement covering Respondents' patents that are Essential to the Covered Standards, and if either party seeks Reciprocity, the Potential Licensee's patents that are Essential to the Covered Standards to the extent not already licensed (hereinafter the "Relevant License Agreement"):

- A. Respondents and Potential Licensee agree to negotiate, for a period of at least six (6) months, to determine the terms of a Relevant License Agreement;
- B. At any time after six months, at the option of Respondents or within sixty (60) days of the request of Potential Licensee, Respondents shall send the Potential Licensee a proposed Relevant License Agreement, which if executed will form a binding license agreement;
- C. Within sixty (60) days after Respondents deliver the Relevant License Agreement to the Potential Licensee, the Potential Licensee shall either:
  1. execute the Relevant License Agreement, or
  2. designate all terms of the proposed Relevant License Agreement that the Potential Licensee contends are inconsistent with Respondents'

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FRAND Commitments (“Contested Terms”), accept all other terms (“Accepted Terms”), for each Contested Term propose an alternative that the Potential Licensee contends is consistent with the FRAND Commitments of Respondents and, if applicable, of the Potential Licensee (“Relevant FRAND Commitments”), and elect to have the Contested Terms resolved through a Request for a FRAND Determination or Binding Arbitration, the purpose of which shall be to determine whether the Contested Terms are consistent with the Relevant FRAND Commitments and, to set the appropriate requirements for terms found inconsistent with the Relevant FRAND Commitments;

- D. It is intended that the Request for a FRAND Determination or Binding Arbitration shall establish the Contested Terms, and that these terms, together with the Accepted Terms, shall constitute a binding Relevant License Agreement, which if executed will form a binding license agreement. Except to the extent inconsistent with the preceding sentence, nothing herein shall restrict the ability of any party from presenting evidence or making arguments in Binding Arbitration or in the Request for a FRAND Determination, including without limitation arguments by Respondents that the District Court hearing the Request for a FRAND Determination cannot or should not hear the action on jurisdictional or justiciability grounds or because an alternative forum would be more appropriate, or arguments regarding validity, Essentiality, Infringement or the value of the patents included in the Relevant License Agreement;
- E. If the Potential Licensee elects to resolve the Contested Terms through a Qualified Request for a FRAND Determination, and the United States District Court in which such Request was filed determines on its own motion or on Respondents’ motion that it cannot issue a ruling on the Contested Terms, then the Respondents and the Potential Licensee shall resolve

## Decision and Order

the Contested Terms through Binding Arbitration, which may be filed by either Respondents or Potential Licensee within sixty (60) days after the dismissal of the Qualified Request for a FRAND Determination.

- F. It shall be a violation of this Order for Respondents to file a claim seeking, or otherwise obtain or enforce, Covered Injunctive Relief in a manner that violates the terms of any agreement entered into with a Potential Licensee pursuant to this Paragraph III.

**IV.**

**IT IS FURTHER ORDERED** that in Respondents' activities in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, in connection with the licensing of Respondents' FRAND Patents, Respondents shall not file a claim seeking, or otherwise obtain or enforce, Covered Injunctive Relief based on the alleged Infringement of a FRAND Patent against any Potential Licensee who has not entered into an agreement pursuant to Paragraph III above:

- A. If filing a claim for, or otherwise obtaining or enforcing, the Covered Injunctive Relief violates the terms of any written agreement with the Potential Licensee.
- B. Until after Respondents have taken the following actions:
1. At least six (6) months prior to pursuing Covered Injunctive Relief, Respondents shall deliver to the Qualified Recipient(s) of the Potential Licensee a copy of this Order and an Offer to License (to the extent not already licensed) the FRAND Patent and Respondents' other FRAND Patents Essential to the same Standard or Standards (the "Covered Standards"). Respondents may condition the Offer to License on Reciprocity, but may not require the Potential Licensee to license any Patent Claim not Essential to a Standard practiced by the Potential Licensee, or to license any other patents or



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intellectual property (any offered terms and conditions that are for additional patents or intellectual property shall not be considered part of the Offer to License);

2. At least sixty (60) days prior to pursuing Covered Injunctive Relief, Respondents shall deliver to the Qualified Recipient(s) of the Potential Licensee an Offer to Arbitrate the terms of a License Agreement to the Respondents' FRAND Patents Essential to the Covered Standards, and, if seeking Reciprocity, to the Potential Licensee's FRAND Patents Essential to the Covered Standards. The Offer to Arbitrate shall include a binding and irrevocable undertaking that Respondents shall enter a License Agreement on terms and conditions established by the arbitrator and pay all applicable royalties established under the agreement as if they had been in effect as of the date Respondents file for arbitration. Respondents may condition the Offer to Arbitrate on the Potential Licensee making the same binding and irrevocable undertaking. Respondents shall offer Binding Arbitration under the following terms and conditions, or on such other terms and conditions as may be mutually agreed to by the parties:
  - a. When the Potential Licensee accepts Respondents' Offer to Arbitrate, the Potential Licensee shall state whether it demands Reciprocity;
  - b. Respondents shall file for arbitration and deliver to the Qualified Recipient(s) of the Potential Licensee a proposed License Agreement for the Respondents' FRAND Patents Essential to the Covered Standards, and, if either party is seeking Reciprocity, to the Potential Licensee's FRAND Patents essential to the Covered Standards, in each case to the extent not already licensed;

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- c. Within sixty (60) days of receiving the proposed License Agreement pursuant to Paragraph IV.B(2)(b), the Potential Licensee shall designate all terms of the License Agreement that it contends are inconsistent with Respondents' FRAND Commitments, propose additional or alternative terms the Potential Licensee believes are necessary for the License Agreement to comply with the FRAND Commitments of Respondents, and if applicable the Potential Licensee's FRAND Commitments, and agree to inclusion of all other terms in the final License Agreement;
- d. The arbitrator shall determine whether the terms contested by the Potential Licensee are consistent with the FRAND Commitments of Respondents, and if applicable, the Potential Licensee. The arbitrator shall revise any terms that it finds are not consistent with the relevant FRAND Commitments;
- e. The arbitrator shall set the terms of the final License Agreement; and
- f. Within thirty (30) days after the arbitrator sets the terms of a final License Agreement, the parties shall enter into and execute a License Agreement;

*Provided that*, if the procedures for Binding Arbitration as set forth in this Order conflict with the mandatory arbitration rules of an SSO to which both Respondent and a Potential Licensee are subject, then either Respondent or the Potential Licensee may require that the relevant provisions of the License Agreement be determined pursuant to the mandatory arbitration rules of such SSO.

- C. If the Potential Licensee has filed a Qualified Request for a FRAND Determination covering Respondents'

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FRAND Patents Essential to the Covered Standards no more than seven (7) months after Respondents delivered the Offer to License or three (3) months after Respondents delivered the Offer to Arbitrate, whichever is later, and such Action has not been dismissed upon a Final Ruling; *provided that* not less than thirty (30) days after the Potential Licensee files the Qualified Request for a FRAND Determination, Respondents may send a proposed License Agreement and a Confirmation Letter (attached as Exhibit A) to the Qualified Recipient(s) of the Potential Licensee. If the Potential Licensee does not deliver written acceptance of the terms in the Confirmation Letter to the recipient designated by Respondents in the Confirmation Letter within sixty (60) days of receipt of the Confirmation Letter, Respondents shall be relieved of their obligations not to file a claim for, or seek or enforce, Covered Injunctive Relief.

- D. The Offer to License and an Offer to Arbitrate shall be irrevocable for the following periods:
1. An Offer to License shall be irrevocable until the date of delivery of an Offer to Arbitrate.
  2. An Offer to Arbitrate shall be irrevocable until thirty (30) days after Respondents file an Action for Covered Injunctive Relief based on alleged infringement of one or more FRAND Patents included in the Offer to Arbitrate, *provided however*, that with respect to Actions containing requests for Covered Injunctive Relief that are pending on the date this Order is issued, the Offer to Arbitrate shall be irrevocable until two (2) months after Respondents deliver an Offer to Arbitrate or, if there is a pending Request for a FRAND Determination covering the same FRAND Patent that is the basis of the request for Covered Injunctive Relief, until there is a Final Ruling on the Request for a FRAND Determination.

## Decision and Order

- E. Notwithstanding any other provision of this Order, nothing herein shall:
1. prevent or restrict the Potential Licensee and Respondents from negotiating, arbitrating or entering into any License Agreement involving FRAND Patents on any terms or in any manner that is mutually agreed to by the Potential Licensee and Respondents;
  2. prevent or restrict Respondents from enforcing any License Agreement entered into prior to the effective date of this Order;
  3. as to a Potential Licensee, apply to Respondents' FRAND Patents to the extent already licensed to such Potential Licensee;
  4. prevent or restrict Respondents from pursuing relief, claims or defenses other than Covered Injunctive Relief, including damages for infringement and potential enhancements for willful infringement;
  5. restrict any party from arguing in any Request for a FRAND Determination that the District Court cannot or should not hear this action on jurisdictional or justiciability grounds or that an alternative forum would be more appropriate; or
  6. restrict any party from making arguments in any Request for a FRAND Determination or in Binding Arbitration regarding the validity, Essentiality, Infringement or value of the patents at issue in such proceeding.
- F. Notwithstanding any other provision of the Order, Respondents shall be permitted to file a claim seeking, or otherwise obtain and enforce, Covered Injunctive Relief against a Potential Licensee, if the Potential Licensee is seeking or has sought on or after the date of this Order, Covered Injunctive Relief against a

## Decision and Order

product (including software), device or service that is made, marketed, distributed or sold by Respondents based on Infringement of the Potential Licensee's FRAND Patent unless prior to seeking the Covered Injunctive Relief, the Potential Licensee does one of the following:

1. makes Qualified Offers to the party whose infringement forms the basis for the claim of Covered Injunctive Relief ("the alleged infringer") and the alleged infringer has refused both offers; or
  2. obtains a Final Ruling on a Request for a FRAND Determination to which the alleged infringer was a party that sets at least the royalty terms for a license to the Standard for which the allegedly infringed FRAND Patents are Essential.
- G. The fact that the final terms determined through Binding Arbitration or a Request for a FRAND Determination may differ from the terms Respondents proposed in an Offer to Arbitrate or an Offer to License shall not, by itself, constitute a violation of this Order.

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

- A. Respondents shall, within sixty (60) days of receiving a written request by a Potential Licensee for a license to Respondents' FRAND Patents Essential to one or more Standards ("Requested License"), provide a written response and begin negotiation with such Potential Licensee for the Requested License. Respondents' written response pursuant to this paragraph shall be in good faith compliance with their FRAND Commitments and all other provisions of this Order.

## Decision and Order

- B. Respondents shall not sell or assign any FRAND Patent to any Third Party unless such Third Party agrees: (i) to become a successor to Respondents' FRAND Commitments to the extent the FRAND Patent is subject to such FRAND Commitments, (ii) not to seek Covered Injunctive Relief on the basis of Infringement of the FRAND Patent except to the extent Respondents would be permitted to seek such Covered Injunctive Relief by the terms of this Order, and (iii) to condition further assignment of the FRAND Patent on the assignee agreeing to the terms of this subparagraph V.B.

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

- A. Within thirty (30) days after this Order has been issued, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondents shall include in its report, a full description of the efforts being made to comply with the relevant Paragraphs of this Order, including the status of each Action that contained a request for Covered Injunctive Relief as of the date Respondents signed the Agreement Containing Consent Order, a description of all pending requests for Covered Injunctive Relief and how such claims comply with the requirements of this Order, and a description of each sale or assignment of a FRAND Patent and an assurance that such sale or assignment complies with Paragraph V.B. of this Order.
- B. Beginning twelve (12) months after the date this Order has been issued, and annually thereafter on the anniversary of the date this Order becomes final, for the next nine (9) years, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this

## Decision and Order

Order. Respondents shall include in its report, among other things that are required from time to time, a description of all pending claims for Covered Injunctive Relief based on Infringement of a FRAND Patent and a statement of how such claims comply with the requirements of this Order, and a description of each sale or assignment of a FRAND Patents and an assurance that such sale or assignment complies with Paragraph V.B. of this Order.

**VII.**

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

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

**VIII.**

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

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

## Decision and Order

which copying services shall be provided by Respondents at its expense; and

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

**IX.**

**IT IS FURTHER ORDERED** that this Order shall terminate on July 23, 2023.

By the Commission, Commissioner Ohlhausen dissenting and Commissioner Wright recused.



Decision and Order

**EXHIBIT A**  
**Confirmation Letter**

[DATE]  
[COUNSEL REPRESENTING POTENTIAL LICENSEE IN  
QUALIFIED REQUEST FOR A FRAND DETERMINATION]  
[POTENTIAL LICENSEE]

Dear [COUNSEL],

I am sending this letter on behalf of Google Inc. and its wholly-owned subsidiary Motorola Mobility LLC. This letter is required by the Federal Trade Commission's Decision and Order in In the Matter of Motorola Mobility LLC and Google Inc., Docket No. C-4410 ("the Order"), to which Google Inc. and Motorola Mobility agreed as a settlement with the FTC. Your court action [ACTION] is a Qualified Request for a FRAND Determination under the terms of the Order. As required by the Order, attached is a copy of the Order. All capitalized terms in this letter refer to terms defined in the Order. Please read the Order carefully. If anything in this letter conflicts with the terms in the Order, the terms in the Order apply.

I am also sending a proposed License Agreement that Google is ready and willing to execute. The proposed License Agreement grants a global license to all Google's FRAND Patents that are Essential to the Standard(s) included in [ACTION], specifically [IDENTIFY STANDARDS] to the extent not already licensed. [If Google is seeking reciprocity, add "Google is seeking Reciprocity as permitted in Google's relevant FRAND Commitments. Therefore, the proposed License Agreement also includes a license to all [POTENTIAL LICENSEE'S] FRAND Patents that are Essential to the same Standard(s)."]

Under the Order, Google generally cannot seek an injunction or exclusion order against [POTENTIAL LICENSEE] while the above action is ongoing. However, Google can demand that, as a condition of not seeking an injunction or exclusion order, Google and the Potential Licensee make the following binding commitments that cannot be revoked:

## Decision and Order

1. Google and the Potential Licensee will abide by all licensing and royalty terms set by a Final Ruling in [ACTION];
2. Google and the Potential Licensee will pay royalties set by a Final Ruling in [ACTION] as though the license for which the royalties are set was in place from the date the action was filed; and
3. Within sixty (60) days of receiving or sending this letter, as applicable, Google and the Potential Licensee will identify in writing to the other party all terms in the attached proposed License Agreement that the sending party is willing to include in a final License Agreement that also includes the terms and royalties set by a Final Ruling in [ACTION].

Nothing in this letter restricts the ability of any party to present any evidence or make any legal arguments in [ACTION], or any other forum, including without limitation, arguments regarding validity, Essentiality, infringement or the value of any patents included in the proposed License Agreement or at issue in [ACTION], or any arguments that the court cannot or should not hear [ACTION] on jurisdictional or justiciability grounds or because an alternative forum would be more appropriate.

Please Note: IF YOU DO NOT SIGN THIS LETTER AND DELIVER IT TO [NAME, ADDRESS AND PHONE NUMBER OF GOOGLE'S DESIGNATED RECIPIENT] WITHIN 60 DAYS FROM RECEIPT, I.E. BY \_\_\_\_\_, GOOGLE MAY BE ABLE TO SEEK AN INJUNCTION OR EXCLUSION ORDER AGAINST YOU WITHOUT VIOLATING THE ORDER.

Sincerely,

[QUALIFIED REPRESENTATIVE]  
GOOGLE INC.

COUNTER-SIGNATURE

---

[NAME]

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[CHIEF EXECUTIVE OFFICER, GENERAL COUNSEL OR  
OUTSIDE COUNSEL]  
[POTENTIAL LICENSEE]

WHEN SIGNED BY BOTH GOOGLE AND [POTENTIAL  
LICENSEE] THIS LETTER SHALL CONSTITUTE A  
BINDING AND IRREVOCABLE COMMITMENT BY BOTH  
PARTIES TO ABIDE BY THE TERMS OF THIS LETTER

Decision and Order

**EXHIBIT B**  
**FRAND Term Letter**

[DATE]  
[QUALIFIED RECIPIENT(S) OF POTENTIAL LICENSEE]  
[POTENTIAL LICENSEE]

Dear [COUNSEL],

I am sending this letter on behalf of Google Inc. and its wholly-owned subsidiary Motorola Mobility LLC (“Google”). The Federal Trade Commission and Google reached a settlement that resulted in the Federal Trade Commission issuing an Order in In the Matter of Motorola Mobility LLC and Google Inc., Docket No. C-4410 (“the Order”). Attached is a copy of the Order. All capitalized terms in this letter refer to terms defined in the Order. Please read the Order carefully. If anything in this letter conflicts with the terms in the Order, the terms in the Order apply.

Under the Order, Google generally cannot seek an injunction or exclusion order against you for using Google’s patented technology to comply with a Standard published by a standard-setting organization such as ETSI, IEEE or ITU if Google has made a FRAND Commitment covering that technology and you are willing and able to pay Google fair and reasonable royalties. However, Google can demand that, as a condition of not seeking an injunction or exclusion order, Google and you agree to the following binding commitments that cannot be revoked:

Google and the [POTENTIAL LICENSEE] agree to license each other’s patents that are Essential to complying with [STANDARD OR STANDARDS] that each uses on terms that are fair and reasonable and that comply with each party’s FRAND Commitments.

Nothing in this letter restricts the ability of you or Google to present any evidence or make any legal arguments in any forum, including without limitation, arguments regarding validity, Essentiality, infringement or the value of any patents, or any arguments that any forum court cannot or should not hear a particular matter on jurisdictional or justiciability grounds or because an alternative forum would be more appropriate.

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Please Note: IF YOU DO NOT SIGN THIS LETTER AND DELIVER IT TO [NAME, ADDRESS AND PHONE NUMBER OF GOOGLE'S DESIGNATED RECIPIENT] WITHIN 30 DAYS FROM RECEIPT, I.E. BY \_\_\_\_\_, GOOGLE MAY BE ABLE TO SEEK AN INJUNCTION OR EXCLUSION ORDER AGAINST YOU WITHOUT VIOLATING THE FTC'S ORDER.

Sincerely,

[QUALIFIED REPRESENTATIVE]  
GOOGLE INC.

COUNTER-SIGNATURE

\_\_\_\_\_  
[NAME]  
[CHIEF EXECUTIVE OFFICER, GENERAL COUNSEL OR  
OUTSIDE COUNSEL]  
[POTENTIAL LICENSEE]

WHEN SIGNED BY BOTH GOOGLE AND [POTENTIAL  
LICENSEE] THIS LETTER SHALL CONSTITUTE A  
BINDING AND IRREVOCABLE COMMITMENT BY BOTH  
PARTIES TO ABIDE BY THE TERMS OF THIS LETTER

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**EXHIBIT C**  
**Section 15 (Definitions)**  
**ETSI Rules of Procedure, 30 November 2011****Annex 6: ETSI Intellectual Property Rights Policy****1 Introduction**

The General Assembly of ETSI has established the following Intellectual Property Rights POLICY.

**2 Definitions**

Terms in the POLICY which are written in capital letters shall have the meaning set forth in Clause 15 entitled DEFINITIONS.

**3 Policy Objectives**

- 3.1 It is ETSI's objective to create STANDARDS and TECHNICAL SPECIFICATIONS that are based on solutions which best meet the technical objectives of the European telecommunications sector, as defined by the General Assembly. In order to further this objective the ETSI IPR POLICY seeks to reduce the risk to ETSI, MEMBERS, and others applying ETSI STANDARDS and TECHNICAL SPECIFICATIONS, that investment in the preparation, adoption and application of STANDARDS could be wasted as a result of an ESSENTIAL IPR for a STANDARD or TECHNICAL SPECIFICATION being unavailable. In achieving this objective, the ETSI IPR POLICY seeks a balance between the needs of standardization for public use in the field of telecommunications and the rights of the owners of IPRs.
- 3.2 IPR holders whether members of ETSI and their AFFILIATES or third parties, should be adequately and fairly rewarded for the use of their IPRs in the implementation of STANDARDS and TECHNICAL SPECIFICATIONS.
- 3.3 ETSI shall take reasonable measures to ensure, as far as possible, that its activities which relate to the preparation, adoption and application of STANDARDS and TECHNICAL SPECIFICATIONS, enable STANDARDS and TECHNICAL SPECIFICATIONS to be available to potential users in accordance with the general principles of standardization.

**4 Disclosure of IPRs**

- 4.1 Subject to Clause 4.2 below, each MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion. In particular, a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER's IPR which might be ESSENTIAL if that proposal is adopted.
- 4.2 The obligations pursuant to Clause 4.1 above do however not imply any obligation on MEMBERS to conduct IPR searches.
- 4.3 The obligations pursuant to Clause 4.1 above are deemed to be fulfilled in respect of all existing and future members of a PATENT FAMILY if ETSI has been informed of a member of this PATENT FAMILY in a timely fashion. Information on other members of this PATENT FAMILY, if any, may be voluntarily provided.

**5 Procedures for Committees**

ETSI shall establish guidelines for the chairmen of COMMITTEES with respect to ESSENTIAL IPRs.

**6 Availability of Licences**

- 6.1 When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the

## Decision and Order

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owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory terms and conditions under such IPR to at least the following extent:

- MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE;
- sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED;
- repair, use, or operate EQUIPMENT; and
- use METHODS.

The above undertaking may be made subject to the condition that those who seek licences agree to reciprocate.

In the event a MEMBER assigns or transfers ownership of an ESSENTIAL IPR that it disclosed to ETSI, the MEMBER shall exercise reasonable efforts to notify the assignee or transferee of any undertaking it has made to ETSI pursuant to Clause 6 with regard to that ESSENTIAL IPR.

- 6.2 An undertaking pursuant to Clause 6.1 with regard to a specified member of a PATENT FAMILY shall apply to all existing and future ESSENTIAL IPRs of that PATENT FAMILY unless there is an explicit written exclusion of specified IPRs at the time the undertaking is made. The extent of any such exclusion shall be limited to those explicitly specified IPRs.
- 6.3 As long as the requested undertaking of the IPR owner is not granted, the COMMITTEE Chairmen should, if appropriate, in consultation with the ETSI Secretariat use their judgment as to whether or not the COMMITTEE should suspend work on the relevant parts of the STANDARD or TECHNICAL SPECIFICATION until the matter has been resolved and/or submit for approval any relevant STANDARD or TECHNICAL SPECIFICATION.
- 6.4 At the request of the European Commission and/or EFTA, initially for a specific STANDARD or TECHNICAL SPECIFICATION or a class of STANDARDS/TECHNICAL SPECIFICATIONS, ETSI shall arrange to have carried out in a competent and timely manner an investigation including an IPR search, with the objective of ascertaining whether IPRs exist or are likely to exist which may be or may become ESSENTIAL to a proposed STANDARD or TECHNICAL SPECIFICATIONS and the possible terms and conditions of licences for such IPRs. This shall be subject to the European Commission and/or EFTA meeting all reasonable expenses of such an investigation, in accordance with detailed arrangements to be worked out with the European Commission and/or EFTA prior to the investigation being undertaken.

**6bis Use of the IPR Licensing Declaration Forms**

MEMBERS shall use one of the ETSI IPR Licensing Declaration forms at the Appendix to this ETSI IPR Policy to make their IPR licensing declarations.

**7 Information on IPR by ETSI**

- 7.1 Any published STANDARD or TECHNICAL SPECIFICATION shall include information pertaining to ESSENTIAL IPRs which are brought to the attention of ETSI prior to such publication.
- 7.2 ETSI shall establish appropriate procedures to allow access to information at any time with respect to ESSENTIAL IPRs which have been brought to the attention of ETSI.

**8 Non-availability of Licences**

- 8.1 Non-availability of licences prior to the publication of a STANDARD or a TECHNICAL SPECIFICATION

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## 8.1.1 Existence of a viable alternative technology

Where prior to the publication of a STANDARD or a TECHNICAL SPECIFICATION an IPR owner informs ETSI that it is not prepared to license an IPR in respect of a STANDARD or TECHNICAL SPECIFICATION in accordance with Clause 6.1 above, the General Assembly shall review the requirement for that STANDARD or TECHNICAL SPECIFICATION and satisfy itself that a viable alternative technology is available for the STANDARD or TECHNICAL SPECIFICATION which:

- is not blocked by that IPR; and
- satisfies ETSI's requirements.

## 8.1.2 Non-existence of a viable alternative technology

Where, in the opinion of the General Assembly, no such viable alternative technology exists, work on the STANDARD or TECHNICAL SPECIFICATION shall cease, and the Director-General of ETSI shall observe the following procedure:

- a) If the IPR owner is a MEMBER,
  - i) the Director-General of ETSI shall request that MEMBER to reconsider its position.
  - ii) If that MEMBER however decides not to withdraw its refusal to license the IPR, it shall then inform the Director-General of ETSI of its decision and provide a written explanation of its reasons for refusing to license that IPR, within three months of its receipt of the Director-General's request.
  - iii) The Director-General of ETSI shall then send the MEMBER's explanation together with relevant extracts from the minutes of the General Assembly to the ETSI Counsellors for their consideration.
- b) If the IPR owner is a third party,
  - i) the Director-General of ETSI shall, wherever appropriate, request full supporting details from any MEMBER who has complained that licences are not available in accordance with Clause 6.1 above and/or request appropriate MEMBERS to use their good offices to find a solution to the problem.
  - ii) Where this does not lead to a solution the Director-General of ETSI shall write to the IPR owner concerned for an explanation and request ultimately that licences be granted according to Clause 6.1 above.
  - iii) Where the IPR owner refuses the Director-General's request and decides not to withdraw its refusal to license the IPR or does not answer the letter within three months after the receipt of the Director-General's request, the Director-General shall then send the IPR owner's explanation, if any, together with relevant extracts from the minutes of the General Assembly to the ETSI Counsellors for their consideration.

## 8.1.3 Prior to any decision by the General Assembly, the COMMITTEE should in consultation with the ETSI Secretariat use their judgment as to whether or not the COMMITTEE should pursue development of the concerned parts of the STANDARD or a TECHNICAL SPECIFICATION based on the non-available technology and should look for alternative solutions.



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**8.2 Non-availability of licences after the publication of a STANDARD or a TECHNICAL SPECIFICATION**

Where, in respect of a published STANDARD or TECHNICAL SPECIFICATION, ETSI becomes aware that licences are not available from an IPR owner in accordance with Clause 6.1 above, that STANDARD or TECHNICAL SPECIFICATION shall be referred to the Director-General of ETSI for further consideration in accordance with the following procedure:

- i) The Director-General shall request full supporting details from any MEMBER or third party who has complained that licences are not available in accordance with Clause 6.1 above.
- ii) The Director-General shall write to the IPR owner concerned for an explanation and request that licences be granted according to Clause 6.1 above. Where the concerned IPR owner is a MEMBER, it shall inform the Director-General of ETSI of its decision and provide a written explanation of its reasons in case of continuing refusal to license that IPR.
- iii) Where the IPR owner refuses the Director-General's request or does not answer the letter within three months, the Director-General shall inform the General Assembly and, if available, provide the General Assembly with the IPR owner's explanation for consideration. A vote shall be taken in the General Assembly on an individual weighted basis to immediately refer the STANDARD or TECHNICAL SPECIFICATION to the relevant COMMITTEE to modify it so that the IPR is no longer ESSENTIAL.
- iv) Where the vote in the General Assembly does not succeed, then the General Assembly shall, where appropriate, consult the ETSI Counsellors with a view to finding a solution to the problem. In parallel, the General Assembly may request appropriate MEMBERS to use their good offices to find a solution to the problem.
- v) Where (iv) does not lead to a solution, then the General Assembly shall request the European Commission to see what further action may be appropriate, including non-recognition of the STANDARD or TECHNICAL SPECIFICATION in question.

In carrying out the foregoing procedure due account shall be taken of the interest of the enterprises that have invested in the implementation of the STANDARD or TECHNICAL SPECIFICATION in question.

**9 ETSI ownership of IPRs**

- 9.1 The ownership of the copyright in STANDARDS and TECHNICAL SPECIFICATIONS documentation and reports created by ETSI or any of its COMMITTEES shall vest in ETSI but due acknowledgement shall be given to copyrights owned by third parties that are identifiable in ETSI copyrighted works.
- 9.2 In general, in the absence of any exceptional circumstances, where SOFTWARE is included in any element of a STANDARD or TECHNICAL SPECIFICATION there shall be no requirement to use that SOFTWARE for any purpose in order for an implementation to conform to the STANDARD or TECHNICAL SPECIFICATION.
  - 9.2.1 Without prejudice to Clause 9.1, any MEMBER contributing SOFTWARE for inclusion in a STANDARD or TECHNICAL SPECIFICATION hereby grants, without monetary compensation or any restriction other than as set out in this Clause 9.2.1, an irrevocable, non-exclusive, worldwide, royalty-free, sub-licensable copyright licence to prepare derivative works of (including translations, adaptations, alterations) the contributed SOFTWARE and reproduce, display, distribute and execute the contributed SOFTWARE and derivative works for the following limited purposes:

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- a) to ETSI and MEMBERS to evaluate the SOFTWARE and any derivative works thereof for determining whether to support the inclusion of the SOFTWARE in that STANDARD or TECHNICAL SPECIFICATION;
- b) to ETSI to publish the SOFTWARE in that STANDARD or TECHNICAL SPECIFICATION; and
- c) to any implementer of that STANDARD or TECHNICAL SPECIFICATION to evaluate the SOFTWARE and any derivative works thereof for inclusion in its implementation of that STANDARD or TECHNICAL SPECIFICATION, and to determine whether its implementation conforms with that STANDARD or TECHNICAL SPECIFICATION.
- 9.2.2 (i) The copyright licence granted in Clause 9.2.1 shall also extend to any implementer of that STANDARD or TECHNICAL SPECIFICATION for the purpose of using the SOFTWARE in any compliant implementation unless (ii) the contributing MEMBER gives an irrevocable undertaking in writing at the time of contribution that it is prepared to grant an irrevocable copyright licence on fair, reasonable and non-discriminatory terms and conditions for the purpose of using the SOFTWARE in any compliant implementation.
- 9.2.3 Any MEMBER contributing SOFTWARE for inclusion in a STANDARD or TECHNICAL SPECIFICATION represents and warrants that to the best of its knowledge, it has the necessary copyright rights to license that contribution under Clause 9.2.1 and 9.2.2 to ETSI, MEMBERS and implementers of the STANDARD or TECHNICAL SPECIFICATION.
- Other than as expressly provided in this Clause 9.2.3: (1) SOFTWARE contributed for inclusion in a STANDARD or TECHNICAL SPECIFICATION is provided "AS IS" with no warranties, express or implied, including but not limited to, the warranties of merchantability, fitness for a particular purpose and non infringement of intellectual property rights and (2) neither the MEMBER contributing SOFTWARE nor ETSI shall be held liable in any event for any damages whatsoever (including, without limitation, damages for loss of profits, business interruption, loss of information, or any other pecuniary loss) arising out of or related to the use of or inability to use the SOFTWARE.
- 9.2.4 With respect to the copyright licenses set out in Clause 9.2.1 and 9.2.2 , no patent licence is granted by implication, estoppel or otherwise.
- 9.3 In respect of IPRs other than copyright in STANDARDS and TECHNICAL SPECIFICATIONS documentation and reports, ETSI shall only seek ownership of IPRs generated either by its employees or by secondees to ETSI from organizations who are not MEMBERS.
- 9.4 ETSI shall, on request by a non-member, grant licences to that non-member on fair and reasonable terms and conditions in respect of any IPRs, other than those referred to in Clause 9.1 above, owned by ETSI. MEMBERS shall be allowed to use IPRs owned by ETSI free of charge.

**10 Confidentiality**

The proceedings of a COMMITTEE shall be regarded as non-confidential except as expressly provided below and all information submitted to a COMMITTEE shall be treated as if non-confidential and shall be available for public inspection unless:

- the information is in written or other tangible form; and
- the information is identified in writing, when submitted, as confidential; and
- the information is first submitted to, and accepted by, the chairman of the COMMITTEE as confidential.

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CONFIDENTIAL INFORMATION incorporated in a STANDARD or TECHNICAL SPECIFICATION shall be regarded as non-confidential by ETSI and its MEMBERS, from the date on which the STANDARD or TECHNICAL SPECIFICATION is published.

**11 Reproduction of Standards Documentation**

MEMBERS may make copies of STANDARDS and TECHNICAL SPECIFICATIONS documentation produced by ETSI for their own use free of charge but may not distribute such copies to others.

**12 Law and Regulation**

The POLICY shall be governed by the laws of France. However, no MEMBER shall be obliged by the POLICY to commit a breach of the laws or regulations of its country or to act against supranational laws or regulations applicable to its country insofar as derogation by agreement between parties is not permitted by such laws.

Any right granted to, and any obligation imposed on, a MEMBER which derives from French law and which are not already contained in the national or supranational law applicable to that MEMBER is to be understood as being of solely a contractual nature.

**13 Policy Decisions**

Without prejudice to ETSI's Statutes and Rules of Procedure, no decisions shall be taken by ETSI in relation to implementation of the POLICY unless supported by a 71 % majority of the weighted individual votes cast by MEMBERS.

**14 Violation of Policy**

Any violation of the POLICY by a MEMBER shall be deemed to be a breach, by that MEMBER, of its obligations to ETSI. The ETSI General Assembly shall have the authority to decide the action to be taken, if any, against the MEMBER in breach, in accordance with the ETSI Statutes.

**15 Definitions**

1 "AFFILIATE" of a first legal entity means any other legal entity:

- directly or indirectly owning or controlling the first legal entity, or
- under the same direct or indirect ownership or control as the first legal entity, or
- directly or indirectly owned or controlled by the first legal entity,

for so long as such ownership or control lasts.

Ownership or control shall exist through the direct or indirect:

- ownership of more than 50 % of the nominal value of the issued equity share capital or of more than 50 % of the shares entitling the holders to vote for the election of directors or persons performing similar functions, or
- right by any other means to elect or appoint directors, or persons who collectively can exercise such control. A state, a division of a state or other public entity operating under public law, or any legal entity, linked to the first legal entity solely through a state or any division of a state or other public entity operating under public law, shall be deemed to fall outside the definition of an AFFILIATE.

2 "COMMITTEE" shall mean any Technical Body of ETSI and shall include ETSI Projects, Technical Committees, ETSI Partnership Projects, and their Working Groups.

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- 3 **"CONFIDENTIAL INFORMATION"** shall mean all information deemed to be confidential pursuant to Clause 10 of the POLICY disclosed directly or indirectly to the MEMBER.
- 4 **"EQUIPMENT"** shall mean any system, or device fully conforming to a STANDARD.
- 5 **"METHODS"** shall mean any method or operation fully conforming to a STANDARD.
- 6 **"ESSENTIAL"** as applied to IPR means that it is not possible on technical (but not commercial) grounds, taking into account normal technical practice and the state of the art generally available at the time of standardization, to make, sell, lease, otherwise dispose of, repair, use or operate EQUIPMENT or METHODS which comply with a STANDARD without infringing that IPR. For the avoidance of doubt in exceptional cases where a STANDARD can only be implemented by technical solutions, all of which are infringements of IPRs, all such IPRs shall be considered ESSENTIAL.
- 7 **"IPR"** shall mean any intellectual property right conferred by statute law including applications therefor other than trademarks. For the avoidance of doubt rights relating to get-up, confidential information, trade secrets or the like are excluded from the definition of IPR.
- 8 **"MANUFACTURE"**, shall mean production of EQUIPMENT.
- 9 **"MEMBER"** shall mean a member or associate member of ETSI. References to a MEMBER shall wherever the context permits be interpreted as references to that MEMBER and its AFFILIATES.
- 10 **"POLICY"** shall mean ETSI's Intellectual Property Rights Policy.
- 11 **"STANDARD"** shall mean any standard adopted by ETSI including options therein or amended versions and shall include European Standards (ENs), ETSI Standards (ESs), Common Technical Regulations (CTRs) which are taken from ENs and including drafts of any of the foregoing, and documents made under the previous nomenclature, including ETs, I-ETs, parts of NETs and TBRs, the technical specifications of which are available to all MEMBERS, but not including any standards, or parts thereof, not made by ETSI.
- The date on which a STANDARD is considered to be adopted by ETSI for the purposes of this POLICY shall be the date on which the technical content of that STANDARD was available to all MEMBERS.
- 12 **"TECHNICAL SPECIFICATION"** shall mean any Technical Specification (TS) adopted by ETSI including options therein or amended version including drafts, the Technical Specifications of which are available to all MEMBERS, but not including any technical specifications, or parts thereof, not made by ETSI.
- The date on which a TECHNICAL SPECIFICATION is considered to be adopted by ETSI for the purposes of this POLICY shall be the date on which the technical content of that TECHNICAL SPECIFICATION was available to all MEMBERS.
- 13 **"PATENT FAMILY"** shall mean all the documents having at least one priority in common, including the priority document(s) themselves. For the avoidance of doubt, "documents" refers to patents, utility models, and applications therefor.
- 14 For the purpose of this IPR Policy, **"SOFTWARE"** shall mean:
- a set of instructions written in any programming language that either directly, or when further compiled, performs a function when executed by hardware that processes data according to instructions, such as an audio or video CODEC; but also
  - data and stream structure definitions, such as ASN.1, TTCN, or XML data representations; and

Decision and Order

**EXHIBIT C**

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- schema examples, such as SDL diagrams and data flow charts;

which can be transformed, either directly, or when further compiled, into usable/implementable code.

Decision and Order

**EXHIBIT D**  
**Form Offer to Arbitrate**

[DATE]  
[QUALIFIED RECIPIENT(S)]  
[POTENTIAL LICENSEE]

Dear [QUALIFIED RECIPIENT(S)]:

I am sending this letter on behalf of Google Inc. and its wholly owned subsidiary Motorola Mobility LLC (“Google”). The Federal Trade Commission and Google reached a settlement that resulted in the FTC issuing an Order In the Matter of Motorola Mobility LLC and Google Inc., Docket No. C-4410 (“the Order”). A copy of the Order is attached. All capitalized terms in this letter that are not specifically defined herein refer to terms defined in the Order and have the definitions given therein. Please read the Order carefully. If anything in this letter conflicts with the terms in the Order, the terms in the Order apply.

Google hereby offers to enter into Binding Arbitration with [POTENTIAL LICENSEE] (the “Company”) pursuant to the terms of the Order, before your choice of Qualified Arbitration Organization (or such other arbitrators or arbitration organizations as shall be separately agreed to in writing by Google and the Company). If you accept this offer within the next sixty (60) days, under the Order Google cannot seek an injunction or exclusion order against you based on infringement of the patents included in the Binding Arbitration. (You may still be able to accept this offer after that because it will remain open for a further period of time as set forth below.)

[IF SEEKING RECIPROCITY: The purpose of the Binding Arbitration would be to establish a License Agreement between Google and the Company cross-licensing our respective Patents that are Essential to the following Standards:]

[IF NOT SEEKING RECIPROCITY: The purpose of the Binding Arbitration would be to establish a License Agreement between Google and the Company granting the Company a license under Google’s Patents (or, at the Company’s option, a License

## Decision and Order

Agreement cross-licensing our respective Patents) that are Essential to the following Standards:]

[LIST STANDARDS HERE]  
(the “Covered Standards”).

Notwithstanding their Essentiality to the Covered Standards, the License Agreement shall exclude any Patents that were licensed by Google to the Company, or by the Company to Google, under a separate license agreement that was effective as of the date of this Offer, in each case to the extent already licensed under such prior agreement.

[IF SEEKING RECIPROCITY: Google is interested in obtaining a cross-license to all of the Company’s Patents that are Essential to the Covered Standards, but Google’s participation in the Binding Arbitration is conditioned only on “Reciprocity” for each of the Covered Standards, as that term is defined in the Order. If the Company does not want to include Essential Patents that are not included within the scope of Reciprocity as defined in the Order within the arbitrated License Agreement, it need not do so and may still accept this Offer.]

Google’s willingness to enter into such a License Agreement is further expressly conditioned upon: (i) the permitted field of use for the patents licensed under the License Agreement being limited to, unless Google and the Company separately agree otherwise in writing, uses covered by Google’s and the Company’s respective FRAND Commitments; and (ii) the right of the selected arbitrator(s) to require reasonable security, including an ongoing escrow of funds, from either party if the arbitrator determines such security to be necessary to ensure that such party will fulfill the financial terms of the arbitrated License Agreement (such escrow to be implemented in a manner consistent with the terms of the Order).

The Binding Arbitration would be conducted according to the process set forth in the Order, as modified by subsequent agreement between Google and the Company.

## Decision and Order

[IF GOOGLE AND THE COMPANY ARE MEMBERS OF SSO WITH MANDATORY ARBITRATION PROVISIONS, INCLUDE LANGUAGE REFERRING TO OPTION TO USE THOSE PROVISIONS HERE.]

To summarize—but without any intention to alter or supersede the terms of the Order, which continue to govern—the basic process would be:

1. Within sixty (60) days of accepting this Offer of Binding Arbitration, the Company would select one of the Qualified Arbitration Organizations (“QAO”s) named in the Order to conduct the binding arbitration (unless Google and the Company have earlier agreed to conduct the Binding Arbitration in a different arbitral forum) (the “Administrator”). If the Company does not select a QAO by that deadline, Google will be entitled to select one of the QAOs to serve as Administrator.
2. Within thirty (30) days of the selection of the QAO, Google and the Company would mutually agree on the number and manner of selection of the arbitrators and the language and location of the arbitration. If we cannot reach agreement on one or more of those items, they will be determined according to default rules set forth in the Order.
3. Within a reasonable time after an Administrator is selected, we will initiate an arbitration proceeding before the selected Administrator. At that time, we will also provide the Company with a proposed License Agreement that will serve as the basis for the Arbitration.
4. The Company will have sixty (60) days from receipt of the proposed License Agreement to (i) designate all terms of the proposed License Agreement that it contends are inconsistent with Google’s FRAND Commitments, (ii) propose additional or alternative terms that the Company believes are necessary for the proposed License Agreement to comply with Google’s and the Company’s respective FRAND Commitments, and (iii) agree to the inclusion of all other terms of the proposed Agreement in the License Agreement.



## Decision and Order

5. After receiving evidence and argument from Google and the Company in accordance with the relevant rules and any relevant agreement between Google and the Company, the arbitrators will determine whether the terms contested by the Company are consistent with Google's FRAND Commitments and, if applicable, the Company's FRAND Commitments, and revise any terms that they find to be inconsistent. This does not restrict either party from making arguments in Binding Arbitration regarding the validity, Essentiality, Infringement or value of the patents at issue in such proceeding, or the ability of the arbitrator to consider these arguments, or to follow existing legal standards and burdens of proof.

6. The revised terms, together with those terms that the arbitrators found to be consistent with the parties' respective FRAND Commitments, those terms that the Company did not challenge (and thereby agreed to), and any additional terms agreed to by Google and the Company will become the Final License Agreement, which both Google and the Company will execute within thirty (30) days of receipt from the arbitrators.

This Offer of Binding Arbitration will remain open until it is withdrawn by Google in writing by written notice to the Company.

[For pending cases: Pursuant to section IV.D.2 of the Order, Google will not withdraw or terminate this Offer until two months after the date of this Offer or until there is a Final Ruling on any Request for a FRAND Determination brought by the Company that is pending as of the date the FTC Order issues and that relates to the Covered Standards.]

[For future cases: Pursuant to the Order, Google will not withdraw or terminate this Offer sooner than thirty (30) days after Google seeks Covered Injunctive Relief against the Company based on the alleged infringement of patents covered by the Offer, provided that Google may withdraw this Offer upon the expiration or termination of the Order.]

If you wish to accept this Offer of Binding Arbitration, please execute the signature block below and return it to:

## Decision and Order

Google Inc.  
1600 Amphitheatre Parkway  
Mountain View, CA 94043  
Attention: General Counsel

Acceptance of this Offer will establish a binding arbitration agreement between Google and the Company, and a binding and irrevocable undertaking that Google and the Company will (i) enter into a License Agreement on terms and conditions established by the Arbitrators as described herein; and (ii) pay to the other party all royalties established under the License Agreement as if the License Agreement had been effective as of the date Google files for arbitration. The agreement and the undertaking shall be enforceable by either party to the greatest extent permitted by law.

Sincerely,

[SIGNATORY]

[TITLE]

on behalf of Google Inc. and Motorola Mobility LLC

On behalf of the Company named above (including its direct and indirect wholly-owned subsidiaries and majority-owned and controlled subsidiaries and joint ventures), I hereby accept Google's Offer of Binding Arbitration under the terms set forth above and in the FTC Order, receipt of a copy of which is hereby acknowledged.

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Agreement”) with Motorola Mobility LLC (formerly Motorola Mobility, Inc. (“Motorola”), a wholly-owned subsidiary of Respondent Google Inc.), and Google Inc. (“Google”), which is designed to settle allegations that Motorola and Google violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by engaging in unfair methods of competition and unfair acts or practices relating to the licensing of standard essential patents (“SEPs”) for cellular, video codec, and wireless LAN standards. The Complaint alleges that, after committing to license the SEPs on fair, reasonable, and non-discriminatory (“FRAND”) terms Motorola sought injunctions and exclusion orders against willing licensees, undermining the procompetitive standard-setting process. After purchasing Motorola for \$12.5 billion in June 2012, Google continued Motorola’s anticompetitive behavior.

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

The purpose of this analysis is to facilitate comments on the Proposed Consent Order. This analysis does not constitute an official interpretation of the Proposed Consent Order, and does not modify its terms in any way. The Agreement has been entered into for settlement purposes only and does not constitute an admission by Motorola or Google that the law has been violated as alleged or that the facts alleged, other than jurisdictional facts, are true.

**Background**

American consumers rely on standardized technology for the interoperability of consumer electronics and other products.

## Analysis to Aid Public Comment

Manufacturers of these products participate in standard-setting organizations (“SSOs”) such as the European Telecommunications Standards Institute (“ETSI”), the Institute of Electrical and Electronics Engineers (“IEEE”), and the International Telecommunication Union (“ITU”) that agree upon and develop standards based on shared technologies that incorporate patents. SSOs and the standards they promulgate have procompetitive benefits; they encourage common technological platforms that many different manufacturers ultimately incorporate into their respective products.<sup>1</sup> Standards foster competition among these manufacturers’ products and facilitate the entry of related products. Overall, standards benefit the market by encouraging compatibility among all products, promoting interoperability of competing devices, and lowering the costs of products for consumers.

Many SSOs require that a firm make a licensing commitment, such as a FRAND commitment, in order for its patented technology to be included in a standard. SSOs have this policy because the incorporation of patented technology into a standard induces market reliance on that patent and increases its value. After manufacturers implement a standard, they can become “locked-in” to the standard and face substantial switching costs if they must abandon initial designs and substitute different technologies. This allows SEP holders to demand terms that reflect not only “the value conferred by the patent itself,” but also “the additional value—the hold-up value—conferred by the patent’s being designated as standard-essential.”<sup>2</sup> The FRAND commitment is a promise intended to mitigate the potential for patent hold-up.<sup>3</sup> In other words, it restrains the exercise of market

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<sup>1</sup> As the Supreme Court has recognized, when properly formulated standards “can have significant procompetitive advantages.” *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988).

<sup>2</sup> *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012) (Posner, J., sitting by designation).

<sup>3</sup> As the Commission explained in its unanimous filing before the United States International Trade Commission (“ITC”), incorporating patented technologies into standards without safeguards risks distorting competition because it enables SEP owners to negotiate high royalty rates and other favorable terms, after a standard is adopted, that they could not credibly demand beforehand. The exercise of this leverage is known as patent hold-up.

## Analysis to Aid Public Comment

power gained by a firm when its patent is included in a standard and the standard is widely adopted in the market.<sup>4</sup>

Despite the significant procompetitive benefits of standard setting, particularly the interoperability of technology that arises from efficient and effective standards, standard setting is a collaborative process among competitors that often displaces free market competition in technology platforms. FRAND commitments by SSO members are critical to offsetting the potential anticompetitive effects of such agreements while preserving the procompetitive aspects of standard setting.

Seeking and threatening injunctions against willing licensees of FRAND-encumbered SEPs undermines the integrity and efficiency of the standard-setting process and decreases the incentives to participate in the process and implement published standards. Such conduct reduces the value of standard setting, as firms will be less likely to rely on the standard-setting process. Implementers wary of the risk of patent hold-up may diminish or abandon entirely their participation in the standard-setting process and their reliance on standards. If firms forego participation in the standard-setting process, consumers will no longer enjoy the benefits of interoperability that arise from standard setting, manufacturers have less incentive to innovate and differentiate product offerings, and new manufacturers will be deterred from entering the market.

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See Third Party United States Federal Trade Commission's Statement on the Public Interest filed on June 6, 2012 in *In re Certain Wireless Communication Devices, Portable Music & Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745, available at [www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf](http://www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf) ; *In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752, available at <http://www.ftc.gov/os/2012/06/1206ftcgamingconsole.pdf>.

<sup>4</sup> As the Ninth Circuit recently stated, a FRAND commitment is “a guarantee that the patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction, but will instead proffer licenses consistent with the commitment made.” *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012) (citing *Apple*, 869 F. Supp. 2d at 914).

## Analysis to Aid Public Comment

**The Proposed Complaint**

Motorola sought to exploit the market power that it acquired through the standard-setting process by breaching its promises to license its SEPs on FRAND terms. ETSI, ITU, and IEEE require that firms disclose whether they will commit to license their SEPs on FRAND terms in order for the SSO to decide if the patents should be included in the relevant cellular, video codec, or wireless LAN standards. Motorola promised to license its patents essential to these standards on FRAND terms, inducing ETSI, ITU, and IEEE to include its patents in cellular, video codec, and wireless LAN standards. These commitments created express and implied contracts with the SSOs and their members. In acquiring Motorola and its patent portfolio, Google affirmatively declared that it would honor Motorola's FRAND commitments.<sup>5</sup>

Relying on Motorola's promise to license its SEPs on FRAND terms, electronic device manufacturers implemented the relevant standards and were locked-in to using Motorola's patents. Motorola then violated the FRAND commitments made to ETSI, ITU, and IEEE by seeking, or threatening, to enjoin certain competitors from marketing and selling products compliant with the relevant standards, like the iPhone and the Xbox, from the market unless the competitor paid higher royalty rates or made other concessions. At all times relevant to the allegations in the Proposed Complaint, these competitors – Microsoft and Apple – were willing to license Motorola's SEPs on FRAND terms.

Specifically, Motorola threatened exclusion orders and injunctions in various forums against these willing licensees. Motorola filed patent infringement claims at the ITC where the only remedy for patent infringement is an exclusion order. Because of the ITC's remedial structure, filing for an exclusion order before the ITC on a FRAND-encumbered SEP significantly raises the risk of patent hold-up in concurrent licensing

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<sup>5</sup> See Letter from Allen Lo, Deputy General Counsel, Google, to Luis Jorge Romero Saro, Director-General, ETSI (Feb. 8, 2012); Letter from Allen Lo, Deputy General Counsel, Google, to Gordon Day, President, IEEE (Feb. 8, 2012) available at [http://static.googleusercontent.com/external\\_content/untrusted\\_dlcp/www.google.com/en/us/press/motorola/pdf/sso-letter.pdf](http://static.googleusercontent.com/external_content/untrusted_dlcp/www.google.com/en/us/press/motorola/pdf/sso-letter.pdf); Letter from Allen Lo, Deputy General Counsel, Google, to Hamadoun Toure, Secretary-General, ITU (Feb. 8, 2012).

### Analysis to Aid Public Comment

negotiations because an exclusion order may be entered by the ITC before a FRAND rate is reached. Motorola also filed for injunctive relief in various federal district courts, which also raises the risk of patent hold-up.

Had Google been successful in obtaining either an injunction or exclusion order against its competitors' products, it could have imposed a wide variety of costs to consumers and competition. These products could have been kept off the market entirely, diminishing competition and denying consumers access to products they wish to purchase, such as the iPhone and Xbox. Alternatively, Google's conduct might have increased prices because manufacturers, when faced with the threat of an injunction, are likely to surrender to higher royalty rates for SEPs. Other manufacturers, deterred by increased licensing fees, might exit the market altogether, or limit their product lines. In the end, prices would likely rise both because of higher royalties and because of less product-market competition. Ultimately, end consumers may bear some share of these higher costs, either in the form of higher prices or lower quality products.

Consumers would also suffer to the extent that Google's conduct impaired the efficacy of the standard-setting process or diminished the willingness of firms to participate in standard-setting processes. Relatedly, such FRAND violations may diminish the interest of SSOs in using new patented technologies – a step that could reduce the technical merit of those standards as well as their ultimate value to consumers. This could result in increased costs or inferior standards. Innovation by implementers would suffer and consumers would lose the benefits of lower costs, interoperability, and rapid technological development that efficient standard-setting enables.

The Proposed Complaint alleges that Motorola and Google's conduct violates Section 5 of the FTC Act, both as an unfair method of competition and an unfair act or practice.

### **Unfair Method of Competition**

Google and Motorola's conduct constitute an unfair method of competition and harms competition by threatening to undermine

## Analysis to Aid Public Comment

the integrity and efficiency of the standard-setting process. FRAND commitments help ensure the efficacy of the standard-setting process and that the outcome of that process is procompetitive. Conversely, that process is undermined when those promises are reneged. Motorola's conduct threatens to increase prices and reduce the quality of products on the market and to deter firms from entering the market. Moreover, Motorola's conduct threatens to deny consumers the many procompetitive benefits that standard setting makes possible. Motorola's conduct may deter manufacturers from participating in the standard setting process and relying on standards, and SSOs from adopting standards that incorporate patented technologies.

Consistent with these principles, courts have found that patent holders may injure competition by breaching FRAND commitments they made to induce SSOs to standardize their patented technologies.<sup>6</sup> Each of these cases, brought under Section 2 of the Sherman Act, involved allegations of bad faith or deceptive conduct by the patent holder before the standard was adopted. However, under its stand-alone Section 5 authority, the Commission can reach opportunistic conduct that takes place after a standard is adopted that tends to harm consumers and undermine the standard-setting process.<sup>7</sup> For example, in *Negotiated Data Solutions, LLC* (“N-Data”),<sup>8</sup> the Commission condemned similar conduct as “inherently ‘coercive’ and ‘oppressive.’”<sup>9</sup> The respondent, N-Data, acquired SEPs from a patent holder that had

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<sup>6</sup> See *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 313-15 (3d Cir. 2007); *In re Rambus, Inc.*, No. 9302, 2006 WL 2330117 (F.T.C. Aug. 2, 2006), available at <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>, *rev'd on other grounds Rambus v. F.T.C.*, 522 F.3d 456 (D.C. Cir. 2008); *Research in Motion, Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 796-97 (N.D. Tex. 2008); *Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846, 2012 U.S. Dist. LEXIS 67102, at \*27-28 (N.D. Cal. May 14, 2012).

<sup>7</sup> The Commission's investigation did not give it reason to believe that Motorola acted with bad faith or an intent to deceive at the time it first made these FRAND commitments to IEEE, ETSI, and ITU.

<sup>8</sup> *In re Negotiated Data Solutions LLC (N-Data)*, File No. 051-0094, 2008 WL 258308 (FTC Jan. 22, 2008).

<sup>9</sup> *N-Data*, 2008 WL 258308, at \*37 (analysis to aid public comment).



## Analysis to Aid Public Comment

committed to license them to any requesting party for a one-time flat fee of \$1,000. After it acquired these SEPs, N-Data reneged on this licensing commitment. “Instead, N-Data threatened to initiate, and in some cases prosecuted, legal actions against companies refusing to pay its royalty demands, which [were] far in excess of [the \$1,000 one-time flat fee].”<sup>10</sup> The Commission found that N-Data’s “efforts to exploit the power it enjoy[ed] over those practicing the [relevant] standard and lacking any practical alternatives” were inherently “coercive” and “oppressive” as these firms were, “as a practical matter, locked into [the] standard.”<sup>11</sup> As here, the Commission found that N-Data’s opportunistic breach of its licensing commitment had the tendency of leading to higher prices for consumers and undermining the standard-setting process.

Google and MMI’s opportunistic violations of their FRAND commitments have the potential to harm consumers by excluding products from the market as a result of an injunction or by leading to higher prices because manufacturers are forced, by the threat of

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<sup>10</sup> *Id.* at \*34–36.

<sup>11</sup> *Id.* at \*37. Both Section 5 and common law precedents support the conclusion that parties engage in coercive and oppressive conduct when they breach commitments after those commitments have induced others to make relationship-specific investments and forego otherwise available alternatives. In *Holland Furnace Co. v. FTC*, 295 F.2d 302 (7th Cir. 1961), the Commission found a Section 5 violation when furnace salesmen dismantled furnaces for cleaning and inspection and refused to reassemble them until customers agreed to buy additional parts or services. *Id.* at 305. In *Alaska Packers’ Ass’n v. Domenico*, 117 F. 99 (9th Cir. 1902), the Ninth Circuit likewise found that seamen acted coercively by threatening to strike unless the owners of a fishing vessel agreed to pay them wages higher than those they had negotiated before the vessel set sail. *Id.* at 102–03. In each case, the victims could have turned to alternatives *ex ante* (before their furnaces had been dismantled or their vessel had set sail for remote waters), but were “locked in,” and therefore vulnerable to exploitation, *ex post*. *Id.* at 102 (explaining that, “at a time when it was impossible for the [vessel owners] to secure other men in their places,” the seamen “refused to continue the services they were under contract to perform unless the [owners] would consent to pay them more money”); Neil W. Averitt, *The Meaning of “Unfair Acts or Practices” in Section 5 of the Federal Trade Commission Act*, 70 Geo. L.J. 225, 253 (1981) (observing that the consumers in *Holland Furnace*, because they “could not escape the need to restore their units to service, . . . willingly or not, . . . often had to purchase replacements from the respondent”).

## Analysis to Aid Public Comment

an injunction, to pay higher royalty rates. As explained in *N-Data*, courts have traditionally viewed opportunistic breaches as conduct devoid of countervailing benefits.<sup>12</sup> As Judge Posner has explained, when a promisor breaches opportunistically, “we might as well throw the book at the promisor. . . . Such conduct has no economic justification and ought simply to be deterred.”<sup>13</sup> As in *N-Data*, “the context here is in standard-setting,” and “[a] mere departure from a previous licensing commitment is unlikely to constitute an unfair method of competition under Section 5.”<sup>14</sup>

**Unfair Act or Practice**

Google and Motorola’s violations of their FRAND commitments also constitute unfair acts or practices under Section 5 because they are “likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”<sup>15</sup> If these practices continue, consumers will likely pay higher prices because many consumer electronics manufacturers will pass on some portion of unreasonable or discriminatory royalties they agree to pay to avoid an injunction or exclusion order. Consumers will not be able to avoid this injury, due to the industry-wide lock-in induced by Motorola’s FRAND commitments. Moreover, this practice has no apparent “countervailing benefits,” either to those upon whom demands have been made, or to ultimate consumers, or to competition.<sup>16</sup>

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<sup>12</sup> *N-Data*, 2008 WL 258308, at \*38 (Analysis to Aid Public Comment).

<sup>13</sup> Richard A. Posner, *Economic Analysis of Law* 130 (5th ed. 1998).

<sup>14</sup> *N-Data*, 2008 WL 258308, at \*37 (Analysis to Aid Public Comment).

<sup>15</sup> 15 U.S.C. § 45(n) (1992). Section 45(n) codified limiting principles set forth in the 1980 FTC Policy Statement on Unfairness. See Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), reprinted in H.R. Rep. No. 156, Pt. 1, 98th Cong., 1st Sess. 33-40 (1983), available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>, appended to the Commission's decision in *International Harvester*, 104 F.T.C. at 949, 1061 (1984).

<sup>16</sup> *N-Data*, 2008 WL 258308, at \*38 (Analysis to Aid Public Comment).

## Analysis to Aid Public Comment

**The Proposed Consent**

The Proposed Consent Order is tailored to prevent Google – through its wholly owned subsidiary, Motorola – from using injunctions or threats of injunctions against current or future potential licensees who are willing to accept a license on FRAND terms. Under this Order, before seeking an injunction on FRAND-encumbered SEPs, Google must: (1) provide a potential licensee with a written offer containing all of the material license terms necessary to license its SEPs, and (2) provide a potential licensee with an offer of binding arbitration to determine the terms of a license that are not agreed upon. Furthermore, if a potential licensee seeks judicial relief for a FRAND determination, Google must not seek an injunction during the pendency of the proceeding, including appeals. Nothing in the Order limits Google or a potential licensee from challenging the validity, essentiality, claim of infringement or value of the patents at issue, and either party may object to a court action on jurisdictional or justiciability grounds, or on the ground that an alternative forum would be more appropriate. The Proposed Consent Order also does not prevent Google from pursuing legal claims regarding its FRAND-encumbered SEPs other than a claim for injunctive relief, such as an action seeking damages for patent infringement. The Order does not define FRAND but requires Google to offer, and follow, specific procedures that will lead to that determination.

The Proposed Consent Order prohibits Google from revoking or rescinding any FRAND commitment that it has made or assumed unless the relevant standard no longer exists, Google no longer owns the SEPs encumbered by the FRAND commitment, or such SEPs are no longer enforceable. Motorola made FRAND commitments on the understanding that they were irrevocable, and Google, in acquiring Motorola's FRAND-encumbered SEPs, must continue to honor those agreements.

The Proposed Consent Order further prohibits Google and Motorola from continuing or enforcing existing claims for injunctive relief based on FRAND-encumbered SEPs. Google and Motorola are similarly prohibited from bringing future claims for injunctive relief based on FRAND-encumbered SEPs. For

## Analysis to Aid Public Comment

both current and future claims for injunctive relief, Google and Motorola must follow specific negotiation procedures, described below, that are intended to protect the interests of potential willing licensees while allowing Google and Motorola to seek injunctions only after the licensee refuses to engage in the negotiation process. However, if a potential licensee indisputably demonstrates that it is not willing to pay Google a reasonable fee for use of Google's FRAND-encumbered SEPs, Google is permitted by this Order to seek injunctive relief.

Outside the processes outlined in the Order, Google is permitted to seek injunctive relief only in the following four narrowly-defined circumstances: (1) the potential licensee is not subject to United States jurisdiction; (2) the potential licensee has stated in writing or in sworn testimony that it will not accept a license for Google's FRAND-encumbered SEPs on any terms; (3) the potential licensee refuses to enter a license agreement for Google's FRAND-encumbered SEPs on terms set for the parties by a court or through binding arbitration; or (4) the potential licensee fails to assure Google that it is willing to accept a license on FRAND terms. The Proposed Consent Order provides Google with a form letter, attached to the Proposed Consent Order as Exhibit B, for requesting a potential licensee to affirm that it is willing to pay a FRAND rate for Google's FRAND-encumbered SEPs, and Google must provide a copy of the Proposed Consent Order along with the form letter. Google may not, however, seek an injunction simply because the potential licensee challenges the validity, value, infringement or essentiality of Google's FRAND-encumbered patents.

The Proposed Consent Order provides potential licensees with two avenues for resolving licensing disputes that involve Google's FRAND-encumbered SEPs. The first is a framework for resolution that a potential licensee may voluntarily elect. Under this path, Google and the potential licensee agree to negotiate the terms of the license for at least six (6) months (unless a license agreement is reached sooner); after the negotiation period concludes, Google may offer a license agreement, or, if the potential licensee requests a license after this negotiation period, Google must provide a proposed license within two months of the request. Google's proposed license agreement must be a binding, written offer that contains all

## Analysis to Aid Public Comment

material terms and limitations. Under this procedure, the potential licensee either accepts the proposed license or informs Google of the terms that it accept and the terms that it believes are inconsistent with Google's FRAND commitments; for each term that it disagrees with, the potential licensee must provide an alternative term that it believes is consistent with Google's FRAND commitment. The potential licensee may then go to court for a FRAND determination or propose binding arbitration to resolve the disputed provisions of Google's proposed license agreement. If a court decides that it cannot resolve the disputed terms, the parties are to go to binding arbitration to finalize the terms of the license agreement.

In the event that the potential licensee does not choose to pursue the path set forth above for resolving the licensing dispute, Google is nevertheless prohibited from seeking injunctive relief unless it takes the following steps. At least six months before seeking an injunction, Google must provide the potential licensee with the Proposed Consent Order and an offer to license Google's FRAND-encumbered patents containing all material terms; Google's offer may require that the potential licensee in turn offer Google a license for the potential licensee's FRAND-encumbered SEPs within the same standard. If no agreement is reached, at least sixty days before initiating a claim for injunctive relief, Google must offer the potential licensee the option to enter binding arbitration to determine the terms of a license agreement between the parties. The Proposed Consent Order describes the terms and conditions that Google must follow should the potential licensee accept the offer for binding arbitration, although the parties are free to agree to their own terms. Google's license offers will be irrevocable until it makes the offer to arbitrate, and Google's offers to arbitrate will be irrevocable until thirty (30) days after Google files for injunctive relief.

Under these provisions, if the potential licensee seeks a court's determination of a FRAND-license-rate between the parties instead of accepting Google's offer to arbitrate, Google may not file for injunctive relief as long as the potential licensee goes to court within seven (7) months of Google providing a license offer, or within three months of Google's offer to arbitrate. But the potential licensee must, in connection with its court

## Analysis to Aid Public Comment

action, provide Google with assurances that it will abide by the license terms set by the court and pay royalties based on a final court determination or Google will be free to seek injunctive relief. The Proposed Consent Order provides Google with a form letter, attached as Exhibit A, for requesting that the potential licensee agree to be bound by the court's FRAND determination.

Under the terms of the Proposed Consent Order, Google retains the option to file for injunctive relief against a potential licensee that itself files a claim for injunctive relief against Google based on the potential licensee's FRAND-encumbered SEPs, unless that potential licensee has followed the procedures similar to those set out by the Proposed Consent Order for Google.

Finally, the Proposed Consent Order prohibits Google from selling or assigning its FRAND-encumbered SEPs to third parties unless those parties agree to assume Google's FRAND commitments, abide by the terms of the Proposed Consent Order, and condition any further sale or assignment of Google's FRAND-encumbered SEPs on the same.

In sum, the Proposed Consent Order improves upon the commitments made by Google in February 2012 to ETSI, IEEE, and ITU to honor Motorola's prior FRAND assurances and limit its pursuit of injunctive relief in connection with Motorola's SEPs by providing clear mechanisms for Google to do so. The Order also clarifies and defines Google's FRAND commitments by prohibiting Google from seeking injunctive relief against implementers who are willing to license Google's SEPs. The Proposed Consent Order also contains standard reporting, notification, and access provisions designed to allow the Commission to monitor compliance. It terminates ten (10) years after the date the Order becomes final.

## Complaint

## IN THE MATTER OF

**TESORO CORPORATION  
AND TESORO LOGISTICS OPERATIONS LLC**

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

*Docket No. C-4405; File No. 131 0052  
Complaint, June 17, 2013 – Decision, August 5, 2013*

This consent order addresses the \$400 million acquisition by Respondents Tesoro Corporation and Tesoro Logistics Operations LLC (“Respondents”) of the Northwest Products Pipeline, as well as certain terminals along the Northwest Pipeline, from Chevron Corporation (“Chevron”). Chevron’s terminals are used to offload gasoline and diesel fuels from the pipeline and load such petroleum products onto tank trucks for delivery to retail gas stations and other purchasers. As both Respondents and Chevron own terminals in Boise, Idaho, the complaint alleged the acquisition would reduce the number of terminals with the capability to loan tank trucks in Boise from three to two, and would substantially lessen competition in this market. The order requires Respondents to sell their existing terminal within six months of the acquisition and appoints a monitor to oversee this divestiture.

*Participants*

For the *Commission*: *Anna Chehtova, Philip M. Eisenstat,*  
and *Marc W. Schneider.*

For the *Respondents*: *Marc Schildkraut, Cooley LLP;* and  
*J. Bruce McDonald, Jones Day.*

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Tesoro Corporation, Tesoro Logistics Operations LLC (“Respondents”), and Chevron Corporation through its subsidiaries have entered into an acquisition agreement that constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing

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to the Federal Trade Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

**I. RESPONDENTS AND JURISDICTION****Tesoro Corporation**

1. Respondent Tesoro Corporation is a publicly traded corporation principally engaged in the refining and marketing of petroleum products in the United States. Tesoro Corporation is organized, existing, and doing business under and by virtue of the laws of Delaware, with its headquarters and principal place of business at 19100 Ridgewood Parkway, San Antonio, Texas 78259.

2. Tesoro Corporation is, and at all relevant times has been, engaged in activities in or affecting “commerce” as defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

**Tesoro Logistics Operations LLC**

3. Respondent Tesoro Logistics Operations LLC is a limited liability company organized, existing, and doing business under and by virtue of the laws of Delaware, with its headquarters and principal place of business at 19100 Ridgewood Parkway, San Antonio, Texas 78259. Tesoro Logistics Operations LLC owns Tesoro Logistics Northwest Pipeline LLC.

4. Respondent Tesoro Logistics Operations LLC is a wholly owned subsidiary of Tesoro Logistics LP, a publically traded limited partnership, organized, existing, and doing business under and by virtue of the laws of Delaware, with its headquarters and principal place of business at 19100 Ridgewood Parkway, San Antonio, Texas 78259.

5. Respondent Tesoro Corporation individually and through subsidiaries owns Tesoro Logistics GP, LLC, the general partner of Tesoro Logistics LP. Tesoro Logistics GP, LLC manages the operations and employs the personnel of Tesoro Logistics LP.



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Tesoro Corporation directly owns 37.6% of limited partner interest in Tesoro Logistics LP.

6. Tesoro Logistics Operations LLC directly or indirectly owns a number of petroleum products terminals, including one in Boise, Idaho, that receive light petroleum products off the Northwest Pipeline. The Northwest Pipeline originates in Salt Lake City, Utah, and delivers product from Salt Lake City refineries to destinations between Salt Lake City, Utah, and its termination point in Spokane, Washington. The Tesoro terminal in Boise stores product it receives off the pipeline, and provides facilities to load the product onto tank trucks for local distribution.

7. Tesoro Logistics Operations LLC is, and at all relevant times has been, engaged in activities in or affecting “commerce” as defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

8. Tesoro Logistics Operations LLC and Tesoro Corporation are collectively referred to as “Tesoro.”

## II. THE ACQUIRED COMPANY

9. Chevron Corporation (“Chevron”) is a publicly traded corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its headquarters and principal place of business located at 6001 Bollinger Canyon Road, San Ramon, California 94853. Chevron, through its Chevron Pipeline Company, owns and operates the Northwest Pipeline, a 760-mile interstate common carrier pipeline that transports petroleum products from Salt Lake City to the states of Idaho and Washington. Chevron, through its Northwest Terminalling Company, also owns refined petroleum products terminals along the Northwest Pipeline in Idaho and Washington.

## III. THE PROPOSED ACQUISITION

10. Pursuant to Asset Sale and Purchase Agreements dated December 6, 2012, Tesoro proposes to purchase Chevron Corporation’s (“Chevron”) Northwest Products Pipeline system,

## Complaint

and Chevron's adjacent terminals, including a terminal in Boise, Idaho ("the Acquisition"). The total value of the proposed acquisition is \$355 million.

11. The Acquisition would combine two of the three providers, and the two largest providers of refined products terminaling services in the relevant geographic market of Boise, Idaho. Respondent Tesoro and Chevron each owns and operates a refined products terminal in Boise, and compete to provide terminaling services in Boise.

#### **IV. JURISDICTION**

12. Respondents, and each of their relevant operating subsidiaries and parent entities are, and at all times relevant herein have been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the FTC Act, 15 U.S.C. § 44.

13. The Acquisition constitutes an acquisition under Section 7 of the Clayton Act.

#### **V. THE RELEVANT MARKET**

14. The relevant line of commerce in which to analyze the competitive effects of the Acquisition is the provision of terminaling services for light petroleum products.

15. The relevant geographic market in which to analyze the competitive effects of the acquisition is Boise, Idaho Metropolitan Statistical Area ("MSA").

#### **VI. THE EFFECTS OF THE ACQUISITION**

16. The Acquisition, if consummated, may substantially lessen competition in the relevant markets in the following ways, among others:

a. by eliminating direct and substantial competition between Respondent Tesoro and Chevron; and

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b. by increasing the likelihood that Respondent Tesoro will exercise market power unilaterally.

17. The ultimate effect of the Acquisition would be to increase the likelihood that prices for refined products terminaling services would rise above pre-Acquisition levels, or that there would be a decrease in the quality or availability of refined products terminaling services, in the relevant geographic market.

**VII. ENTRY CONDITIONS**

18. Post-acquisition, entry or expansion into the relevant markets would not be timely, likely, and sufficient in scope to deter or negate the anticompetitive effects of the proposed acquisition.

**VIII. VIOLATIONS CHARGED**

19. The agreements described in Paragraph 10 constitute a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

20. The acquisition described in Paragraph 10 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 seventeenth day of June, 2013, issues its Complaint against Respondents.

By the Commission.

## Decision and Order

**DECISION AND ORDER**

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and its Order to Maintain Assets (“Order to Maintain Assets”) and having accepted the 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 described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and enters the following Decision and Order (“Order”):

1. Respondent Tesoro Corporation is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 19100 Ridgewood Parkway, San Antonio, Texas 78259.

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2. Respondent Tesoro Logistics Operations LLC is a limited liability company organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 19100 Ridgewood Parkway, San Antonio, Texas 78259. Tesoro Logistics Operations LLC is an indirect subsidiary of Tesoro Corporation.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

**ORDER****I.**

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

- A. “Tesoro Corporation” means Tesoro Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Tesoro Corporation (including Tesoro Logistics Operations LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Tesoro Logistics Operations LLC” means Tesoro Logistics Operations LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Tesoro Logistics Operations LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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- C. “Commission” means the Federal Trade Commission.
- D. “Acquirer” means the Person identified in Paragraph II.A.1. of this Order.
- E. “Acquisition” means the proposed acquisition described in the Asset Sale and Purchase Agreement Between Northwest Terminalling Company and Tesoro Logistics Operations LLC, dated December 6, 2012.
- F. “Acquisition Date” means the date the Acquisition is consummated.
- G. “Confidential Information” means any and all of the following information:
  - 1. all information that is a trade secret under applicable trade secret or other law;
  - 2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, computer hardware, software and computer software, and database technologies, systems, structures, and architectures;
  - 3. all information concerning the relevant business (which includes historical and current financial statements, financial projections and budgets, tax returns and accountants’ materials, historical, current, and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer lists and files, contracts, and

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the names and backgrounds of key personnel and personnel training techniques and materials); and

4. all notes, analyses, compilations, studies, summaries and other material to the extent containing or based, in whole or in part, upon any of the information described above;

*Provided, however,* that Confidential Information shall not include information that (i) was, is or becomes generally available to the public other than as a result of a breach of this Order; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.

- H. “Contract” means any agreement, contract, lease, consensual obligation, promise, or undertaking (whether written or oral and whether express or implied), whether or not legally binding.
- I. “Direct Cost” means the actual cost of labor, including employee benefits, materials, resources, and services, plus the actual cost of any third-party charges.
- J. “Divestiture Agreement” means any agreement identified in Paragraph VI.B. of this Order.
- K. “Divestiture Date” means the date on which Respondents (or a Divestiture Trustee) divest the Boise Terminal Assets pursuant to this Order.
- L. “Boise Terminal Assets” means all of Respondents’ right, title, and interest in and to all property and assets, real, personal, or mixed, tangible and intangible, of every kind and description, wherever located, relating to operation of the Boise Terminal Business, including but not limited to:

## Decision and Order

1. all real property interests (including fee simple interests and real property leasehold interests), including all easements, appurtenances, licenses, and permits, together with all buildings and other structures, facilities, and improvements located thereon, owned, leased, or otherwise held;
2. all Tangible Personal Property, including any Tangible Personal Property removed from any location of the Boise Terminal Business since the date of the announcement of the Acquisition, and not replaced, if such property was used in connection with the operations of the Boise Terminal Business prior to the Acquisition Date;
3. all inventories other than inventories held by a customer;
4. all (i) trade accounts receivable and other rights to payment from customers and the full benefit of all security for such accounts or rights to payment, including all trade accounts receivable representing amounts receivable in respect of goods shipped or products sold or services rendered to customers, (ii) all other accounts or notes receivable and the full benefit of all security for such accounts or notes, and (iii) any claim, remedy or other right related to any of the foregoing;
5. all Contracts and all outstanding offers or solicitations to enter into any Contract, to the extent such Contracts pertain exclusively to the Boise Terminal Business, and to the extent assignable;
6. all consents, licenses, registrations, or permits issued, granted, given, or otherwise made available by or under the authority of any governmental body or pursuant to any legal requirement, and all pending applications therefor or renewals thereof;



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7. all data and Records, including client and customer lists and Records, referral sources, research and development reports and Records, production reports and Records, service and warranty Records, equipment logs, operating guides and manuals, financial and accounting Records, creative materials, advertising materials, promotional materials, studies, reports, correspondence and other similar documents and Records, and copies of all personnel Records (to the extent permitted by law);
8. all intangible rights and property, including Intellectual Property, going concern value, goodwill, telephone, telecopy, and e-mail addresses and listings;
9. all insurance benefits, including rights and proceeds; and
10. all rights relating to deposits and prepaid expenses, claims for refunds, and rights to offset in respect thereof.

*Provided, however,* that the Boise Terminal Assets need not include (i) any software that can readily be purchased or licensed from sources other than Respondents and which has not been materially modified (other than through user preference settings), (ii) any assets that are shared with, or also pertain to, other businesses owned by Respondents prior to the Acquisition, unless such assets primarily relate to the Boise Terminal Business, and (iii) any part of the Boise Terminal Assets if not needed by Acquirer and the Commission approves the divestiture without such assets.

- M. “Boise Terminal Business” means the light petroleum products Terminaling business conducted by Respondents in Boise, Idaho, prior to the Acquisition.

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- N. “Boise Terminal Employee” means any full-time, part-time, or contract individual (i) who is employed by Respondents as of the Acquisition Date, and (ii) whose job responsibilities relate or related primarily to the Boise Terminal Business at any time from the date of the announcement of the Acquisition.
- O. “Intellectual Property” means all intellectual property owned or licensed (as licensor or licensee) by Respondents in which Respondents have a proprietary interest, including (i) commercial names, all assumed fictional business names, trade names, registered and unregistered trademarks, service marks and applications; (ii) all patents, patent applications and inventions and discoveries that may be patentable; (iii) all registered and unregistered copyrights in both published works and unpublished works; (iv) all rights in mask works; (v) all know-how, trade secrets, confidential or proprietary information, customer lists, software, technical information, data, process technology, plans, drawings, and blue prints; (vi) and all rights in internet web sites and internet domain names presently used by Respondents.
- P. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.
- Q. “Public Record Date” means the date on which the Commission accepts the Consent Agreement and places it on the public record for comment.
- R. “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- S. “Shared Intellectual Property” means any Intellectual Property (i) that pertains to operation of the Boise Terminal Business and any other business owned by Respondents prior to the Acquisition and (ii) is

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excluded from the definition of the Boise Terminal Assets; provided, however, that Shared Intellectual Property shall not include any software that can readily be purchased or licensed from sources other than Respondents and which has not been materially modified (other than through user preference settings) and shall not include any commercial names, all assumed fictional business names, trade names, registered and unregistered trademarks, service marks and applications.

- T. “Tangible Personal Property” means all machinery, equipment, tools, furniture, office equipment, computer hardware, supplies, materials, vehicles, and other items of tangible personal property (other than inventories) of every kind owned or leased, together with any express or implied warranty by the manufacturers or sellers or lessors of any item or component part thereof and all maintenance records and other documents relating thereto.
- U. “Terminal Customer” means any Person who has a Contract with Respondents for Terminaling services in Boise, Idaho (including Contracts that Respondents acquire as a result of the Acquisition).
- V. “Terminaling” means the temporary storage of light petroleum products received via pipeline, marine vessel, tank trucks, rail, or transport trailers, and the re-delivery of light petroleum products from storage tanks into tank trucks, rail cars, transport trailers, or pipelines.
- W. “Transitional Assistance” means any (i) administrative assistance (including, but not limited to, order processing, shipping, accounting, and information transitioning services) or (ii) technical assistance with respect to the provision of light petroleum products terminaling services.

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

- A. Respondents shall:
1. No later than 180 days from the date this Order is issued, divest the Boise Terminal Assets, absolutely and in good faith, at no minimum price, as an on-going business, to a Person that receives the prior approval of the Commission (hereinafter referred to as “Acquirer”) and in a manner that receives the prior approval of the Commission; and
  2. No later than the Divestiture Date, grant a worldwide, royalty-free, irrevocable, and transferable license (subject to the prior approval of the Commission) under all Shared Intellectual Property to the Acquirer that will enable the Acquirer to operate the Boise Terminal Business in substantially the same manner as Respondents prior to the Acquisition, including the freedom to extend existing services and products and develop new services and products.
- B. No later than the Divestiture Date, Respondents shall secure all approvals, consents, ratifications, waivers, or other authorizations from all Persons that are necessary for the divestiture of the Boise Terminal Assets.
- C. At the request of the Acquirer and in a manner that receives the prior approval of the Commission, Respondents shall provide Transitional Assistance to the Acquirer for a period of not more than nine (9) months after Respondents divest the Boise Terminal Assets:
1. Such assistance shall be sufficient to enable the Acquirer to operate the divested assets and business in substantially the same manner and at the same quality achieved by Respondents prior to the divestiture; and

## Decision and Order

2. Respondents shall not (i) require the Acquirer to pay compensation for Transitional Assistance that exceeds the Direct Cost of providing such goods and services; (ii) terminate its obligation to provide Transitional Assistance because of a material breach by the Acquirer of the agreement to provide such assistance, in the absence of a final order of a court of competent jurisdiction; or (iii) seek to limit the damages (such as indirect, special, and consequential damages) which the Acquirer would be entitled to receive in the event of Respondents' breach of any agreement to provide Transitional Assistance.
- D. For a period of two (2) years after the Boise Terminal Assets are divested, Respondents shall not solicit the employment of any Boise Terminal Employee who becomes employed by Acquirer at the time the Boise Terminal Assets are divested; provided, however, a violation of this provision will not occur if: (i) the individual's employment has been terminated by Acquirer, (ii) Respondents advertise for employees in newspapers, trade publications, or other media not targeted specifically at the employees, or (iii) Respondents hire employees who apply for employment with Respondents, so long as such employees were not solicited by Respondents in violation of this paragraph.

**III.**

**IT IS FURTHER ORDERED** that for a period of six (6) months after the Divestiture Date:

- A. Respondents shall allow any Terminal Customer to terminate its Contract with respect to any or all Terminaling services provided by Respondents in Boise, Idaho, without penalty or charge, upon request of the Terminal Customer.

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- B. Respondents shall notify each Terminal Customer of its right to terminate its Contract (i) no later than ten (10) days after the Public Record Date for Contracts in effect on the Public Record Date; (ii) no later than the execution of the Contract for Contracts that Respondents enter into or renew after the Public Record Date; and (iii) in substantially the same form as the notification attached to this Order as Appendix A.

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

- A. Respondents shall (i) keep confidential (including as to Respondents' employees) and (ii) not use for any reason or purpose, any Confidential Information held or controlled by Respondents relating to the Boise Terminal Business and Boise Terminal Asset (other than information relating to Respondents' own transactions in the course of conducting business as throughput customers of the Boise Terminal Business); *provided, however*, that Respondents may disclose or use such confidential information:
1. To perform their obligations or as permitted under this Order, the Order to Maintain Assets, or a Divestiture Agreement; and
  2. To comply with financial reporting requirements, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against the Boise Terminal Business or Boise Terminal Assets, or as required by law;

*Provided further*, that Respondents shall require that employees who have had access to any Confidential Information relating to the Boise Terminal Business or Boise Terminal Assets (other than information relating to Respondents' own transactions in the course of conducting business as throughput customers of the Boise Terminal Business) within the one (1) year

## Decision and Order

period prior to the Acquisition Date sign an agreement to maintain the confidentiality of such information.

- B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order, Respondents shall limit such disclosure or use (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A., and (iii) only after such employees or Persons have signed an agreement to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph IV. as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph IV., including implementation of access and data controls, training of their employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

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

- A. If Respondents have not divested the Boise Terminal Assets as required by Paragraphs II. and III. of this Order, the Commission may appoint a Divestiture Trustee to divest the Boise Terminal Assets in a manner that satisfies the requirements of this Order. The Divestiture Trustee appointed pursuant to this Paragraph may be the same Person appointed as Monitor pursuant to the relevant provisions of the Order to Maintain Assets.
- B. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or

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any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

- C. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- D. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.
- E. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:



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

## Decision and Order

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

## Decision and Order

significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.

6. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence or willful misconduct by the Divestiture Trustee. For purposes of this Paragraph V.E.6., the term "Divestiture Trustee" shall include all Persons retained by the Divestiture Trustee pursuant to Paragraph V.E.5. of this Order.
  7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
  8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
  9. Respondents may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- F. The Commission may require the Divestiture Trustee and each of the Divestiture Trustee's consultants,

## Decision and Order

accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.

- G. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph V.
- H. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

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

- A. Respondents shall enter into, and submit to the Commission for approval, one or more agreements with Acquirer that sets forth the manner in which Respondents shall complete (i) the divestiture of the Boise Terminal Assets required by this Order and (ii) any other obligation under this Order that requires prior approval of the Commission.
- B. Respondents shall comply with all provisions of any agreement between Respondents and Acquirer that has been approved by the Commission ("Divestiture Agreement"). In the event of a conflict between the terms of this Order and a Divestiture Agreement, or any ambiguity in the language used in a Divestiture Agreement, the terms of this Order shall govern to resolve such conflict or ambiguity.
- C. Respondents shall not modify the terms of a Divestiture Agreement without the prior approval of

## Decision and Order

the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

**VII.**

**IT IS FURTHER ORDERED** that the purpose of the divestiture of the Boise Terminal Assets is to ensure the continued use of the assets in the same businesses in which such assets were engaged at the time of the announcement of the Acquisition by Respondents and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

**VIII.**

**IT IS FURTHER ORDERED** that:

- A. Respondents shall file a verified written report with the Commission setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order and the Order to Maintain Assets:
  - 1. No later than thirty (30) days after the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraph II.A. – II.C. of this Order; and
  - 2. No later than one (1) year after the date this Order is issued and annually thereafter until Respondents have completed their obligations under Paragraphs II. and III. of this Order, and at such other times as the Commission staff may request.
- B. With respect to the divestiture required by Paragraph II. of this Order, Respondents shall include in their compliance reports (i) the identities of all parties and a description of all substantive contacts or negotiations relating to the divestiture and approval, (ii) copies, other than of privileged materials, of all written

## Decision and Order

communications to and from such parties, all internal memoranda, and all reports and recommendations concerning the divestiture and approval, and (iii) as applicable, a statement that any divestiture approved by the Commission has been accomplished, including a description of the manner in which Respondents completed such divestiture and the date the divestiture was accomplished.

**IX.**

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

- A. Dissolution of either Respondent;
- B. Acquisition, merger, or consolidation of either Respondent; or
- C. Any other change in either Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

**X.**

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

## Decision and Order

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

**XI.**

**IT IS FURTHER ORDERED** that this Order shall terminate on August 5, 2023.

By the Commission.

Decision and Order

**APPENDIX A**  
**Notice**

To settle concerns arising from Tesoro's acquisition of certain assets of Chevron Corporation, on [insert date of consent agreement], Tesoro agreed with the staff of the Federal Trade Commission ("FTC") to allow customers that purchase Terminaling services for light petroleum products in Boise, Idaho, to terminate their contracts with respect to any or all of the services, at the option of the customer, without penalty or charge, immediately upon request of the customer at any time from the [insert Public Record Date] until six (6) months after Tesoro has sold its current terminal in Boise, Idaho.

You are being sent this notice because you are or will be a customer that purchases Terminaling services from Tesoro in Boise, Idaho. You may read and download a copy of the Order from the FTC at its web site at [web link to Order] as well as other documents relating to the settlement. Tesoro's obligations with respect to contract termination are set out in Paragraph \_\_ of the Order. Capitalized terms used in the Order are defined in Paragraph I. of the Order.

If you wish to terminate your contract with respect to any or all of the Terminaling services you purchase from Tesoro, please contact xxxxxxxxxxxx, Tel: xxxxxxxxxxxx, Email: xxxxxxxxxxxx. If you have any questions or concerns about these obligations, you may contact the staff of the Compliance Division, Bureau of Competition, Federal Trade Commission, Washington, D.C., Tel: 202-326-xxxx.



## Order to Maintain Assets

**ORDER TO MAINTAIN ASSETS**

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the Consent Agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure described in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following Order to Maintain Assets (“Order to Maintain Assets”):

1. Respondent Tesoro Corporation is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 19100 Ridgewood Parkway, San Antonio, Texas 78259.

## Order to Maintain Assets

2. Respondent Tesoro Logistics Operations LLC is a limited liability company organized, existing, and doing business under, and by virtue of, the laws of the State of Delaware, with its office and principal place of business located at 19100 Ridgewood Parkway, San Antonio, Texas 78259. Tesoro Logistics Operations LLC is an indirect subsidiary of Tesoro Corporation.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and the proceeding is in the public interest.

**ORDER****I.**

**IT IS HEREBY ORDERED** that, as used in this Order to Maintain Assets, the following definitions shall apply:

- A. “Tesoro Corporation” means Tesoro Corporation, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Tesoro Corporation (Tesoro Logistics Operations LLC), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Tesoro Logistics Operations LLC” means Tesoro Logistics Operations LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and the joint ventures, subsidiaries, partnerships, divisions, groups, and affiliates in each case controlled by Tesoro Logistics Operations LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Commission” means the Federal Trade Commission.

## Order to Maintain Assets

- D. “Acquirer” means the Person identified in Paragraph II.A.1. of the Decision and Order.
- E. “Acquisition” means the proposed acquisition described in the Asset Sale and Purchase Agreement Between Northwest Terminalling Company and Tesoro Logistics Operations LLC, dated December 6, 2012.
- F. “Acquisition Date” means the date the Acquisition is consummated.
- G. “Boise Terminal Assets” means the assets identified in Paragraph I.L. of the Decision and Order.
- H. “Boise Terminal Business” means the light petroleum products Terminating business conducted by Tesoro in Boise, Idaho, prior to the Acquisition.
- I. “Boise Terminal Employee” means any full-time, part-time, or contract individual (i) who is employed by Respondents after the Acquisition Date, and (ii) whose job responsibilities relate or related primarily to the Boise Terminal Business at any time from the date of the announcement of the Acquisition.
- J. “Confidential Information” means any and all of the following information:
  - 1. all information that is a trade secret under applicable trade secret or other law;
  - 2. all information concerning product specifications, data, know-how, formulae, compositions, processes, designs, sketches, photographs, graphs, drawings, samples, inventions and ideas, past, current and planned research and development, current and planned manufacturing or distribution methods and processes, customer lists, current and anticipated customer requirements, price lists, market studies, business plans, computer hardware,

## Order to Maintain Assets

software and computer software and database technologies, systems, structures, and architectures;

3. all information concerning the relevant business (which includes historical and current financial statements, financial projections and budgets, tax returns and accountants' materials, historical, current and projected sales, capital spending budgets and plans, business plans, strategic plans, marketing and advertising plans, publications, client and customer lists and files, contracts, the names and backgrounds of key personnel and personnel training techniques and materials); and
4. all notes, analyses, compilations, studies, summaries and other material to the extent containing or based, in whole or in part, upon any of the information de-scribed above;

*Provided, however,* that Confidential Information shall not include information that (i) was, is or becomes generally available to the public other than as a result of a breach of this Order; (ii) was or is developed independently of and without reference to any Confidential Information; or (iii) was available, or becomes available, on a non-confidential basis from a third party not bound by a confidentiality agreement or any legal, fiduciary or other obligation restricting disclosure.

K. "Decision and Order" means the:

1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance and service of a final Decision and Order by the Commission; and
2. Final Decision and Order issued by the Commission in this matter following the issuance and service of a final Decision and Order by the Commission.

## Order to Maintain Assets

- L. “Divestiture Agreement” means any agreement identified in Paragraph VI.B. of the Decision and Order.
- M. “Final Report” means the report as defined in Paragraph V.C.(ii) of this Order to Maintain Assets.
- N. “Person” means any individual, partnership, corporation, business trust, limited liability company, limited liability partnership, joint stock company, trust, unincorporated association, joint venture or other entity or a governmental body.
- O. “Terminaling” means the temporary storage of light petroleum products received via pipeline, marine vessel, tank trucks, rail, or transport trailers, and the re-delivery of products from storage tanks into tank trucks, rail cars, transport trailers, or pipelines.

**II.**

**IT IS FURTHER ORDERED** that from the date Respondents execute the Consent Agreement until the Divestiture Date, Respondents shall manage the Boise Terminal Business and Boise Terminal Assets in the ordinary course of business consistent with past practices as of the date that Respondents announced the Acquisition. Respondents shall, among other requirements:

- A. Maintain the Boise Terminal Business and Boise Terminal Assets in substantially the same condition (except for normal wear and tear) existing at the time Respondents execute the Consent Agreement;
- B. Keep available the services of all Boise Terminal Employees (that are performing in a satisfactory manner) and maintain the relations and good will with suppliers, customers, landlords, creditors, agents, and others having business relationships with the Boise Terminal Business and Boise Terminal Assets;

## Order to Maintain Assets

- C. Preserve the Boise Terminal Business and Boise Terminal Assets as an ongoing business and not take any affirmative action, or fail to take any action within Respondents' control, as a result of which the viability, competitiveness, and marketability of the Boise Terminal Business and Boise Terminal Assets would be diminished; and
- D. Provide the Boise Terminal Business with sufficient financial and other resources to:
1. Operate the Boise Terminal Business and Boise Terminal Assets at least at the current rate of operation and staffing and to carry out, at their scheduled pace, all business plans and promotional activities in place prior to the Acquisition;
  2. Perform all maintenance to, and replacements or remodeling of, the assets of the Boise Terminal Business in the ordinary course of business and in accordance with past practice and current plans;
  3. Carry on such capital projects, physical plant improvements, and business plans as are already underway or planned for which all necessary regulatory and legal approvals have been obtained, including but not limited to existing or planned renovation, remodeling, or expansion projects; and
  4. Maintain the viability, competitiveness, and marketability of the Boise Terminal Business and Boise Terminal Assets:

Such financial resources to be provided to the Boise Terminal Business shall include, but shall not be limited to, (i) general funds, (ii) capital, and (iii) working capital.

## Order to Maintain Assets

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

- A. Respondents shall staff the Boise Terminal Business and Boise Terminal Assets with sufficient employees to maintain the viability and competitiveness of the Boise Terminal Business and Boise Terminal Assets, including but not limited to, providing each Boise Terminal Employee with reasonable financial incentives, if necessary, including continuation of all employee benefits and regularly scheduled raises and bonuses, to continue in his or her position pending divestiture of the Boise Terminal Assets.
- B. Respondents shall allow the Acquirer an opportunity to identify, recruit, and hire any Boise Terminal Employee:
  - 1. No later than twenty (20) days before execution of a Divestiture Agreement, Respondents shall (i) identify all Boise Terminal Employees, (ii) allow Acquirer to inspect the personnel files and other documentation of all Boise Terminal Employees, to the extent permissible under applicable laws, and (iii) allow Acquirer an opportunity to interview Boise Terminal Employees;
  - 2. Respondents shall (i) remove any impediments that may deter or prevent any Boise Terminal Employee from accepting employment with Acquirer, including any non-compete or confidentiality provision of an employment contract (other than Confidential Information relating to Respondents in their role as a customer of the Boise Terminal Business and Confidential Information not relating to the Boise Terminal Business and Boise Terminal Assets) and (ii) vest all accrued retirement benefits as of the date of transition of employment with Acquirer for all

## Order to Maintain Assets

Boise Terminal Employees who accept an offer of employment from Acquirer; and

3. Respondents shall (i) not solicit or induce any Boise Terminal Employee to decline an offer of employment with Acquirer, and (ii) provide any Key Employee to whom Acquirer has made a written offer of employment with a financial incentive, if necessary, to accept a position with Acquirer at the time the Boise Terminal Assets are divested, pursuant to the terms set forth in Confidential Appendix A attached to this Order.

“Key Employee” means any individual identified as a key employee by agreement between Respondents and Acquirer and included in a Divestiture Agreement.

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

- A. Respondents shall (i) keep confidential (including as to Respondents’ employees) and (ii) not use for any reason or purpose, any Confidential Information held or controlled by Respondents relating to the Boise Terminal Business and Boise Terminal Assets (other than information relating to Respondents’ own transactions in the course of conducting business as throughput customers of the Boise Terminal Business); *provided, however*, that Respondents may disclose or use such confidential information:
  1. To perform their obligations, or as permitted, under this Order to Maintain Assets, the Decision and Order, or any Divestiture Agreement; or
  2. To comply with financial reporting requirements, obtaining legal advice, defending legal claims, investigations, or enforcing actions threatened or brought against the Boise Terminal Business or Boise Terminal Assets, or as required by law;



## Order to Maintain Assets

*Provided further*, that Respondents shall require that employees who have had access to any Confidential Information relating to the Boise Terminal Business or Boise Terminal Assets (other than information relating to Respondents' own transactions in the course of conducting business as throughput customers of the Boise Terminal Business) within the one (1) year period prior to the Acquisition Date sign an agreement to maintain the confidentiality of such information.

- B. If disclosure or use of any Confidential Information is permitted to Respondents' employees or to any other Person under Paragraph IV.A. of this Order to Maintain Assets, Respondents shall limit such information (i) only to the extent such information is required, (ii) only to those employees or Persons who require such information for the purposes permitted under Paragraph IV.A., and (iii) only after such employees or Persons have signed an agreement in writing to maintain the confidentiality of such information.
- C. Respondents shall enforce the terms of this Paragraph IV. as to their employees or any other Person, and take such action as is necessary to cause each of their employees and any other Person to comply with the terms of this Paragraph IV., including implementation of access and data controls, training of their employees, and all other actions that Respondents would take to protect their own trade secrets and proprietary information.

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

- A. At any time after Respondents sign the Consent Agreement, the Commission may appoint Walter Schanbacher to serve as Monitor.

## Order to Maintain Assets

- B. Respondents shall enter into an agreement with the Monitor, subject to the prior approval of the Commission, that (i) shall become effective no later than one (1) day after the date the Commission appoints the Monitor, and (ii) confers upon the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities on the terms set forth in this Order and in consultation with the Commission:
1. The Monitor shall (i) monitor Respondents' compliance with the obligations set forth in this Order to Maintain Assets and the Decision and Order, and (ii) act in a fiduciary capacity for the benefit of the Commission;
  2. Respondents shall (i) insure that the Monitor has full and complete access to all Respondents' personnel, books, records, documents, and facilities relating to compliance with this Order to Maintain Assets and the Decision and Order, or to any other relevant information as the Monitor may reasonably request, and (ii) cooperate with, and take no action to interfere with or impede the ability of, the Monitor to perform his duties pursuant to this Order to Maintain Assets;
  3. The Monitor shall (i) serve at the expense of Respondents, without bond or other security, on such reasonable and customary terms and conditions as the Commission may set, and (ii) may employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities;
  4. Respondents shall indemnify the Monitor and hold him harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of his duties, including all reasonable fees of counsel and other

## Order to Maintain Assets

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 the Monitor's gross negligence or willful misconduct; and

5. 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, that such agreement shall not restrict the Monitor from providing any information to the Commission.
- C. The Monitor shall report in writing to the Commission (i) every thirty (30) days from the Acquisition Date, (ii) no later than thirty (30) days from the date Respondents have completed all obligations required by Paragraphs II. and III. of the Decision and Order ("Final Report"), and (iii) at any other time as requested by the staff of the Commission, concerning Respondents' compliance with this Order to Maintain Assets and the Decision and Order.
  - D. The Commission may require the Monitor and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants to sign a confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
  - E. The Monitor's power and duties shall terminate three business days after the Monitor has completed his final report pursuant to Paragraph V.C.(ii) of this Order to Maintain Assets, or at such other time as directed by the Commission.
  - F. If at any time the Commission determines that the Monitor has ceased to act or failed to act diligently, or is unwilling or unable to continue to serve, the

## Order to Maintain Assets

Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld:

1. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of the substitute Monitor within five (5) days after notice by the staff of the Commission to Respondents of the identity of any substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
  2. Respondents shall, no later than five (5) days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the approval of the Commission, confers on the substitute Monitor all the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities pursuant to this Order to Maintain Assets on the same terms and conditions 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 this Order to Maintain Assets.

**VI.**

**IT IS FURTHER ORDERED** that the purpose of this Order to Maintain Assets is to (i) preserve the Boise Terminal Business and Boise Terminal Assets as a viable, competitive, and ongoing business independent of Respondents until the divestiture required by the Decision and Order is achieved; (ii) prevent interim harm to competition pending the relevant divestiture and other relief; and (iii) help remedy any anticompetitive effects of the proposed Acquisition as alleged in the Commission's Complaint.

## Order to Maintain Assets

**VII.**

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

- A. Dissolution of either Respondent;
- B. Acquisition, merger or consolidation of either Respondent; or
- C. Any other change in either Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

**VIII.**

**IT IS FURTHER ORDERED** that, for the purpose of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon five (5) days' notice to Respondents, Respondents shall, without restraint or interference, permit any duly authorized representative 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 other records and documents in the possession or under the control of Respondents related to compliance with this Order to Maintain Assets, which copying services shall be provided by Respondents at their expense; and
- B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

Analysis to Aid Public Comment

## IX.

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

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. Three (3) business days after the Monitor has completed his Final Report required by Paragraph V.C.(ii) of this Order to Maintain Assets.

By the Commission.

## ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

### I. Introduction

The Federal Trade Commission (the “Commission”), subject to its final approval, has accepted for public comment an Agreement Containing Consent Orders (“Consent Agreement”) with Tesoro Corporation and Tesoro Logistics Operations LLC (“Respondents”). On December 6, 2012, Respondents executed related Asset Sale and Purchase Agreements with the Northwest Terminalling Company and Chevron Pipeline Company, subsidiaries of Chevron Corporation, to acquire the Northwest Products Pipeline system and Chevron’s associated terminals, including a terminal in Boise, Idaho, for a total of \$355 million (the “Acquisition”). Respondents already own and operate a terminal in Boise, Idaho (the “Tesoro Terminal”).

The Commission’s Complaint alleges that Respondents have entered into an acquisition agreement that constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended,

## Analysis to Aid Public Comment

15 U.S.C. § 45, and which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, by substantially lessening competition in terminaling services for light petroleum products in the Boise, Idaho Metropolitan Statistical Area (“Boise MSA”). The Acquisition would reduce the competitive options for terminaling services in the Boise MSA from three to two, with Respondents owning the two largest terminals. The proposed Consent Agreement effectively remedies the Acquisition’s possible anticompetitive effects by requiring Respondents to divest its own terminal in Boise, the Tesoro Terminal.

**II. Respondents and Other Relevant Entities****A. Tesoro Corporation**

Tesoro Corporation is a publically traded corporation principally engaged in the refining and marketing of petroleum products in the United States.

**B. Tesoro Logistics Operations LLC**

Tesoro Logistics Operations LLC, a limited liability company, is a wholly owned subsidiary of Tesoro Logistics LP, a publically traded limited partnership. Respondent Tesoro Corporation individually and through its subsidiaries owns Tesoro Logistics GP, LLC, the general partner of Tesoro Logistics LP. Tesoro Logistics GP, LLC manages the operations and employs the personnel of Tesoro Logistics LP, and owns a two percent general partner interest in the partnership. Tesoro Corporation directly owns 37.6% of limited partner interest in Tesoro Logistics LP.

Tesoro Logistics Operations LLC directly or indirectly owns a number of petroleum products terminals, including the Tesoro Terminal in Boise, Idaho, that receive light petroleum products off the Northwest Pipeline. The Tesoro Terminal in Boise stores product it receives off the pipeline and provides facilities to load the product onto tank trucks for local distribution.

## Analysis to Aid Public Comment

**C. Chevron Corporation**

Chevron Corporation (“Chevron”) is a publicly traded corporation principally engaged in fully integrated petroleum operations in the United States, including the exploration, production, manufacture, transportation, and sale of petroleum products. Chevron, through Chevron Pipeline Company, owns and operates the Northwest Pipeline, a 760-mile interstate common-carrier pipeline that transports petroleum products from Salt Lake City to the States of Idaho and Washington. Chevron, through Northwest Terminalling Company owns petroleum terminals along the Northwest Pipeline in Idaho and Washington, including one in Boise, Idaho.

**III. Distribution of Petroleum Products and Competitive Effects**

Pipelines and terminals play a key role in the distribution of refined light petroleum products, a product category that includes gasoline, diesel fuel, and jet fuel. Pipelines are the least expensive means of moving bulk quantities of light petroleum products across land. The alternatives, rail transportation and truck transportation, are not cost competitive when pipeline transportation is available.

Terminals provide a critical connection between bulk supply through pipelines and local distribution of light petroleum products. The efficient operation of pipelines requires continuous shipment of large volumes of light petroleum products. Efficient local distribution utilizes tank trucks to pick up product from the terminal and deliver it to customers.

Terminals have specialized truck-loading facilities, known as “truck racks,” to transfer light petroleum products from storage tanks to individual tank trucks. Terminal services provided to suppliers of light petroleum products include storage, dispensing, and ethanol and additive blending. Suppliers of light petroleum products trying to reach a particular local market have no economically viable alternative to terminals.

The Acquisition would reduce the competitive options for terminaling services in Boise from three to two, with Tesoro



## Analysis to Aid Public Comment

owning the two largest terminals. Currently, in the Boise MSA, there are three terminals and one storage facility lacking truck racks. Tesoro, Chevron, and United Oil Company each own and operate terminals. Holly Energy Partners and Sinclair Corporation jointly own a storage facility under the name Boise Petroleum. This facility cannot load light petroleum products into tank trucks because it lacks a truck rack. Companies storing light petroleum products at Boise Petroleum must move the products to another terminal to load it onto tank trucks for delivery to the Boise market.

Of the three terminals in Boise, the Tesoro Terminal and the Chevron terminal together account for most of the terminal capacity. The United Oil terminal is the smallest terminal in Boise. Tesoro's control of most of the terminal capacity in Boise may substantially lessen competition in the relevant market. It increases the likelihood that Tesoro would exercise market power unilaterally by raising the terminaling fees or denying access to terminaling services for light petroleum products in the Boise MSA.

**IV. The Proposed Agreement Containing Consent Orders**

Under the Proposed Agreement Containing Consent Orders, Respondents have one hundred and eighty (180) days from the issuance of the Decision and Order ("Order") to divest the Tesoro Terminal, to a Commission-approved buyer. Pursuant to the Order, Respondents may complete the Acquisition of Chevron's Northwest Pipeline and associated terminals immediately upon issuance of the Order. The required divestiture of the Tesoro Terminal will maintain the level of competition that existed in the market for terminaling services in the Boise MSA prior to the Acquisition. The Order to Maintain Assets (discussed in the next section) will protect the competitive status quo until Respondents are able to find a suitable buyer of the Tesoro Terminal.

The Order contains an "open season" provision. Respondents agree to let any customer at the Chevron Boise terminal terminate its contract without penalties for a period of six months after the divestiture sale of the Tesoro Terminal. Respondents agree to notify customers at the Chevron Boise terminal of their right to

## Analysis to Aid Public Comment

terminate their existing contracts. These provisions will ensure that the new owner of the Tesoro Terminal can compete for new business to replace Respondents' current business at the Tesoro Terminal. Respondents are the only customer of the Tesoro Terminal and they could move their business to the Chevron Boise terminal when the divestiture is completed.

The Order requires Respondents to provide transitional assistance and support services to the buyer of the Tesoro Terminal. Respondents must also license any key software and intellectual property to the buyer. The Order allows the buyer to recruit Respondents' employees who work at the Tesoro Terminal. For a period of two years after the divestiture of the Tesoro Terminal, Respondents may not solicit the employees that accept employment offers from the buyer, to rejoin Respondents. The Order also limits Respondents' access to, and use of, confidential business information pertaining to the Tesoro Terminal.

If Respondents fail to fully divest the Tesoro Terminal within the one hundred and eighty (180) day time period, the Order grants the Commission power to appoint a divestiture trustee to complete the divestiture. The Commission may also appoint a divestiture trustee, if it brings an action against Respondents pursuant to Section 5(l) of the FTC Act. The Order also governs the divestiture trustee's duties, privileges, and powers.

The Order requires Respondents, or the divestiture trustee, if appointed, to file periodic reports detailing efforts to divest the Tesoro Terminal and the status of that undertaking. Commission representatives may gain reasonable access to Respondents' business records related to compliance with the consent agreement. The Order terminates ten (10) years after its issuance.

**V. The Order to Maintain Assets**

The Order to Maintain Assets seeks to preserve the Tesoro Terminal as a viable, competitive, ongoing business, and to ensure that Respondents do not access the confidential business information belonging to this business. Respondents agree to preserve the Tesoro Terminal in substantially the same condition existing at the time when Respondents executed the Consent

### Analysis to Aid Public Comment

Agreement. Pursuant to the Order to Maintain Assets, Respondents will provide the Tesoro Terminal with sufficient financial and other resources to maintain current operation levels and carry already planned capital and improvement projects.

The Order to Maintain Assets also empowers the Commission to appoint a monitor to oversee Respondents' compliance with their obligations under the Order. The Order to Maintain Assets outlines the rights, duties, and responsibilities of the monitor, including access to business records, hiring necessary consultants and attorneys, and any other thing reasonably necessary to carry out their duties. The Order to Maintain Assets further prohibits Respondents from interfering with the monitor's obligations and requires them to indemnify the monitor.

The monitor shall submit periodic reports to the Commission concerning compliance with the Order to Maintain Assets. The Commission may appoint a different monitor if the original monitor fails to carry out his duties. The Order to Maintain Assets terminates either (1) three days after the Commission withdraws its acceptance of the Consent Agreement or (2) three days after the monitor completes its final report required by Paragraph V.C.(ii) of this Order to Maintain Assets.

## **VI. Opportunity for Public Comment**

The proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. The Commission has also issued its Complaint in this matter. Comments received during this comment period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and the comments received and will decide whether it should withdraw from the Consent Agreement, modify it, or make final the proposed Order.

By accepting the proposed Consent Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the Complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed Order to aid the Commission in its determination of whether it should

*Analysis to Aid Public Comment*

make final the proposed Order contained in the Agreement. This analysis is not intended to constitute an official interpretation of the proposed Order, nor is it intended to modify the terms of the proposed Order in any way.

## Complaint

## IN THE MATTER OF

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

*Docket No. C-4411; File No. 131 0069*  
*Complaint, August 27, 2013 – Decision, August 27, 2013*

This consent order addresses the acquisition by General Electric Company (“GE”) of the aviation division of Avio S.p.A. (“Avio”) for approximately \$4.3 billion. Avio’s aviation division designs and manufactures modules, component parts and electrical systems for civil and military engines. The complaint alleges that the acquisition raised competitive concerns in the aircraft engine market, as aircraft engines are highly differentiated products. Thus, a hypothetical monopolist for engines designed for a specific type of aircraft could profitably increase prices. Avio has the sole design responsibility for the aircraft gearbox on a forthcoming Pratt & Whitney PW1100F engine, one of two engines available on the Airbus A320neo aircraft. The only other available engine is manufactured by CFM, of which GE owns a 50% interest. Accordingly, the complaint alleges the acquisition would eliminate competition for this engine and would provide GE with the ability and incentive to disrupt the design and certification of the Avio-supplied airline gearbox for the Pratt & Whitney PW1100G engine. The consent order provides a narrowly tailored remedy of the acquisition’s likely anticompetitive effects. The order bars GE from interfering with Avio staffing decisions with respect to the PW1100G project and further requires GE to provide certain transition services, including licenses to essential intellectual property and access to Avio specialized tools, in the event Pratt & Whitney wishes to use an alternative supplier to manufacture the PW1100G. The order further appoints a monitor to oversee GE’s compliance with the terms of the order.

*Participants*

For the *Commission*: *Stephen W. Rodger* and *Mark D. Silvia*.

For the *Respondent*: *Deborah L. Feinstein*, *Jonathan I. Gleklen*, and *Matthew M. Schultz*, *Arnold & Porter, LLP*.

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to

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believe that Respondent General Electric Company (“GE”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the aviation business of Avio S.p.A. (“Avio”), a corporation subject to the jurisdiction of the Commission, in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**I. RESPONDENT**

1. Respondent GE is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at 3135 Easton Turnpike, Fairfield, Connecticut 06828.

2. Respondent is engaged in, among other things, the design and manufacture of jet engines and other equipment for commercial and military aircraft. Respondent has a 50% interest in CFM International (“CFM”), which is a joint venture with Snecma S.A. of France.

3. Respondent is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

**II. THE ACQUIRED COMPANY**

4. Avio is a corporation organized, existing, and doing business under and by virtue of the laws of Italy, with its headquarters at Via I Maggio, 99, 10040, Rivalta Di Torino, Torino, Italy.

5. Avio’s AeroEngine division, among other things, designs and manufactures component parts and electrical systems for civil and military engines.

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6. Avio is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

### III. THE PROPOSED ACQUISITION

7. Pursuant to an Agreement dated December 21, 2012 (the “Agreement”), GE proposes to acquire Avio’s aviation business for approximately \$4.3 billion (the “Acquisition”).

### IV. RELEVANT MARKET

8. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are (1) accessory gearboxes (“AGBs”) for Pratt & Whitney’s PW1100G engine that will power the Airbus S.A.S. (“Airbus”) A320neo aircraft, and (2) engines that compete for placement on the A320neo aircraft.

- a. AGBs use the mechanical power of the engine shaft to power various accessory systems on the engine and the aircraft, including oil and hydraulic pumps and electrical generators. AGBs are specifically designed for the requirements of individual engine platforms, which vary considerably between different engines and aircraft. Because each AGB for a given engine platform is unique, and cannot be substituted for another AGB from a different engine platform, Pratt & Whitney could not substitute AGBs made for other engines in response to a small but significant and non-transitory increase in price. Thus, the AGB designed for the PW1100G engine constitutes its own relevant product market.
- b. Aircraft engines are engineered specifically for the thrust requirements and mission profile of the aircraft on which they are installed. Purchasers of aircraft engines cannot substitute engines which do not meet the specific requirements of the relevant aircraft

## Complaint

platform, or which have not been certified by aviation authorities for use on that aircraft. A320neo purchasers could not substitute other engines in the face of a small but significant and non-transitory increase in price for current engines offered to power the A320neo. Thus, the aircraft engines chosen by Airbus for, and certified for use on, the A320neo constitute their own relevant product market.

9. For the purposes of this Complaint, the relevant geographic market in which to analyze the effects of the transaction is the entire world. Engine components such as AGBs are sold to engine manufacturers located across the globe, and those engine manufacturers then sell to aircraft manufacturers that are also located in various parts of the world. Aircraft manufacturers do not significantly alter aircraft features for specific national markets, and aircraft customers are located throughout the world.

**V. STRUCTURE OF THE MARKETS**

10. Avio currently has sole design responsibility for the AGB on the Pratt & Whitney PW1100G engine, which will be one of two engines available on the A320neo aircraft. Design efforts for the PW1100G AGB have been underway for some time, but further development and testing remains before the engine will be certified by aviation authorities for use on the aircraft. While other component suppliers may be capable of designing AGBs for large commercial aircraft generally, they do not serve as acceptable substitutes for Avio on the PW1100G, because switching component manufacturers at this stage in development would be cost prohibitive. Additionally, the time required for another component supplier to re-design the AGB would require a delay of up to several years in the certification of both the PW1100G engine and the Airbus A320neo aircraft.

11. In the market for engines powering the Airbus A320neo aircraft, only Pratt & Whitney's PW1100G engine and CFM's Leap 1-A engine, in which GE has a 50% interest, compete head-to-head for sales. Other aircraft engine manufacturers do not currently manufacture engines for the A320neo and could not do so or obtain certification within the timeframe necessary to



### Complaint

become a viable substitute for the current engine options on the A320neo platform. The market for engines on the A320neo is highly concentrated, and likely to remain so for the foreseeable future. Pratt & Whitney and CFM each have won roughly half of the A320neo orders placed to date for which the customer has selected an engine.

## VI. ENTRY CONDITIONS

12. Sufficient and timely entry into the market for AGBs for the PW1100G on the A320neo aircraft is unlikely to deter or counteract any anticompetitive effects created by the proposed transaction. AGB design and development for large commercial aircraft like the A320neo requires significant experience and resources, and it would take several years for a third-party supplier to develop AGBs for the PW1100G, which would be insufficient to prevent any potential anticompetitive effects of the proposed acquisition. Given the experience and knowledge of the Avio design team and the complexity of transferring the in-progress design work, Pratt & Whitney would unlikely be able to take over the AGB development without incurring significant delays in engine certification and delivery.

13. Sufficient and timely entry into the market for engines powering the A320neo is also unlikely to deter or counter any anticompetitive effects arising from the proposed transaction. The initial design and production of an aircraft engine requires many years and a large financial investment, and must be followed by a long certification process by aviation authorities throughout the world.

## VII. EFFECTS OF THE ACQUISITION

14. The effects of the Acquisition, if consummated, may be to substantially lessen competition and tend to create a monopoly in the market for aircraft engines for the Airbus A320neo in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by providing GE with the ability and incentive to profitably disrupt the design and certification of the AGB for the Pratt & Whitney PW1100G engine, which would provide GE market

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power and the ability and incentive to raise prices, reduce quality, or delay delivery of engines to A320neo customers.

### VIII. VIOLATIONS CHARGED

15. The Agreement described in Paragraph 7 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

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

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-seventh day of August, 2013, issues its Complaint against said Respondent.

By the Commission, Commissioner Wright not participating.

### DECISION AND ORDER

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by the General Electric Company (hereinafter referred to as “GE” or “Respondent”) of the aviation business of Avio S.p.A. (hereinafter referred to as “Avio NewCo”), and Respondent having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by

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

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

1. Respondent General Electric Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at 3135 Easton Turnpike, Fairfield, Connecticut 06828.
2. The Commission has jurisdiction of the subject matter of this proceeding and of Respondent, and the proceeding is in the public interest.

**ORDER****I.**

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

- A. "General Electric," "GE" or "Respondent" means General Electric Company, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions,

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groups and affiliates in each case controlled by General Electric Company, and the respective directors, officers, employees, agents, representatives, successors and assigns of each; after the Acquisition, “General Electric,” “GE” or “Respondent” also includes Avio NewCo.

- B. “GE Aviation” means, for purposes of this Order, GE with the exception of and expressly excluding Avio NewCo.
- C. “Avio” means Avio S.p.A., a company organized and incorporated under the laws of Italy, whose registered office is at Via I Maggio, 99, 10040, Rivalta Di Torino, Torino, Italy.
- D. “Avio NewCo” means the Aviation Business acquired by GE pursuant to the Acquisition (regardless of how that acquired business is organized or structured under GE ownership in the future), and includes its employees, agents and representatives, successors and assigns, and any joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Avio NewCo.
- E. “Accessory Gear Box” or “AGB” means the accessory gearbox being developed and produced for the PW1100G series engine pursuant to, and as defined in, the Avio/PW Agreement.
- F. “Acquisition” means the acquisition by GE of the Aviation Business of Avio S.p.A. pursuant to the purchase agreement dated December 21, 2012.
- G. “Agreements” means the Avio/PW Agreement and the CAA, each as defined herein.
- H. “Aviation Business” means the aviation business of Avio, as that term is defined in the purchase agreement dated December 21, 2012.

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- I. “Avio/PW Agreement” means the Long Term Agreement between United Technologies Corporation acting through its Pratt & Whitney Division and Avio S.p.A., dated February 1, 2012 (attached as Confidential Exhibit A), to the extent it relates to Development and Production, and as amended by the CAA.
- J. “Commercial Assurances Agreement” or “CAA” means the Commercial Assurances Agreement among United Technologies Corporation (acting through its Pratt & Whitney Division), Pratt & Whitney Canada Corp., Pratt & Whitney Aero Engines International GmbH, Avio S.p.A., GE Avio S.R.L., Nuovo Pignone Holding S.p.A., and General Electric Company (acting through its GE Aviation business unit) dated June 19, 2013 (attached as Confidential Exhibit B) to the extent it relates to Development and Production, including but not limited to Sections 3.02, 8.01 – 8.07, 8.09 – 8.11, and 9.11.
- K. “Commission” means the Federal Trade Commission.
- L. “Core Employees” means the employees, agents or consultants other than Key Employees, comprising the core technical / engineering team responsible for Development and Production, as described in Exhibit 9.11(a) of the CAA.
- M. “Customer Representative” means the P&W customer representative as provided for in Section 8.10 of the CAA.
- N. “Design and Certification” means product design for the PW1100G sufficient to cause the granting of a certificate of airworthiness by an airworthiness authority, as described more fully in the Agreements.
- O. “Development and Production” means the research, development, design, certification, engineering, testing, re-design, re-development, production, supply

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and all related work relating to the AGB and Oil Tank for the Pure Power® PW1100G Engine for the A320NEO, as described more fully in the Avio/PW Agreement.

- P. “Entry Into Service Date” means the date the first A320NEO aircraft equipped with PW1100G engines is delivered by Airbus S.A.S. to a customer.
- Q. “Firewall Excluded Information” means any and all information (i) which at the time of disclosure to Respondent is already in the public domain; (ii) which after disclosure is published or otherwise becomes part of the public domain through no act or fault of Respondent; (iii) that is independently developed by Respondent without the use of or access to the information of P&W and without violating any applicable law or this Order; or (iv) which becomes known to Respondent from a third party not in breach of applicable law or a confidentiality obligation with respect to the information; provided, however, that “Firewall Excluded Information” shall not include any “Related Information,” as that term is described in the CAA.
- R. “Firewalled Information” means any Proprietary Information of P&W provided pursuant to the Agreements, including but not limited to information contained in any documents, models, business cases, details of fleet incentives, specifications, software, programs, computer disks, visual presentations, photographs, drawings, magnetic or digital form and any other media; provided, however, that “Firewalled Information” shall not include any Firewall Excluded Information.
- S. “IPRs” means any and all rights in inventions, patents, utility models, registered design rights, copyrights, moral rights, database rights, trade secrets and other Proprietary Information, and all other intellectual property rights of any kind, any and all categories of intellectual property rights set forth in the Agreements,

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including all registrations of (or other equivalent national rights), applications to register, and the right to apply for registration of any of the foregoing rights, each for their full term (including, without limitation, any extensions or renewals thereof), provided that “IPRs” shall not include trademarks, trade and business names, or any goodwill associated with any trademarks or trade or business names.

- T. “Key Employees” means the Program Manager, Technical Leader and Systems Leaders, as those employees and positions are described in Exhibit 9.11(a) of the CAA.
- U. “Monitor” means the person appointed by the Commission pursuant to Paragraph VI of this Order.
- V. “New Engine Development Staffing Plan” means the staffing plan described at Section 9.11 of the CAA.
- W. “Oil Tank” means the oil tank being developed and produced for the PW1100G series engine pursuant to, and as defined in, the Avio/PW Agreement.
- X. “Pratt & Whitney” or “P&W” means the Pratt & Whitney division of United Technologies Corporation, with its principal place of business at 400 Main Street, East Hartford, Connecticut 06108.
- Y. “Proprietary Information” means all confidential and proprietary non-public information, know-how, specifications, drawings, sketches, models, samples, data, test results, computer programs, proprietary processes, documentation and other technical, financial, economic and business information contained, received or transmitted in any form or format (e.g., physically, orally, visually, by document, email, computer disks, magnetic tape, photograph, handwritten notes, drafts, drawings or any other type of media).

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- Z. “PW1100G” means the P&W Pure Power® PW1100G Engine for the A320NEO, as described in the Avio/PW Agreement.
- AA. “Technical Representative” means the P&W technical representative as provided for in Section 8.09 of the CAA.

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

- A. The Agreements shall be incorporated by reference into this Order and made a part hereof.
- B. Respondent shall comply with the terms of the Agreements, and any breach by Respondent of any term of the Agreements shall constitute a failure to comply with this Order. If any term of either of the Agreements varies from the terms of this Order (“Order Term”), then to the extent that Respondent cannot fully comply with both terms, the Order Term shall determine the obligations under this Order.
- C. The Agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, and nothing in this Order shall be construed to reduce any obligations of Respondent under the Agreements.
- D. Respondent shall not modify the terms of either of the Agreements without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission’s Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5).

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

- A. GE Aviation shall:



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1. Take all actions necessary to perform its obligations under the CAA and shall perform its obligations under the CAA using a degree of care, professionalism and diligence that is no less than the same degree of care, professionalism and diligence demanded or required by GE Aviation from its commercial suppliers.
2. Take no actions, and shall not direct Avio NewCo to take any actions, that are likely to, or that would, limit, impair, hinder, reduce or degrade, directly or indirectly, Avio NewCo's performance under the Agreements. In furtherance of, and not in limitation to, the foregoing:
  - a. For a period extending through the second (2nd) anniversary of the Entry Into Service Date, GE Aviation shall not (unless otherwise provided in this Paragraph or the Agreements, or unless undertaken with the prior consent of the Monitor in consultation with Commission staff), participate in, direct, interfere with, or otherwise influence Avio NewCo's staffing decisions under the Agreements. In furtherance of, and not in limitation to, this sub-paragraph:
    - (1) GE Aviation shall not transfer or cause to be transferred, directly or indirectly, Key Employees or Core Employees to other GE Aviation or Avio NewCo businesses or projects, nor induce or provide incentives for Key Employees or Core Employees to transfer from, or terminate employment with, Avio NewCo, where doing so would cause GE to fail to comply with the New Engine Development Staffing Plan;
    - (2) GE Aviation shall not terminate any Key Employees or Core Employees, except for serious or gross misconduct that would

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warrant dismissal, where doing so would cause GE to fail to comply with the New Engine Development Staffing Plan; in the event of such termination, GE Aviation shall:

- (a) Notify the Monitor and P&W prior to such termination, and
  - (b) Not interfere with the prompt replacement of any terminated Key Employee or Core Employee with a qualified employee approved by the Monitor;
- (3) GE Aviation shall not take any actions that have, are intended to have, or are reasonably expected to have, an adverse impact on any of the Key Employees or Core Employees, provided, however, that this Paragraph shall not prohibit Respondent from taking actions generally applicable to Avio NewCo employees, such as changes to benefits or retirement programs;
- (4) GE Aviation may, with the agreement and consent of P&W or with the consent of the Monitor (in consultation with Commission staff), make available staffing and financial resources for Development and Production under the Agreements that are in addition to the staffing and financial resources decided upon by Avio NewCo;
- b. For a period extending through the fourth (4th) anniversary of the Entry Into Service Date, GE Aviation shall, in consultation with the Monitor, provide sufficient additional financial, technical or engineering resources as may be requested by Avio NewCo to address any issues or delays arising with respect to

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Development and Production under the Agreements; and

- c. GE Aviation shall not interfere, directly or indirectly, with P&W's ability to have at least one Technical Representative and at least one Customer Representative onsite at Avio NewCo's facility in Rivalta Di Torino, Italy, as provided for under Sections 8.09 and 8.10 of the CAA.
- B. Avio NewCo shall:
1. Take all actions necessary to perform, and shall perform, its obligations under the Avio/PW Agreement and the CAA in a manner consistent with the terms of those Agreements and using a degree of care, professionalism, and diligence that is no less than the same degree of care, professionalism, and diligence used by, or expected to be used by, Avio NewCo when engaged in similar activities prior to, or but for, the Acquisition.
  2. Take all necessary actions to prevent, and shall prevent, any reduction, impairment, or deterioration of its performance, service level, degree of care, or diligence under the Agreements following the Acquisition. In furtherance of, and not in limitation to, the foregoing, Avio NewCo shall:
    - a. Provide sufficient staffing and financial resources to perform its obligations under the Agreements;
    - b. Continue making staffing decisions relating to its performance under the Avio/PW Agreement independent of GE Aviation, at a level at least consistent with past practice and the New Engine Development Staffing Plan, unless

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otherwise agreed to by P&W after consultation with the Monitor;

- c. Not terminate any Key Employees or Core Employees, except for serious or gross misconduct that would warrant dismissal, where doing so would cause GE to fail to comply with the New Engine Development Staffing Plan; in the event of such termination, through the second (2nd) anniversary of the Entry Into Service Date, Avio NewCo shall:
  - (1) Notify the Monitor and P&W prior to such termination, and
  - (2) Promptly replace any terminated Key Employee or Core Employee with a qualified employee approved by the Monitor;
- d. As provided in the Agreements, provide an incentive bonus program to all Key Employees and Core Employees to remain with Avio NewCo and to achieve the timely completion of the AGB and Oil Tank development for Design and Certification under the terms of the Agreements, including a program whereby each such employee shall be eligible to earn a bonus up to the value of the employee's annual gross salary;
- e. Permit P&W to maintain at least one on-site Customer Representative at the site in Rivalta Di Torino, Italy, and permit the P&W Customer Representative(s) reasonable access to facilities where work relating to the Agreements is being performed as provided for under Section 8.10 of the CAA; and
- f. Permit P&W to have at least one Technical Representative onsite at the site in Rivalta Di Torino, Italy, to monitor the status and progress

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of the PW1100G engine program as provided for under Section 8.09 of the CAA.

- C. The purpose of this Paragraph III is to ensure that Avio NewCo continues to perform its obligations under the Avio/PW Agreement independent of GE Aviation (unless otherwise provided under the terms of this Order or the Agreements), and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's complaint.

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

- A. In the event the Avio/PW Agreement is terminated pursuant to Section 8.04(a) of the CAA, Respondent shall cooperate with P&W in taking any and all actions necessary to assign or transfer the relevant Avio NewCo obligations under the Avio/PW Agreement, including but not limited to licensing of any and all necessary IPRs, and shall provide, at P&W's option, any and all necessary support or transition services, so as to prevent disruption to Development and Production under the Avio/PW Agreement. Such cooperation, support, and transition services shall include, but not be limited to, the following:
1. At P&W's option, Avio NewCo shall continue to perform under the Agreements, on a non-exclusive basis and in a manner consistent with its obligations under the Agreements and this Order, for a period up to thirty (30) months following termination, consistent with the terms of Section 8.04(c) of the CAA;
  2. Respondent shall provide to P&W any and all technical support, assistance, materials or know-how as may be necessary to assign or transfer Avio NewCo's obligations under the Avio/PW Agreement;

## Decision and Order

3. P&W shall have the right, without restriction, to procure from third parties the same or similar services provided by Avio NewCo under the Avio/PW Agreement;
4. Respondent shall cooperate with P&W in taking any and all actions necessary to assign or transfer the relevant Avio NewCo obligations to third parties;
5. P&W shall have the right to acquire from Avio NewCo, on reimbursement of reasonable costs and without delay, all documentation, tools, jigs, dies, patterns and other equipment owned or possessed by Avio NewCo and used solely to perform its obligations under the Avio/PW Agreement. For any documentation, tools, jigs, dies, patterns and other equipment owned or possessed by Avio NewCo that are necessary, but not used solely, to perform obligation under the Avio/PW Agreement, Avio NewCo shall permit P&W to make copies or reproductions, and provide all rights to use the same;
6. Respondent shall grant to P&W non-exclusive, royalty-free, fully-paid, worldwide, non-terminable, perpetual, non-sublicensable (except as expressly set forth below) and irrevocable licenses for Avio IPRs so far as are necessary for P&W and/or a subcontractor or agent on behalf of P&W to perform the obligations of Avio NewCo under the Avio/PW Agreement, including the right to sub-license third parties to carry out the relevant activities for P&W which were the obligations of Avio NewCo under the Avio/PW Agreement. Avio/NewCo will allow P&W full, immediate access to, and shall deliver to P&W, copies of all relevant documentation in support of such licenses. For those IPRs which Avio NewCo does not have the power to grant licenses, Avio NewCo shall identify all IPRs and provide reasonable assistance

## Decision and Order

to P&W to acquire rights to such IPRs from their owners; and

7. Respondent shall immediately return, or certify the destruction of, all previously furnished Firewalled Information, Related Information or other P&W Proprietary Information related to the Avio/PW Agreement.

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

- A. GE Aviation shall not request, receive, solicit, access, use, disclose, provide, discuss, exchange, circulate or convey, directly or indirectly, any Firewalled Information or Related Information, unless specifically allowed or required to do so under the CAA or as necessary to comply with the terms of this Order.
- B. Respondent shall prevent access to, and disclosure of, Firewalled Information and Related Information by or to any persons not authorized to access, receive, or use such information pursuant to the Agreements or the terms of this Order.
- C. Respondent shall develop and implement procedures with respect to Firewalled Information and Related Information, with the advice and assistance of the Monitor, to comply with the requirements of this Order and the provisions as outlined in Section 8.01 of the CAA.
  1. Such procedures shall assure, without limitation, that such information is:
    - a. Accessible to, and accessed by, only authorized persons or entities pursuant to the terms of the Agreements and this Order;

## Decision and Order

- b. Not accessible by, or disclosed to, any persons or entities not authorized to have access to such materials pursuant to the terms of the Agreements and this Order;
  - c. Used solely for purposes of Development and Production, unless otherwise agreed by P&W, or allowed under the Agreements or this Order; and
  - d. Maintained confidentially and securely;
2. Such procedures shall include, without limitation:
- a. Monitoring compliance;
  - b. Requiring and enforcing compliance with appropriate remedial action in the event of non-compliant use or disclosure;
  - c. Distributing information and providing training regarding the procedures to all relevant GE Aviation and Avio NewCo employees, at least annually; and
  - d. Instituting all necessary information technology procedures, authorizations and protocols, and any other controls necessary to comply with this Paragraph.

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

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



## Decision and Order

- B. The Commission shall select the Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of a proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Monitor, Respondent 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, Respondent shall execute an agreement that, subject to the prior approval of the Commission, confers upon the Monitor all the rights and powers necessary to permit the Monitor to monitor Respondent's compliance with the requirements of this Order and the Agreements.
- D. If a Monitor is appointed by the Commission, Respondent shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Monitor:
1. The Monitor shall have the power and authority to monitor Respondent's compliance with the requirements of this Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the underlying purpose of this Order and in consultation with the Commission or Commission staff.
  2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
  3. The Monitor shall serve until five (5) years after the Entry Into Service Date; provided, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purpose of this Order.

## Decision and Order

4. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent's compliance with its obligations under this Order. Respondent shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent's compliance with this Order and the Agreements.
5. The Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
6. Respondent shall indemnify the Monitor and hold the Monitor harmless against all losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Monitor.
7. Respondent may require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; provided,

## Decision and Order

however, that such agreement shall not restrict the Monitor (and its representatives) from providing any information to, or receiving information from, the Commission.

8. The Commission may, among other things, require the Monitor and each of the Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
9. In the event the Commission determines that the Monitor is no longer willing or able to perform his/her duties under this Order, or has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor in the same manner as provided in this Paragraph.
10. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.

**VII.**

**IT IS FURTHER ORDERED** that Respondent shall file a verified written report with the Commission within thirty (30) days from the date this Order is issued, annually on that date through the fifth (5th) Anniversary of the Entry Into Service Date, and at such other times as the Commission may require, setting forth in detail the manner and form in which it has complied, and is complying, and will comply with this Order.

**VIII.**

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

## Decision and Order

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

**IX.**

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

- A. Access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of Respondent.
- B. The opportunity to interview officers, directors, or employees of Respondent, who may have counsel present, related to compliance with this Order.

**X.**

**IT IS FURTHER ORDERED** that this Order shall terminate on August 27, 2023.

By the Commission, Commissioner Wright not participating.

## Analysis to Aid Public Comment

**ANALYSIS OF 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”) with General Electric Company (“GE”), which is designed to remedy the anticompetitive effects of its proposed acquisition of the aviation business of Avio S.p.A. (“Avio”). Under the terms of the proposed Consent Agreement, GE would be required, among other things, to avoid interference with Avio’s design and development work on a critical engine component – the accessory gearbox (“AGB”) – on the Pratt & Whitney PW1100G engine for the Airbus S.A.S. (“Airbus”) A320neo aircraft. GE and Pratt & Whitney are the only manufacturers of engines for the A320neo, and compete head-to-head for sales of engines to purchasers of that aircraft.

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

Pursuant to an Agreement dated December 21, 2012, GE proposes to acquire Avio’s aviation business for approximately \$4.3 billion. The Commission’s Complaint alleges that the proposed acquisition is in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, by lessening the competition in the worldwide market for engine sales on the A320neo aircraft. That is because the acquisition would provide GE with the ability and incentive to disrupt the design and certification of the AGB for the Pratt & Whitney PW1100G engine, which in turn would provide GE with market power in the market for engines for the A320neo

## Analysis to Aid Public Comment

aircraft, allowing it to raise prices, reduce quality, or delay delivery of engines to A320neo customers. The proposed Consent Agreement will remedy the alleged violations by eliminating GE's ability and incentive to engage in such anticompetitive conduct post-merger.

**II. The Parties**

GE, headquartered in Connecticut, is one of the world's largest companies, with business segments serving a wide variety of industries throughout the globe. GE's aviation segment, among other things, designs and manufactures jet engines for commercial and military aircraft. GE sells narrow-body commercial aircraft engines through its 50% stake in CFM International ("CFM"), a joint venture with the French engine manufacturer Snecma S.A.

Avio is headquartered in Torino, Italy, and is an important designer and manufacturer of component parts for civil and military aircraft engines. Avio provides, among other things, structural parts, gearboxes, and electrical systems for aircraft engines. Avio is currently the sole designer of the AGB on the Pratt & Whitney PW1100G engine.

**III. The Products and Structure of the Markets**

AGBs use the mechanical power of the rotating turbine shaft in a jet engine to power various accessory systems needed by the engine and the aircraft, including oil and hydraulic pumps and electrical systems. Although AGBs on different aircraft engines perform similar functions, AGBs are designed for the specific engine in which it will be used to account for the shape of that engine, the position of the AGB in the engine, and the configuration and specifications of the various accessory systems the gearbox will power. Because AGBs require significant cost and time to develop, and because the aircraft engine – with its AGB – must be tested extensively and certified for flight by aviation authorities before it can be put into service, an engine manufacturer cannot quickly or easily replace an engine's AGB if it encounters difficulties with its component supplier.

Avio has the sole design responsibility for the AGB on the forthcoming Pratt & Whitney PW1100G engine, which will be

## Analysis to Aid Public Comment

one of two engines available on the Airbus A320neo aircraft. While Avio is in the advanced stages of designing this AGB, further development and testing must be completed before the AGB and the PW1100G engine will be certified for use by aviation authorities. Beyond that, further design work may be necessary even after the AGB and engine receive certification. Pratt & Whitney has no viable alternative to continuing to work with Avio to develop the AGB for the PW1100G, even after its rival engine manufacturer, GE, acquires Avio.

Aircraft engines provide the thrust necessary for flight and must be specifically engineered for the requirements and mission profile of the aircraft on which they are to be installed. When designing a new airplane, an aircraft manufacturer typically approaches engine manufacturers as potential suppliers and selects one or more to provide engines for the aircraft under development. These engines become customers' only options for that aircraft platform. Airbus chose to work with only Pratt & Whitney and CFM to develop engines for the A320neo platform. Aside from the PW1100G, the only other engine available for the Airbus A320neo is the CFM Leap 1-A engine, in which GE has a 50% interest. These two engines compete for sales on the A320neo aircraft platform, and because other engine manufacturers could not design, or attain certification for, an alternate A320neo engine within several years, purchasers of this aircraft do not have other viable substitutes for these engines.

The relevant geographic market in which to analyze the effects of the proposed transaction is the entire world. Engine component developers located around the world supply components to engine manufacturers who are also located worldwide. The aircraft manufacturers themselves are located across the globe, sell to customers worldwide, and do not significantly alter aircraft features for specific national markets.

#### **IV. Entry**

Entry into the relevant markets would not be timely, likely, or sufficient in magnitude to deter or counteract the anticompetitive effects likely to result from the proposed transaction. AGB design for large commercial aircraft like the A320neo requires significant

## Analysis to Aid Public Comment

experience and resources, and it would take several years for a third-party provider to complete the development process and begin supplying AGBs for the PW1100G. This delay would make such third-party entry insufficient to prevent any potential anticompetitive effects from the proposed transaction. Similarly, entry into the market for engines powering the A320neo is also unlikely to deter or counter the anticompetitive effects of the proposed transaction. The design and production of an aircraft engine, along with the necessary certification of that engine on the aircraft platform, takes many years and a large financial investment.

**V. Effects of the Acquisition**

The proposed transaction, if consummated, would provide GE with both the ability and the incentive to disrupt the design and certification of the Avio-supplied AGB for the Pratt & Whitney PW1100G engine. A delay in the development of the PW1100G engine would substantially increase GE's market power for the sale of engines for the A320neo, as it manufactures the only other engine option for that aircraft. In response to such a delay, a significant number of Pratt & Whitney customers would likely switch to the CFM Leap 1-A, and GE would likely use its increased market power to raise price, reduce quality, or delay delivery of engines to customers of the A320neo aircraft.

**VI. The Consent Agreement**

The proposed Consent Agreement remedies the acquisition's likely anticompetitive effects by removing GE's ability and incentive to disrupt Avio's AGB work during the design, certification, and initial production ramp-up phase. The proposed Consent Agreement incorporates portions of a recent commercial agreement between GE, Avio, and Pratt & Whitney and Pratt & Whitney's original contract with Avio that relate to the design and development of the AGB and related parts for the PW1100G. A breach by GE of these aspects of these agreements therefore would constitute a violation of the Consent Agreement.

The Consent Agreement further requires GE not to interfere with Avio staffing decisions as they relate to work on the AGB for the PW1100G. It allows Pratt & Whitney to have a technical



*Analysis to Aid Public Comment*

representative and a customer representative on-site at GE/Avio's facility to observe work on the PW1100G AGB. In addition, should Pratt & Whitney terminate its agreement with Avio, GE will be required to provide certain transition services, including licenses to intellectual property and access to specialized Avio tools, to help Pratt & Whitney or a third-party supplier produce AGBs and related parts for the PW1100G. The Consent Agreement also contains a firewall provision that limits GE's access, through Avio, to Pratt & Whitney's proprietary information relating to the AGB. Finally, the Consent Agreement allows for the appointment of an FTC-approved monitor to oversee GE's compliance with its obligations under the Consent Agreement.

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

**RELIEF MART, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4412; File No. 122 3128**Complaint, September 19, 2013 – Decision, September 19, 2013*

This consent order addresses false and misleading statements relating to memory foam mattresses. The respondent, Relief-Mart, manufactured a memory foam mattresses under the brand name “Biogreen,” which it claimed were free of volatile organic compounds (VOCs) and had no chemical off-gassing or odor. Relief-Mart further advertised that such mattresses were less toxic than other types of mattresses and offered both health and environmental benefits to consumers. The complaint alleges that Relief Mart’s claims were unsubstantiated and that its representations violated Section 5 of the FTC Act. The consent order bars Relief-Mart from making zero-VOC claims unless the VOC emission level is zero micrograms per meter cubed or unless the company possesses and relies upon competent and reliable scientific evidence that their mattresses contain no more than a trace level of VOCs, as prescribed in the Green Guides. The consent order further requires Relief-Mart to keep copies of all advertisements and materials relating to its mattresses and to file periodic compliance reports with the Commission.

*Participants*

For the *Commission*: *Thomas Goodhue and Robin Moore.*

For the *Respondent*: *Jeffrey R. Richter, Firestone & Richter.*

**COMPLAINT**

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

1. Respondent is a California corporation with its principal office or place of business at 755 Lakefield Rd., Ste. H, Westlake Village, CA 91361. Respondent does business under the names Relief-Mart and Tempflow.

## Complaint

2. Respondent manufactures, advertises, offers for sale, sells, and distributes “memory foam” mattresses, which are marketed as mattresses that conform to the sleeper’s body shape and weight. Respondent distributes these mattresses through its website, [www.tempflow.com](http://www.tempflow.com).

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

4. Respondent has disseminated or has caused the dissemination of promotional materials for its memory foam mattresses, including, but not limited to, print advertisements and website advertisements in the attached exhibits.

5. In many instances, including but not limited to the promotional materials shown in Exhibits 1 through 3, Respondent has prominently represented that:

- a. Respondent’s memory foam mattresses do not contain volatile organic compounds (“VOCs”). Exhibits 1-3.
- b. Respondent’s memory foam mattresses have “no VOC off-gassing.” Exhibit 2.
- c. Respondent’s memory foam mattresses lack the common smell typically associated with memory foam. Exhibit 1.

6. In truth and in fact, Respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5 at the time the representations were made.

**COUNT I (Unsubstantiated Representations)**

7. Through the means described in Paragraphs 4 and 5, Respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made.

## Decision and Order

8. In truth and in fact, Respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5 at the time the representations were made. Therefore, the representations set forth in Paragraph 7 are false or misleading.

**THEREFORE**, the Federal Trade Commission, this nineteenth day of September 2013, has issued this complaint against Respondent.

By the Commission.

**DECISION AND ORDER**

The Federal Trade Commission, having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of a 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 violations of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), which includes: a statement by the respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; and waives and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the Federal Trade Commission Act, and that a complaint should issue stating its charges in that respect, and

## Decision and Order

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 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 order:

1. Respondent is a California corporation with its principal office or place of business at 755 Lakefield Rd., Ste. H, Westlake Village, CA 91361.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

**ORDER****DEFINITIONS**

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

1. Unless otherwise specified, "Respondent" shall mean Relief-Mart, Inc., also doing business as Relief-Mart and Tempflow, its successors and assigns, and its officers, agents, representatives, and employees.
2. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. "Competent and reliable scientific evidence" shall mean tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true.

## Decision and Order

4. “Covered product” shall mean any mattress or component part.
5. “Trace” level of VOCs shall mean:
  - A. VOCs have not been intentionally added to the product;
  - B. The presence of VOCs at that level does not cause material harm that consumers typically associate with VOCs, including, but not limited to, harm to the environment or human health; and
  - C. The presence of VOCs at that level does not result in concentrations higher than would be found at background levels in the ambient air.
6. “Volatile Organic Compound” (“VOC”) shall mean any compound of carbon that participates in atmospheric photochemical reactions, but excludes carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate, and specific compounds that the EPA has determined are of negligible photochemical reactivity, which are listed at 40 C.F.R. § 51.100(s).

**I.**

**IT IS ORDERED** that Respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that the covered product is VOC-free or free of harmful VOCs, unless the VOC emission level is zero micrograms per meter cubed ( $\mu\text{g}/\text{m}^3$ ), or Respondent possesses and relies upon competent and reliable scientific evidence that the covered product contains no more than a trace level of VOCs.

## Decision and Order

**II.**

**IT IS FURTHER ORDERED** that Respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, regarding:

- A. The VOC level of such product;
- B. The fact that such product is odorless, or the odor or smell of any such product in comparison to another mattress(es) or its component part(s);
- C. Any other environmental benefit or environmental attribute of such product; or
- D. Any other health benefit or health attribute related to the VOC or chemical content of such product or exposure to such product;

unless the representation is true, not misleading, and, at the time it is made, Respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

**III.**

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

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

## Decision and Order

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

**IV.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments of receipt of this order obtained pursuant to this Part.

**V.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required



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by this Part shall be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: "Relief-Mart, Inc., File No. 122 3128, Docket No. C-4412."

**VI.**

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

**VII.**

This order will terminate on September 19, 2033, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

## Analysis to Aid Public Comment

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

By the Commission.

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

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

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

This matter involves respondent’s marketing and sale of memory foam mattresses. According to the FTC’s complaint, respondent represented that its mattresses do not contain volatile organic compounds (“VOCs”), have no VOC off-gassing, and lack the odors commonly associated with memory foam. The complaint alleges that respondent did not possess and rely upon a reasonable basis substantiating these representations when it made them. Thus, the complaint alleges that respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act. The Commission does not typically challenge subjective claims,

## Analysis to Aid Public Comment

such as smell.<sup>1</sup> However, a consumer acting reasonably under the circumstances is likely to interpret representations that a memory foam mattress lacks the common smell associated with memory foam to mean that the mattress is free of VOCs.

The proposed consent order contains two provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I addresses the marketing of VOC-free mattresses. It prohibits respondent from making zero-VOC claims unless the VOC emission level is zero micrograms per meter cubed or the company possesses and relies upon competent and reliable scientific evidence that their mattresses contain no more than a trace level of VOCs based on the Green Guides' guidance on making free-of claims.<sup>2</sup> Part II addresses VOC claims, odor-free claims and comparative odor claims, environmental benefit or attribute claims, and certain health claims made about mattresses. It prohibits such representations unless the representation is true, not misleading, and substantiated by competent and reliable scientific evidence.

Parts III through VI require Relief-Mart to: keep copies of advertisements and materials relied upon in disseminating any representation covered by the order; provide copies of the order to certain personnel, agents, and representatives having supervisory responsibilities with respect to the subject matter of the order; notify the Commission of changes in its structure that might affect compliance obligations under the order; and file a compliance report with the Commission and respond to other requests from FTC staff. Part VII provides that the order will terminate after twenty (20) years, with certain exceptions.

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

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<sup>1</sup> See FTC, FTC POLICY STATEMENT ON DECEPTION, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

<sup>2</sup> See Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62, 122, 62,123 (Oct. 11, 2012).

## Complaint

## IN THE MATTER OF

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

*Docket No. C-4415; File No. 121 0165*  
*Complaint, October 22, 2013 – Decision, October 22, 2013*

The consent order addresses the consummated acquisition of Actual Systems of America, Inc. (“Actual Systems”) by Solera Holdings, Inc. (“Solera”). On May 2012, Solera acquired all of the stock of Actual Systems for nearly \$9 million. The complaint alleges that Solera, through its wholly-owned subsidiary Hollander, Inc., and Actual Systems both provide yard management systems for the automotive recycling industry, and the acquisition combined two of the only three meaningful providers of such services in the United States and Canada. The consent order remedies the anticompetitive effects of the acquisition by requiring Solera to divest assets related to Actual Systems’ to a Commission approved acquirer, ASA Holdings.

*Participants*

For the *Commission*: *Scott Reiter, Eric Rohlck, and Cecilia Waldeck.*

For the *Respondent*: *Evan Cohen and Aimee Goldstein, Simpson Thacher & Bartlett LLP.*

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (the “Commission”), having reason to believe that respondent Solera Holdings, Inc. (“Solera”), acquired Actual Systems of America, Inc. (“Actual Systems”), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

## Complaint

**I. RESPONDENT SOLERA HOLDINGS, INC.**

1. Solera is a global provider of services and software to the automobile insurance claims processing industry. Solera also participates in the automotive recycling industry through its indirect, wholly-owned subsidiary, Hollander, Inc. Hollander, Inc. is one of the leading providers of yard management systems (“YMS”) used by automotive recycling yards. Solera is a company organized and existing under the laws of the State of Delaware, with its principal place of business at 7 Village Circle, Suite 100, Westlake, Texas, 76262.

**II. ACTUAL SYSTEMS OF AMERICA**

2. Prior to its acquisition by Respondent, Actual Systems was a privately-held company that shared substantial common ownership with Actual Systems U.K., Ltd. (“ASUK”) and Beech Systems, Ltd. (“Beech”). Actual Systems is a company organized and existing under the laws of the State of Colorado, with its principal place of business at 3131 South Vaughn Way #134, Aurora, Colorado, 80014. Actual Systems also participates in the automotive recycling industry, providing YMS used by automotive recycling yards.

**III. JURISDICTION**

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

**IV. THE ACQUISITION**

4. On May 29, 2012, Solera acquired 100% of the stock of Actual Systems through a stock purchase agreement. On that same day, Solera acquired 100% of the stock of ASUK and all of Beech’s assets through a separate stock purchase agreement and an asset purchase agreement. Solera paid approximately \$8.7 million collectively for the three companies. At the time of the

## Complaint

acquisition, both Solera and Actual Systems developed and sold YMS for use by automotive recycling yards.

**V. THE RELEVANT PRODUCT MARKET**

5. For purposes of this Complaint, the relevant line of commerce within which to analyze the effects of the transaction is the market for YMS.

**VI. THE RELEVANT GEOGRAPHIC MARKET**

6. For purposes of this Complaint, the relevant geographic market within which to analyze the effects of the transaction is the United States and Canada.

**VII. MARKET STRUCTURE**

7. The YMS market is highly concentrated. Prior to the transaction, Solera and Actual Systems were two of only three meaningful providers of YMS.

**VIII. CONDITIONS OF ENTRY**

8. Entry into the relevant market has not been, and would not be, timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the acquisition. The time required to create a new YMS would be substantial. In addition, it would be difficult or costly to obtain the required license to the Hollander Interchange, a necessary input for offering a YMS.

**IX. EFFECTS OF THE ACQUISITION**

9. The effects of the acquisition have been a substantial lessening of competition in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45. Specifically, the acquisition:

- a. Eliminated actual, direct, and substantial competition between Solera and Actual Systems in the YMS market;

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- b. Substantially increased the level of concentration in the YMS market; and
- c. Increased the likelihood that Respondent Solera will unilaterally exercise market power in the YMS market.

**X. VIOLATIONS CHARGED**

10 The allegations contained in Paragraphs 1 through 9 above are hereby incorporated by reference as though fully set forth here.

11. The transaction described in Paragraph 4 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-second day of October, 2013, issues its Complaint against said Respondent.

By the Commission.

**DECISION AND ORDER**

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

## Decision and Order

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

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

1. Respondent Solera is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters address located at 7 Village Circle, Suite 100, Westlake, TX 76262.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondent Solera, and the proceeding is in the public interest.

**ORDER****I.**

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

- A. “Solera” means Solera Holdings, Inc., its directors, officers, employees, agents, representatives,



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successors, and assigns; and its joint ventures, subsidiaries (including, but not limited to Actual Systems of America, Hollander and Audatex), divisions, groups, and affiliates controlled by Solera Holdings, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- B. “Actual Systems” means Actual Systems of America, a subsidiary of Solera.
- C. “Actual Systems UK” means Actual Systems (UK) Limited, a subsidiary of Solera.
- D. “Commission” means the Federal Trade Commission.
- E. “Beech Systems” means Beech Systems Ltd., a corporation organized, existing and doing business under and by virtue of the laws of Nevis, having a registered address of Main Street, P.O. Box 556, Charlestown, Nevis, West Indies.
- F. “ASA Holdings” means Actual Systems of America Holdings LLC, a limited liability corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its headquarters address located at 313 South Vaughn Way #134, Aurora, Colorado 80014.
- G. “Acquisition” means Respondent Solera’s acquisition of Actual Systems on May 29, 2012.
- H. “Acquirer” means:
  - 1. an entity that is specifically identified in this Order to acquire particular assets that Respondent Solera is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in

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connection with the Commission's determination to make this Order final; or

2. an entity that receives the prior approval of the Commission to acquire particular assets that Respondent Solera is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- I. "Actual Systems Intellectual Property" means all of the intellectual property held by Actual Systems, Beech Systems, Actual Systems UK, and any additional intellectual property used in the development, manufacturing, storage, distribution and sale of the Actual Systems Products in North America obtained, created, or used by Respondent Solera since the Acquisition up to the Date of Divestiture including, but not limited to:
1. the names, Trademarks, and websites of the Actual Systems Products for use and sale in North America including, but not limited to, [www.actual-america.com](http://www.actual-america.com) website;
  2. Actual Systems Products manufacturing copyrights;
  3. Software owned by Respondent Solera or for which Respondent Solera has licensed rights that may be transferred;
  4. source code, scripts, procedures developed by Actual Systems for application on the Actual Systems computers or client/customer computers, and all documentation related to such source code, scripts, and procedures;
  5. computer programs owned by Respondent Solera or for which Respondent Solera has licensed rights that may be transferred;

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6. Patents including, but not limited to, the right to obtain and file for patents;
7. Actual Systems Products sales copyrights;
8. licenses including, but not limited to, licenses to third party software if transferable and sub licenses to software modified by Respondent Solera;
9. know how (including, but not limited to, flow sheets, process and instrumentation), diagrams, risk analysis, certificates of analysis, goodwill, technology (including, but not limited to, equipment specifications), drawings, utility models, designs, design rights, techniques, data, inventions, practices, recipes, raw material specifications, process descriptions;
10. technical information (including, but not limited to, material and final product specifications);
11. protocols (including, but not limited to, operational manuals);
12. quality control information and methods, and other confidential or proprietary technical, business, development and other information;
13. trade secrets;
14. all rights to limit the use or disclosure thereof of Trade Dress, and the modifications or improvements to such intellectual property; and
15. subject to any mutually agreed covenant between Respondent Solera and Acquirer, rights to sue and recover damages or obtain injunctive relief for infringement, dilution, misappropriation, violation or breach of any of the foregoing.

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- J. “Actual Systems North American Business” means all of Respondent Solera’s assets, tangible and intangible, businesses and goodwill, related to the research, development, manufacture, distribution, marketing or sale of Actual Systems Products in North America including, without limitation, the following:
1. all of the Actual Systems assets acquired in the Acquisition and located in North America;
  2. contracts, service arrangements, and on-going business with the Actual Systems Yards in North America, and the personnel and offices supporting the Actual Systems Yards in North America;
  3. a Cloned Form of the Actual Systems Products as those products exist as of the Divestiture Date;
  4. all inventory, including raw materials, packaging materials, work in process and finished goods, in each case to the extent consisting of, or intended for use in the manufacture or sale of, the Actual Systems Products in North America;
  5. all commitments and orders for the purchase of goods that have not been shipped, to the extent such goods are, or are intended for use in the manufacture or sale of, the Actual Systems Products in North America;
  6. all rights under warranties and guarantees, express or implied, with respect to the Actual Systems Products in North America;
  7. all items of prepaid expenses, to the extent related to the Actual Systems Products in North America; and
  8. all books, records and files related to the Actual Systems Products in North America;

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*Provided, however,* that “Actual Systems North American Business” does not include any portion of any of the foregoing assets, businesses and goodwill that relates only to the Actual Systems Products and Actual Systems Yards outside of North America;

*Provided further, however,* that “Actual Systems North American Business” does not include assets or groups of assets specifically excluded in the Solera/ASA Holdings Divestiture Agreement.

- K. “Actual Systems Products” means the Pinnacle Professional (or Pinnacle Pro), Pinnacle Classic, or any other product made by or supported by Actual Systems before the Acquisition including, but not limited to, its handheld inventory and bar code device, integrated inter trading, Pinnacle Net, and the eBay interface.
- L. “Actual Systems Yards” means auto recyclers or other entities who use Actual Systems Products.
- M. “Aurora Facility” means the facilities located at 313 South Vaughn Way #134, Aurora, Colorado 80014.
- N. “Cloned Form” means a program (e.g., an operating system or an application program) that has functions and behavior identical to another program including all source code. The Cloned Form of the software will include fully paid up licenses or sub licenses or shared ownership to the appropriate licenses that are owned or transferable by Respondent Solera and come with the software.
- O. “Confidential Business Information” means all competitively sensitive, proprietary, and all other information that is not in the public domain relating to the Actual Systems North American Business, and includes, but is not limited to, pricing lists, customer lists, contracts, cost information, marketing methods, or processes; provided, however, that Confidential Business Information does not include any information

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that a person demonstrates: (i) was or becomes generally available to the public other than as a result of a disclosure by such person in violation of any contractual, legal, fiduciary, or other obligation to maintain the confidentiality, or (ii) was available, or becomes available, to such person on a non-confidential basis, but only if, to the knowledge of such person, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information. Confidential Business Information includes information regardless of the form, including written and electronic versions.

- P. “Designated Employee” means a Person listed in Confidential Exhibit B to this Order.
- Q. “Divestiture Date” means the date on which the divestitures, licensing, and assignments pursuant to Paragraph II or Paragraph VI of this Order are consummated.
- R. “Hollander Interchange” means the numeric indexing system maintained and sold or licensed by Solera and used to identify automotive parts and assemblies and their ability to be interchanged.
- S. “North America” means the United States of America and Canada.
- T. “Patents” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case existing as of the Acquisition, and includes all reissues, additions, divisions, continuations, continuations in part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.

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- U. “Person” means any natural person, partnership, corporation, association, trust, joint venture, limited liability company, government, government agency, division, or department, or other business or legal entity.
- V. “Remedial Agreement” means the following:
1. the Solera/ASA Holdings Divestiture Agreement if such agreement has not been rejected by the Commission pursuant to Paragraph II of this Order; and
  2. any agreement between Respondent Solera and a Commission approved Acquirer (or between a Divestiture Trustee and a Commission approved Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, and all amendments, exhibits, attachments, agreements, and schedules thereto, Related To the relevant assets to be granted, licensed, delivered or otherwise conveyed, that have been approved by the Commission to accomplish the requirements of this Order.
- W. “Software” means executable computer code and the documentation for such computer code, but does not mean data processed by such computer code.
- X. “Solera/ASA Holdings Divestiture Agreement” means the stock purchase agreement, together with all licenses, assignments, and other agreements entered into by Respondent Solera and ASA Holdings for the sale of Actual Systems, which conducts the Actual Systems North American Business, and all other agreements, leases, transfers, and licenses required by this Order. The Solera/ASA Holdings Divestiture Agreement is attached as Confidential Exhibit A to this Order.

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- Y. “Third Party(ies)” means any Person other than Respondent Solera or the Acquirer.
- Z. “Trade Dress” means the current trade dress of a particular product or Person including, without limitation, product packaging, logos, and the lettering of the product trade name, brand name, or corporate name.
- AA. “Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights therein, and the goodwill symbolized thereby and associated therewith.
- BB. “Yard Management System” means point-of-sale systems used by an auto recycler to operate its business including, but not limited to, managing inventory and selling parts.
- CC. “Yard Management System Business” means any and all assets, tangible and intangible, businesses and goodwill, related to the research, development, manufacture, distribution, marketing or sale of a Yard Management System.

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

- A. Within ten (10) days after the Commission accepts this Order for public comment, Respondent Solera shall divest the Actual Systems North American Business, grant a royalty-free, fully-paid-up, irrevocable, perpetual exclusive license or equivalent grant (even as to the Respondent Solera during the term of the Order) in North America to the Actual Systems Intellectual Property, with rights to sublicense in North America; and as part of the Remedial Agreement, grant a license to the Hollander Interchange, absolutely and in good



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faith, to ASA Holdings pursuant to, and in accordance with, the Solera/ASA Holdings Divestiture Agreement. The Solera/ASA Holdings Divestiture Agreement (which shall include, among other things, the stock purchase agreement, a transition services agreement, and an IP Transfer Agreement between Respondent Solera and ASA Holdings) shall not vary or contradict, or be construed to vary or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of ASA Holdings, or to reduce any obligations of Respondent Solera under such agreements, and such agreements, if approved by the Commission, shall be incorporated by reference into this Order and made a part hereof.

*Provided, however,* that with respect to documents or other materials included in the Actual Systems North American Business that contain information (a) that relates to both the Actual Systems North American Business and to other products or businesses of Respondent Solera, or (b) for which Respondent Solera has a legal obligation to retain the original copies, Respondent Solera shall be required to divest to the Acquirer only copies or, at its option, relevant excerpts of such documents and materials, but Respondent Solera shall provide the Acquirer access to the originals of such documents as necessary, it being a purpose of this proviso to ensure that Respondent Solera not be required to divest itself completely of records or information that relate to products or businesses other than the Actual Systems North American Business;

*Provided further, however,* that with respect to any contract or agreement included in the Actual Systems North American Business that relates both to the Actual Systems Products and to any other product, Respondent Solera may, concurrently with assigning such contract or agreement to the extent it relates to the Actual Systems Products, retain its rights under

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such contract or agreement for purposes of such other product(s).

*Provided further, however,* if, at the time the Commission determines to make this Order final, the Commission notifies Respondent Solera that ASA Holdings is not an acceptable Acquirer then, after receipt of such written notification: (1) Respondent Solera shall immediately notify ASA Holdings of the notice received from the Commission and shall as soon as practicable effect the rescission of the Solera/ASA Holdings Divestiture Agreement; and (2) Respondent Solera shall, within one hundred twenty (120) days from the date this Order becomes final, divest the Actual Systems North American Business, and enter into licenses, other agreements, and, if required, leases as described in Paragraph II.A., and divest any other assets or enter into any other relief required to satisfy the purposes of this Order, absolutely and in good faith, at no minimum price, to or with an Acquirer, that receives the prior approval of the Commission, and in a manner that receives the prior approval of the Commission;

*Provided further, however,* that if Respondent Solera has complied with the terms of Paragraphs II.A. and II.B. before the date on which this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondent Solera that the manner in which the divestiture and assignments were accomplished is not acceptable, the Commission may direct Respondent Solera, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture and assignments including, but not limited to, entering into additional agreements or arrangements, as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Prior to the Divestiture Date, Respondent Solera shall secure all consents, assignments, and waivers, if required, from all Third Parties, that are related to the

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Actual Systems North American Business including securing a lease for the Aurora Facility, if required, and securing consents, if required, from all customers of the Actual Systems North American Business whose contracts are being assigned or extended to the Acquirer pursuant to Paragraph II.A.

*Provided, however,* Respondent Solera may satisfy this requirement with respect to any one or more leases or agreements by certifying that the Acquirer has executed such relevant agreements directly with each of the relevant Third Parties.

- C. Respondent Solera shall include, as part of a Remedial Agreement, any transition services agreement by which Respondent Solera contemplates providing services or assistance it will provide the Acquirer. Such transition services agreement shall include, but not be limited to:
1. the scope of services, term, and prices or costs for such services; and
  2. the option for the Acquirer to terminate a particular service being provided to the Acquirer:
    - a. at any time, with prior notice not greater than thirty (30) days, without penalty or payment for the remainder of the original service period; and
    - b. without automatically terminating, or incurring a penalty or additional cost for continuing, that particular service in another part of the world.
- D. Any Remedial Agreement that has been approved by the Commission between Respondent Solera (or a Divestiture Trustee) and a Commission approved Acquirer shall be deemed incorporated into this Order, and any failure by Respondent Solera to comply with

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any term of such Remedial Agreement shall constitute a failure to comply with this Order.

- E. Respondent Solera shall not terminate or modify any agreement that is part of a Remedial Agreement before the end of the term approved by the Commission without prior approval of the Commission pursuant to Commission Rule 2.41(f)(5), 16 C.F.R. § 2.41(f)(5).
- F. The purposes of this Paragraph II of the Order are: (1) to ensure that the Acquirer will have the intention and ability to produce, sell, and maintain the Actual Systems Products in North America independently of Respondent Solera; (2) to ensure that the Acquirer will have the intention and ability to maintain and grow the customer base using the Actual Systems Products in North America; and (3) to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

**III.**

**IT IS FURTHER ORDERED** that for the term of this Order, Respondent Solera shall not sell, market, or otherwise distribute any Yard Management System or part thereof in North America that was translated or copied from, or in the same computer code as the Cloned Form of the Actual Systems Products licensed as part of the Remedial Agreement pursuant to Paragraph II or Paragraph VI of this Order.

*Provided, however,* that Respondent Solera is not prohibited from creating similar products to the Actual Systems Products and selling, marketing, or otherwise distributing such products as part of the current Yard Management System products sold by Respondent Solera.

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**IV. (Confidentiality)****IT IS FURTHER ORDERED** that

- A. Except in the course of performing its obligations under a Remedial Agreement, or as expressly allowed pursuant to this Order:
1. Respondent Solera shall not use any Confidential Business Information, or provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to any Person. Among other things, Respondent Solera shall not use such Confidential Business Information:
    - a. to assist or inform Respondent Solera employees who develop, manufacture, solicit for sale, sell, or service Respondent Solera products that compete with the products divested, sold, or distributed pursuant to this Order including, but not limited to, the employees of the Hollander business owned and operated by Solera;
    - b. to interfere with any suppliers, distributors, resellers, or customers of the Acquirer;
    - c. to interfere with any contracts divested, assigned, or extended to the Acquirer pursuant to this Order; or
    - d. to interfere in any other way with the Acquirer pursuant to this Order or with the Actual Systems North American Business divested pursuant to this Order.
  2. Respondent Solera shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to any Person except the Acquirer or other persons

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specifically authorized by the Acquirer to receive such information;

3. Respondent Solera shall not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information to the employees associated with the Solera Yard Management System Business; and
  4. Respondent Solera shall institute procedures and requirements to ensure that:
    - a. Respondent Solera employees with access to Confidential Business Information do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order; and
    - b. Respondent Solera employees associated with the Solera Yard Management System Business do not solicit, access or use any Confidential Business Information that they are prohibited under this Order from receiving for any reason or purpose.
- B. The requirements of this Paragraph IV do not apply to Confidential Business Information that Respondent Solera demonstrates to the satisfaction of the Commission, in the Commission's sole discretion:
1. was or becomes generally available to the public other than as a result of a disclosure by Respondent Solera in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information;
  2. is necessary to be included in mandatory regulatory filings; provided, however, that Respondent Solera shall make all reasonable efforts to maintain the confidentiality of such information in the regulatory filings;

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3. was available, or becomes available, to Respondent Solera on a non confidential basis, but only if, to the knowledge of Respondent Solera, the source of such information is not in breach of a contractual, legal, fiduciary, or other obligation to maintain the confidentiality of the information;
  4. is information the disclosure of which is consented to by the Acquirer;
  5. is necessary to be exchanged in the course of consummating the transactions under the Remedial Agreement;
  6. is disclosed in complying with this Order;
  7. is information the disclosure of which is necessary to allow Respondent Solera to comply with the requirements and obligations of the laws of the United States and other countries;
  8. is disclosed in defending or pursuing legal claims, investigations or enforcement actions threatened or brought against or by Respondent Solera or the Actual Systems North American Business; or
  9. is disclosed in obtaining legal advice.
- C. The purpose of this Paragraph IV is to maintain the full economic viability, marketability and competitiveness of the Actual Systems North American Business until the Divestiture Date, to minimize any risk of loss of competitive potential for the Actual Systems North American Business, to minimize the risk of disclosure and unauthorized use of Confidential Business Information of the Actual Systems North American Business, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Actual Systems North American Business, except for ordinary wear and tear.

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**V. (Monitor)****IT IS FURTHER ORDERED** that:

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



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

- a. Assuring that Respondent Solera expeditiously complies with all of its obligations and performs all of its responsibilities as required by this Order; and
  - b. Monitoring any agreements between Respondent Solera and the Acquirer.
2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
  3. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent Solera's personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent Solera's compliance with its obligations under the Order. Respondent Solera shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent Solera's compliance with the Order.
  4. The Monitor shall serve, without bond or other security, at the expense of Respondent Solera on such reasonable and customary terms and conditions as the Commission may set. The Monitor shall have authority to employ, at the expense of Respondent Solera, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities. The Monitor shall account for all expenses incurred, including fees for services rendered, subject to the approval of the Commission.

## Decision and Order

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

## Decision and Order

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

**VI. (Divestiture Trustee)****IT IS FURTHER ORDERED** that:

- A. If Respondent Solera has not fully complied with the obligations as required by Paragraph II of this Order, the Commission may appoint a Divestiture Trustee to divest the Actual Systems North American Business, and enter any other agreements, assignments, and licenses, in a manner that satisfies the requirements of this Order.

In the event that the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent Solera shall consent to the appointment of a Divestiture Trustee in such action to effectuate the divestitures and other obligations as described in Paragraph II. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph VI shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court appointed Divestiture Trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondent Solera to comply with this Order.

## Decision and Order

- B. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent Solera, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent Solera has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent Solera of the identity of any proposed Divestiture Trustee, Respondent Solera shall be deemed to have consented to the selection of the proposed Divestiture Trustee.
- C. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent Solera 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 required by this Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Paragraph VI, Respondent Solera shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the Actual Systems North American Business, and enter into all other agreements, licenses and assignments as described in Paragraph II of this Order.
  2. The Divestiture Trustee shall have one (1) year after the date the Commission approves the trust agreement described herein to divest the Actual Systems North American Business, and enter into all other agreements, licenses and assignments as described in Paragraph II of this Order, absolutely and in good faith, at no minimum price, to one or

## Decision and Order

more acquirers that receive the prior approval of the Commission and in a manner that receives the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period or periods may be extended by the Commission; provided, however, the Commission may extend the divestiture period only two (2) times.

3. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the relevant assets that are required to be divested by this Order and to any other relevant information, as the Divestiture Trustee may request. Respondent Solera shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondent Solera shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondent Solera shall extend the time for divestiture under this Paragraph VI in an amount equal to the delay, as determined by the Commission.
4. The Divestiture Trustee shall use best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Solera's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an acquirer as required by this Order.

*provided, however,* if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for assets and businesses to be

## Decision and Order

divested pursuant to Paragraph II, and if the Commission determines to approve more than one such acquiring entity, the Divestiture Trustee shall divest to the acquiring entity selected by Respondent Solera from among those approved by the Commission;

*provided further, however,* that Respondent Solera shall select such entity within five (5) days after receiving notification of the Commission's approval.

5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Solera, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Solera, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent Solera, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the relevant assets that are required to be divested by this Order.
6. Respondent Solera 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,

## Decision and Order

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

7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
  8. The Divestiture Trustee shall act in a fiduciary capacity for the benefit of the Commission.
  9. The Divestiture Trustee shall report in writing to Respondent Solera and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture.
  10. Respondent Solera may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
  11. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, and other representatives and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in connection with the performance of the Divestiture Trustee's duties.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the

## Decision and Order

Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph VI.

- F. The Commission or, in the case of a court appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the obligations under Paragraph II of this Order.
- G. The Divestiture Trustee(s) appointed pursuant to Paragraph VI of this Order may be the same Person appointed as the Monitor pursuant to Paragraph V of this Order.

**VII. (Employees)**

**IT IS FURTHER ORDERED** that:

- A. Beginning no later than the time Respondent Solera signs the Consent Agreement in this matter until ninety (90) days after the Divestiture Date:
  - 1. Respondent Solera shall provide the Designated Employees with reasonable financial incentives to continue in their positions for such period. Such incentives shall include a continuation of all employee benefits offered by Respondent Solera until the Designated Employee has been hired, the Acquirer has decided not to hire such Designated Employee, or the Designated Employee has declined, in writing, the Acquirer's offer, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by law), and additional incentives to such Designated Employee as may be necessary to transition the Actual Systems North American Business to the Acquirer;
  - 2. Respondent Solera shall not interfere with the interviewing, hiring, or employing of the Designated Employees by the Acquirer and shall



## Decision and Order

remove any impediments within the control of Respondent Solera that may deter, or otherwise prevent or discourage the Designated Employees from accepting employment with the Acquirer including, but not limited to, any noncompete provisions of employment or other contracts with Respondent Solera that would affect the ability or incentive of those individuals to be employed by the Acquirer. Provided, however, that in no event shall Respondent Solera be required to accelerate any contingent payments that may become payable to the respective seller parties in connection with Respondent Solera's acquisition of Actual Systems, Actual Systems UK, and the assets of Beech Systems. In addition, Respondent Solera shall not make any counteroffer to a Designated Employee who receives a written offer of employment from the Acquirer, unless and until the Designated Employee has declined, in writing, the Acquirer's offer.

3. Respondent Solera shall, in a manner consistent with local labor laws:
  - a. facilitate employment interviews between each Designated Employee and the Acquirer, including providing the names and contact information for such employees and allowing such employees reasonable opportunity to interview with the Acquirer, and shall not discourage such employee from participating in such interviews;
  - b. not interfere in employment negotiations between each Designated Employee and the Acquirer;
  - c. with respect to each Designated Employee who receives an offer of employment from the Acquirer:

## Decision and Order

- (1) not prevent, prohibit, or restrict, or threaten to prevent, prohibit, or restrict the Designated Employee from being employed by the Acquirer, and shall not offer any incentive to the Designated Employee to decline employment with the Acquirer;
- (2) cooperate with the Acquirer in effecting transfer of the Designated Employee to the employ of the Acquirer, if the Designated Employee accepts an offer of employment from the Acquirer;
- (3) eliminate any confidentiality restrictions that would prevent the Designated Employee who accepts employment with the Acquirer from using or transferring to the Acquirer any information relating to the manufacture and sale of the Actual Systems Products in North America; and
- (4) unless alternative arrangements are agreed upon with the Acquirer, retain the obligation to pay the benefits of any Designated Employee who accepts employment with the Acquirer including, but not limited to, all accrued bonuses, vested pensions, and other accrued benefits (except for payments that are excepted in Paragraph VII.A.2., above).

*Provided, however,* that subject to the conditions of continued employment prescribed in this Order, this Paragraph VII.A. shall not prohibit Respondent Solera from continuing to employ any Designated Employee under the terms of such employee's employment as in effect prior to the date of the written offer of employment from the Acquirer to such employee.

- B. Respondent Solera shall not, for a period of two (2) years following the Divestiture Date, directly or

## Decision and Order

indirectly, solicit, induce, or attempt to solicit or induce any employee of the Acquirer, to terminate his or her employment relationship with the Acquirer.

*Provided, however,* Respondent Solera may place general advertisements for or conduct general searches for employees including, but not limited to, in newspapers, trade publications, websites, or other media not targeted specifically at the Acquirer's employees;

*Provided further, however,* Respondent Solera may hire Designated Employees who apply for employment with Respondent Solera as long as such employees were not solicited by Respondent Solera in violation of this Paragraph.

**VIII. (Prior Notice)**

**IT IS FURTHER ORDERED** that for a period of ten (10) years from the date this Order is issued, Respondent Solera shall not, without providing advance written notification to the Commission in the manner described in this Paragraph VIII, directly or indirectly, acquire:

- A. any stock, share capital, equity, or other interest in any Person, corporate or non corporate, that produces, designs, manufactures, or sells Yard Management Systems in or into North America; or
- B. any business, whether by asset purchase or otherwise, that engages in or engaged in, at any time after the Acquisition, or during the six (6) month period prior to the Acquisition, the design, manufacture, production, or sale of Yard Management Systems in or into North America.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (herein referred to as "Athe Notification"), and shall be prepared and transmitted in

## Decision and Order

accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondent Solera and not of any other party to the transaction. Respondent Solera shall provide the Notification to the Commission at least thirty (30) days prior to consummating the transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondent Solera shall not consummate the transaction until thirty (30) days after submitting such additional information or documentary material. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition.

*Provided, however,* that prior notification shall not be required by this paragraph for a transaction for which Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

*Provided, further, however,* that prior notification shall not be required by this Paragraph VIII for any acquisition after which Respondent Solera would hold no more than one percent (1%) of the outstanding securities or other equity interest in any Person described in this Paragraph VIII.

**IX. (Compliance Reports)**

**IT IS FURTHER ORDERED** that:

- A. Within thirty (30) days after the date this Order is issued, and every thirty (30) days thereafter until Respondent Solera has fully complied with Paragraphs II.A., II.B., II.C., II.D., and VII.A. of this Order, Respondent Solera shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent Solera shall submit at the same time a

## Decision and Order

copy of its report concerning compliance with this Order to the Monitor or Divestiture Trustee, if any Monitor or Divestiture Trustee has been appointed pursuant to this Order. Respondent Solera shall include in its report, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant Paragraphs of the Order.

- B. Beginning twelve (12) months after the date this Order becomes final, and annually thereafter on the anniversary of the date this Order is issued, for the next nine (9) years, Respondent Solera shall submit to the Commission a verified written report setting forth in detail the manner and form in which it has complied, is complying, and will comply with this Order. Respondent Solera shall include in its compliance reports, among other things that are required from time to time, a full description of the efforts being made to comply with the Order and copies of all written communications to and from all persons relating to this Order. Additionally, Respondent Solera shall include in its compliance report whether or not it made any notifiable acquisitions pursuant to Paragraph VIII. Respondent Solera shall include a description of such acquisitions.

**X. (Reorganization)**

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

- A. dissolution of Respondent Solera;
- B. acquisition, merger or consolidation of Respondent Solera; or
- C. any other change in Respondent Solera including, but not limited to, assignment and the creation or

## Decision and Order

dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

**XI. (Access)**

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

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

**XII. (Termination)**

**IT IS FURTHER ORDERED** that this Order shall terminate on October 22, 2023.

By the Commission.

Decision and Order

**CONFIDENTIAL EXHIBIT A**

**Solera/ASA Holdings Divestiture Agreement**

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

Decision and Order

**CONFIDENTIAL EXHIBIT B**

**Designated Employees**

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



## Analysis to Aid Public Comment

**ANALYSIS OF 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”) with Solera Holdings, Inc. (“Solera”), which is designed to remedy the anticompetitive effects of its consummated acquisition of Actual Systems of America, Inc. (“Actual Systems”). Under the terms of the Consent Agreement, Solera is required to divest assets related to Actual Systems’ United States and Canadian yard management system (“YMS”) business to ASA Holdings, Inc. (“ASA Holdings”).

The proposed Consent Agreement requires Solera to provide ASA Holdings with assets related to Actual Systems’ United States and Canadian YMS business. The assets include contracts and licenses with current Actual Systems customers in the United States and Canada, and co-ownership of all intellectual property related to Actual Systems products sold in the United States and Canada. This Consent Agreement would preserve the competition that was eliminated through the acquisition.

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

Pursuant to a Stock Purchase Agreement dated May 29, 2012, Solera acquired all of the stock of Actual Systems. Through a separate Stock Purchase Agreement and Asset Purchase Agreement executed that same day, Solera acquired 100% of the stock of Actual Systems U.K., Ltd. (“ASUK”) and Beech Systems, Ltd. (“Beech”). Solera paid approximately \$8.7 million collectively for the three companies, which shared common ownership.

## Analysis to Aid Public Comment

Solera, through its wholly-owned subsidiary Hollander, Inc. (“Hollander”), and Actual Systems both provide YMS to the automotive recycling industry. In particular, at the time of the acquisition, Hollander and Actual Systems were two of only three meaningful providers of YMS in the United States and Canada. The Commission’s Complaint alleges that the consummated acquisition violated 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 market for YMS. The proposed Consent Agreement remedies the alleged violations by replacing the lost competition in the relevant market that resulted from the acquisition.

**II. The Product and Structure of the Market**

The relevant product market in which to analyze the competitive effects of the acquisition is YMS. The relevant geographic market in which to analyze the competitive effects of the acquisition is the United States and Canada. Hollander and Actual Systems are closest competitors in this market and are two of only three competitively meaningful YMS providers.

**III. Effects of the Acquisition**

The acquisition is likely to result in significant anticompetitive harm in the highly-concentrated YMS market. Solera and Actual Systems were two of only three significant competitors in this market. The acquisition has eliminated actual, direct, and substantial competition between Solera and Actual Systems, and likely will result in higher prices and reduced innovation for YMS.

**IV. Entry**

Entry or repositioning is not likely to avert the anticompetitive impact of Solera’s acquisition of Actual Systems. The time and cost required to develop a YMS are substantial, and far outweigh the potential profit incentives for either new entrants or firms operating in adjacent markets. In addition, it would be difficult for a new entrant to obtain a license to the Hollander Interchange, an auto parts database required to compete in the YMS market.

## Analysis to Aid Public Comment

**V. The Proposed Consent Agreement**

The proposed Consent Agreement remedies the competitive concerns raised by the transaction by requiring Solera to divest assets related to Actual Systems' United States and Canadian business to ASA Holdings. This divestiture preserves competition that was eliminated as a result of the acquisition.

ASA Holdings is comprised of individuals with extensive experience with Actual Systems and the YMS market. The main principal of ASA Holdings is Peter Riddle. Mr. Riddle founded ASUK in 1985, developed the base YMS software program that would become Actual Systems' YMS, and formed Actual Systems in the United States. The other members of ASA Holdings are Emilio Fontana and Peter Bishop. Mr. Fontana was involved with Actual Systems since the mid-1990s, including serving as a member of its Board of Directors. Mr. Bishop worked for Actual Systems for over 10 years, including serving as its General Manager and Director from 2004 until its acquisition by Solera. The terms required by the proposed Consent Agreement will enable ASA Holdings to effectively replace the competition in the YMS market lost as a result of the acquisition.

The proposed Consent Agreement also contains several provisions designed to ensure that the divestiture is successful. For instance, Solera must provide ASA Holdings with a license to the Hollander Interchange lasting the length of the proposed Consent Agreement.

If the Commission determines that ASA Holdings is not an acceptable acquirer of the assets to be divested, or that the manner of the divestiture is not acceptable, Solera must rescind the divestiture and divest the assets within 120 days of the date the Order becomes final to another Commission-approved acquirer. If Solera fails to divest the assets within the 120 days, the Commission may appoint a trustee to divest the relevant assets.

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

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

*Docket No. C-4416; File No. 122 3129*  
*Complaint, November 8, 2013 – Decision, November 8, 2013*

This consent order addresses false and misleading statements that respondent Ecobaby Organics, Inc. (“Ecobaby”) made regarding its “natural latex” mattresses. The complaint alleges that Ecobaby made unsubstantiated claims that its mattresses are chemical-free, formaldehyde-free, free of VOCs such as toluene and benzene, and without toxic substances, in violation of FTC Act Section 5. Though Ecobaby asserted its mattresses were certified by an independent third party certifier, the complaint alleges that the certifier was not independent and, in fact, was an alter ego of Ecobaby. The consent order bars Ecobaby from making zero-VOC claims unless the VOC emission level is zero micrograms per cubic meter or unless the company possesses and relies upon competent and reliable scientific evidence that their mattresses contain no more than a trace level of VOCs, as prescribed in the Green Guides. The consent order further requires Ecobaby to keep copies of all advertisements and materials relating to its mattresses and to file periodic compliance reports with the Commission.

*Participants*

For the *Commission*: *Thomas Goodhue and Robin Moore.*

For the *Respondent*: *Not represented by counsel.*

**COMPLAINT**

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

1. Respondent is a California corporation with its principal office or place of business at 9541 Ridgehaven Ct., San Diego, CA 92123. Respondent does business under the names Ecobaby and Purerest.

## Complaint

2. Respondent manufactures, advertises, offers for sale, sells, and distributes “natural latex” mattresses, which are marketed as mattresses that conform to the sleeper’s body shape and weight, as well as baby mattresses. Respondent distributes these mattresses through its website, [www.purerest.com](http://www.purerest.com).

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

4. Respondent has disseminated or has caused the dissemination of promotional materials for its latex mattresses, including, but not limited to, print advertisements and website advertisements in the attached exhibits.

5. In many instances, including but not limited to the promotional materials shown in Exhibits 1 through 8, Respondent has prominently represented that:

- a. Respondent does not allow any Formaldehydes, Toluene, or Phenols in its latex mattresses. *See, e.g.*, Exhibit 1.
- b. Respondent’s products do not contain Formaldehyde. *See, e.g.*, Exhibit 2.
- c. Respondent’s latex mattresses contain no Toluene or Benzene. *See, e.g.*, Exhibit 3.
- d. The rubber used in Respondent’s latex mattresses is “chemical free.” *See, e.g.*, Exhibits 4-5.
- e. Respondent’s mattresses are chemical free. *See, e.g.*, Exhibit 6.
- f. Respondent’s crib mattresses contain no toxic substances. *See, e.g.*, Exhibit 7.
- g. Respondent’s mattresses contain fewer contaminants and chemicals than other companies’ memory foam or latex mattresses. *See, e.g.*, Exhibit 8.

## Complaint

- h. Tests show that Respondent's mattresses do not contain volatile organic compounds ("VOCs"). *See, e.g., Exhibits 3-4, 7.*
- i. Tests show that Respondent's mattresses contain no Formaldehyde. *See, e.g., Exhibit 2.*
- j. Tests show that Respondent's mattresses are "chemical-free." *See, e.g., Exhibit 4.*

6. In truth and in fact, Respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5.

7. In truth and in fact, testing does not confirm that Respondent's mattresses are free of chemicals, VOCs, and Formaldehyde.

8. Respondent has prominently displayed in many of its promotional materials the seal of the National Association of Organic Mattress Industry ("NAOMI"). Exhibit 1. Respondent represents that its mattresses conform to NAOMI's standards. Exhibit 6.

9. In reality, NAOMI is not an independent, third-party certifier or organization with appropriate expertise in evaluating whether Respondent's mattresses meet objective standards. In fact, Respondent controls NAOMI and NAOMI is an alter ego of Respondent.

**COUNT I (False or Misleading Representations)**

10. Through the means described in Paragraphs 4 and 8, Respondent has represented, expressly or by implication, that:

- a. NAOMI is an independent third-party certifier or organization with appropriate expertise in evaluating whether Respondent's mattresses meet objective standards; and

## Complaint

- b. NAOMI has awarded its seal to Respondent based on the application of NAOMI's objective standards.

## 11. In truth and in fact:

- a. NAOMI is not an independent third-party certifier with appropriate expertise in evaluating whether Respondent's mattresses meet objective standards; and
- b. Respondent awarded the NAOMI seal to its own products without applying objective standards.

Therefore, the representations set forth in paragraph 10 are deceptive.

**COUNT II (Unsubstantiated Representations)**

12. Through the means described in Paragraphs 4 and 5, Respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made.

13. In truth and in fact, Respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5 at the time the representations were made. Therefore, the representations set forth in Paragraph 12 are false or misleading.

**COUNT III (Establishment Claim)**

14. Through the means described in Paragraphs 4 and 5(h)-5(j), Respondent has represented, expressly or by implication, that testing shows that Respondent's latex mattresses are free of chemicals, VOCs, and Formaldehyde.

15. In truth and in fact, testing does not show that Respondent's latex mattresses were free of chemicals, VOCs, and Formaldehyde. Therefore, the representations set forth in Paragraph 14 are false or misleading.

## Complaint

16. Respondent's practices, as alleged in this complaint, constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

**THEREFORE**, the Federal Trade Commission, this eighth day of November, 2013, has issued this complaint against Respondent.

By the Commission.



Complaint

EXHIBIT 1

About Us | Organic Certifications | All About Mattresses | Consumer Education | Policies & Warranties
1-800-596-7450 (Mon-Fri 9am to 3pm PST) | Contact Us

[Register](#) | [Log In](#) | [My Account](#) | [Shopping Cart](#)



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PureRest & EcoBaby Organics >



**Purity Guarantee**

IF YOU FIND A PURER MATTRESS ANYWHERE ELSE WITHIN 30 DAYS,  
WE WILL LET YOU KEEP OURS FOR FREE

### Top of the Line

6-13" 100% Natural Rubber Mattresses



#### Pure-Rest History

SHOWROOM: 9541 Ridgehaven Ct, San Diego, CA 92123

EcoBaby, Inc & Pure-Rest Organics Offers over 17 Years of Purity and Quality Manufacturing in everything organic textiles for the home and family, including babies. We take care of your natural needs from birth and through out life.

Our line of Organic Mattresses, Bedding, Pillows, Pads, Comforters, Blankets, Baby & Children Clothing, Diapers, and Toys... are ALL tested yearly at a third party lab. No gimmicks, no hidden fibers, no hidden additives, no certifies that have no meaning in order to make ourselves look good. Just straightforward organics from a company whose president is chemically sensitive and recognizes the need for purity from the start and through the consumer's door.

Preventing Bed Bug Infestations-See our consumer education section above

Follow the link to see why we do not get Greenguard Certified. Pages 39-48 clearly show the high limits allowed by Greenguard. This does not meet our standards.

#### USA Manufacturer

Pure-Rest Organics believes in supporting our countries economy by supplying jobs to over 20 employees and basing our primary manufacturing operations in the United States.

In addition by supporting Pure-Rest Organics, you also support dozens of stay at home moms who carry our products through their own web portals and many brick and mortar stores and boutiques through out the United States.

Please note that while some of our textiles do come from India we strive every year to manufacture more and more of our products here, at home.

#### Pure-Rest Purity

Our commitment to purity is the reason we are the only company actually sending our materials for third party testing. Other companies try to deceive with certifications by Eco companies that are great for regular companies trying to be more green but allow formaldehydes, toluene, & phenols in lower limits. We allow zero. [See details of what is allowed in order to call a product organic.](#)

We painted our location with Zero VOC paint, sealed our floors with zero VOC sealer, sealed our sewing tables, & only hire people willing to use no scented products and do not live with a smoker. All in an effort to make sure your organic products do not become contaminated. We also seal any non washable products in pure polyethylene to maintain purity during storage and transit.





Follow this link to see why we do not get Greenguard Certified

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View Organic Certifications











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**EXHIBIT 2*****Problems with “Organic Labeling”***

We here at Ecobaby/Pure-Rest believe in the integrity of products labeled as organic. We want to see stricter standards. We disagree about what is currently allowed. For full list of allowed substances, please see Oregon Tilth and refer to the GOTS standard. Here are examples of what is allowed by the certifying bodies of organics:

Pg. 21 of GOTS: An input is considered as “heavy metal free” if it complies with the limit values for traces of the following elements as set by ETAD:  
Antimony 50ppm, Arsenic 50ppm, Barium 100ppm, Cadmium 20ppm, Cobalt 500ppm, Copper 250ppm, Chrome 100ppm, Iron 2500ppm, Manganese 100ppm, Nickel 200ppm, Mercury 4ppm, Selenium 20ppm, Silver 100ppm, Zinc 1500ppm, Tin 250ppm.  
You read that right, there can be antimony and arsenic in your organic mattress.

Other allowed are 5% of the following:

- a. viscose, acetate, and lyocell
- b. Polyester
- c. Polyurethane
- d. Polyamide

Allowed Formaldehyde at 300 mg/kg for mattresses. This means your organic crib mattress is allowed to have 4000 mg of formaldehyde.

Allowed Lead at .2mg/kg. This means your organic crib mattress is allowed to have 2.8 mg of lead.

Allowed Arsenic at .2mg/kg. This means your organic crib mattress is allowed to have 2.8 mg of arsenic.

Allowed Pesticides at .5mg/kg. This means your organic crib mattress is allowed to have 7 mg of pesticides.

***OUR COMMITMENT to TRUE ORGANICS***

We test our products to prove they do not have any of these toxic substances in them, allowed or not. They are NOT allowed in our products.

Ginny Turner-President  
Ecobaby/Pure-Rest Organics

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EXHIBIT 3

7 Inch Organic Zip Harmony Mattress

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ORGANIC and Natural Mattresses > Zip Customizable Mattresses > 7" Organic Zip Outer Mattress Harmony >

**7" Organic Zip Outer Mattress Harmony**

The first multi layer premium quality natural mattress with absolutely NO Benzene or Toluene. Tested to .001 ppb. The competition has these VOC's in their mattresses, often this information is hidden somewhere on their site. What makes this customizable mattress so special!

By using plates of various firmnesses of truly natural rubber, you have the ability to adjust your bed to feel exactly as you desire. The variance of the plates of rubber allow your body to be cradled and supported just where you need it. The zip-off cover can be removed if necessary. Every attention to detail on this high quality mattress. Featuring the same unique natural flame retardant combination of organic cotton and wool (certified organically processed by Oregon Tilth) fully quilted for durability and comfort. The springy resilient natural wool fiber batting structure contain an abundance of air. This certified organic cotton (GOTS) and wool (Oregon Tilth) combination acts to cushion the body and prevent the formation of painful pressure points. Wool also allows your body to breathe freely while regulating body temperature for an undisturbed and rejuvenating sleep.

In addition the natural lanolin in wool protects your mattress from sweat, dust mites, and nasty bed bugs. No flipping is necessary and if any plate ever needs changing for any reason, it is easy and inexpensive. This mattress has a 10 year fixed, 20 year prorated warranty. This warranty does not include the soft top plate which has a 20 year prorated warranty (this is because soft plates may break down a bit more quickly from weight, moisture, a lot of movement, etc). However the replacement plate can be purchased if you are using your mattress past the 20 year period. If you wish to have the bottom core split for partner comfort, then order in pieces. Order 2 pieces of 3" half core (specify ca king, queen, or order twin xl for king) in the make your own mattress core section, 1 complete soft top 3", and 1 Mattress Zip On Quilted Outer.

**TWIN 6" Harmony Zip Mattress, F, XF.**  
Twin Zip Style Harmony Mattress - Firm, XFRM - zip outer of organically processed EcoWool quilted to our elegant organic cotton damask.

Price: \$1,188.00

Quantity:  [Buy Now](#)

**Twin 6" Firm Rubber Mattress, Zip Outer**  
Twin Zip Style Harmony Rubber Latex Twin Mattress Firm. 6" Firm Core.

Price: \$1,188.00

Quantity:  [Buy Now](#)

**Twin Size Harmony Zip with a firmness of 7**  
One of our deluxe Harmony Zipped mattresses in the Twin Size with cores Extra Firm and Extra Firm! This specific mattress is pretty firm, with no give.

Price: \$1,188.00

Quantity:  [Buy Now](#)

**Twin Size Harmony Zip with a firmness of 2**  
One of our deluxe Harmony Zipped mattresses in the Twin Size with cores Extra Soft and Firm! This specific mattress is very soft, but still supportive enough for light weight people. Not recommended for heavier people or those who need very supportive/hard mattresses.

Price: \$1,188.00

Quantity:  [Buy Now](#)

**Twin Mattress Zip XtraSoft, XtraFirm**  
Zip Style Harmony Mattress - XtraSoft Top and XtraFirm Support Core

Price: \$1,188.00

Quantity:  [Buy Now](#)

**Twin Size Harmony Zip Firm, Xtra Soft**  
One of our deluxe Harmony Zipped mattresses in the Twin Size with cores XtraSoft and Firm! This mattress is slightly firm, but still with a little give!

Price: \$1,188.00

Quantity:  [Buy Now](#)

**Twin Size Harmony Zip with a firmness of 3**  
One of our deluxe Harmony Zipped mattresses in the Twin Size with cores Extra Firm and Extra Soft! This specific mattress is soft, but still very supportive for all people.

Price: \$1,188.00

**Twin XL Size Harmony Zip with a firmness rating of 2**  
One of our deluxe Harmony Zipped mattresses in the Twin XL Size! This specific mattress is very soft, but still supportive enough for light weight people. Not recommended for heavier people or those who need very supportive/hard mattresses.













**Twin XL size Harmony zip with a firmness of 3**  
One of our deluxe Harmony Zipped mattresses in the Twin XL Size with cores Extra Soft and Extra Firm! This specific mattress is soft, but still very supportive for all people.

Price: \$1,222.00

http://www.purerest.com/Mattresses/Zip-Cover-Split-7-Harmony-Mattresses[11/29/2011 8:00:26 AM]

Complaint

EXHIBIT 3

 <p><b>Elegant Organic Cotton Damask zip off outer. FIRM - FIRM</b></p> <p>Price: \$1,222.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>	 <p><b>Elegant Organic Cotton Damask zip off outer. Choose your cores. XSoft Top and Firm Support Core</b></p> <p>Price: \$1,596.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>	 <p><b>Core - zip outer of organically processed EcoWool quilted to our elegant organic cotton damask.</b></p> <p>Price: \$1,596.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>
 <p><b>Full Mattress Firm, Firm</b> Zip Style Harmony Mattress - 3" cores: Firm and Firm Core with organic cotton quilted to organic wool zip off cover to make a 7" Mattress. This Firmness is for a child up to 90 lbs on the soft side, and then flip for a mattress up to 180 lbs.</p> <p>Price: \$1,596.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>	 <p><b>Full Harmony 6" Zip Mattress XS_XE</b> Zip Style Harmony Mattress - XSoft Top and XFirm Support Core - zip outer of organically processed EcoWool quilted to our elegant organic cotton damask.</p> <p>Price: \$1,596.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>	 <p><b>Queen Size Harmony Zip with a firmness of 2</b> One of our deluxe Harmony Zipped mattresses in the Queen Size with cores extra soft and Firm! This specific mattress is very soft, but still supportive enough for light weight people. Not recommended for heavier people or those who need very supportive/hard mattresses.</p> <p>Price: \$1,698.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>
 <p><b>Queen Size Harmony Zip with a 3" Firm, 3" Xtrafirm</b> One of our deluxe Harmony Zipped mattresses in the Queen Size! This specific mattress is very supportive.</p> <p>Price: \$1,698.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>	 <p><b>Queen Size Harmony Zip xtrasoft, firm</b> One of our deluxe Harmony Zipped mattresses in the Queen Size with cores Xtra Soft and Firm! This specific mattress is soft, but still very supportive for all people.</p> <p>Price: \$1,698.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>	 <p><b>Queen Size Harmony Zip with a firmness of 3</b> One of our deluxe Harmony Zipped mattresses in the Queen Size with cores Extra Soft and Extra Firm! This specific mattress is soft, but still very supportive for all people.</p> <p>Price: \$1,698.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>
 <p><b>Queen Size Harmony Zip with a firmness of 5</b> One of our deluxe Harmony Zipped mattresses in the Queen Size with cores super firm and extra soft! This specific mattress is very firm, with only a small amount of give.</p> <p>Price: \$1,698.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>	 <p><b>King Size Harmony Zip with a firmness of 2</b> One of our deluxe Harmony Zipped mattresses in the King Size with cores extra soft and firm! This specific mattress is very soft, but still supportive enough for light weight people. Not recommended for heavier people or those who need very supportive/hard mattresses.</p> <p>Price: \$2,123.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>	 <p><b>King Mattress Firmness Rating 3</b> Zip Style Harmony Mattress - XSoft Top and XFirm Support Core with zip outer of organically processed EcoWool quilted to our elegant organic cotton damask.</p> <p>Price: \$2,123.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>
<p><b>King Harmony Zip XtraSoft, Firm</b> King Harmony Mattress with Zip off outer, 3" rubber core-Firm, 3" rubber</p>	<p><b>Ca King Mattress XS_E</b> Zip Style Harmony Mattress - 3" XSoft Top and Firm Support Core with our organically processed EcoWool quilted to our elegant damask outer.</p>	<p><b>CA King Zip Harmony Mattress XS_XE</b> Cal King Zip Style Harmony Mattress - XSoft Top and XFirm Support Core - zip outer of organically processed</p>

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EXHIBIT 4

ORGANIC and Natural Crib & Infant Mattresses

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All of our crib mattresses are made with the purest ingredients we could find. We use wool processed organically so that you know there are no extraneous chemicals or fibers (most "organic" wool is processed in plants that process other fibers, so it gets chemicals and fibers in it. To know for sure, you would need to get an actual test result from a lab that tested their CARDED wool).

The rubber is also tested for toxic vocs at a third party lab. We do not use ANY synthetic, nondisclosed hidden fibers as our competitors do. We want you to have total purity. Beware of so called certifications. Organic has to be 95% pure to be called organic, Green Guard allows even more contaminants and chemicals.

Crib Innerspring Mattress - extra firm 260 actual coils with Quilted Organic Cotton Batting and Quilted Organic Wool - this padding makes for a firm mattress that has some give in the padding to cut down on flat head syndrome for which they do not know what damage it could be causing. Organic fibers make it breathable and the quilting make so fibers don't shift.



**Pure Organic Wool Tested Natural Rubber**  
Organic and Natural Infant Mattresses



The only tested Chemical-free organic mattress Safe and bacteria resistant naturally

Organic and Natural Crib Mattresses



Organic and Natural Stokke Mattresses and Accessories

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EXHIBIT 5

7 Inch Deluxe Organic Harmony Mattress

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Organic and Natural Mattresses > Organic Mattresses \$950 and up > 7" Organic Deluxe Harmony >

**7" Organic Deluxe Harmony**

Our Harmony Pure-Rest natural rubber mattress has a 7 inch pure chemical-free natural rubber core surrounded by an organic cotton fabric layer, with organically processed wool (certified by Oregon Tilth) from organically raised sheep quilted to our deluxe Pure-Rest European organic cotton fabric which ensures the wool will not migrate out over the years. Our Harmony Mattress is mold, mildew, and dust mite resistant. Available in Firm (31 ILD) or ExtraFirm (35 ILD) or SuperFirm (41 ILD). These choices are so you can choose depending on your weight and how firm you want your mattress to be. 10 Year Fixed and 20 year prorated warranty backed by our 17 year history. Rubber mattresses are best used on a platform slat bed without a foundation - slats 2-3" apart.

Item	Description	Price	Options	Qty
<a href="#">Twin Firm Harmony Mattress</a>	Twin Firm 31 ILD Harmony 7" Mattress. 6" rubber core with organic wool/organic cotton quilted outer.	\$1,443.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Twin Extra Firm</a>	Harmony Mattress Extra Firm 35 ILD with 6" rubber core and deluxe outer of organic wool quilted to organic cotton.	\$1,443.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Twin XL Firm</a>	Twin XL Harmony Mattress Medium Firm 31 ILD 7" mattress with 6" natural rubber core and organic wool quilted to organic cotton outer.	\$1,460.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Twin XL Extra Firm</a>	Harmony 7" Deluxe Mattress Extra Firm 35 ILD with organic wool quilted to organic damask cotton outer.	\$1,460.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Full Firm 7" Harmony</a>	Harmony Mattress Medium Firm 31 ILD-Organic Cotton Damask/organic wool quilted outer with 6" chemical free rubber core.	\$1,698.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Full Extra Firm</a>	Harmony Mattress Extra Firm 35 ILD wit 6" natural rubber core and organic cotton damask quilted to organic wool outer.	\$1,698.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Queen Firm Deluxe Harmony</a>	Harmony Mattress Medium Firm 31 ILD -- 6" natural rubber core with thick layer of organic wool quilted to organic cotton Damask elegant outer.	\$1,817.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Queen Extra Firm</a>	Harmony Mattress Extra Firm 35 ILD -- 6" natural rubber core with thick layer of organic wool quilted to organic cotton Damask elegant outer.	\$1,817.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">King - Firm 7" Deluxe Harmony</a>	King Firm 7" Deluxe Harmony Mattress -- 6" natural rubber core with thick layer of organic wool quilted to organic cotton Damask elegant outer.	\$2,378.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">King - Extra Firm</a>	Deluxe Organic Harmony Mattress King Extra Firm 7" Rubber Mattress w/organic wool/organic cotton quilted outer	\$2,378.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Ca King - Firm</a>	Cal King Firm 31 Ild Deluxe 7" Harmony Mattress -- 6" natural rubber core with thick layer of organic wool quilted to organic cotton Damask elegant outer.	\$2,378.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Ca King - Extra Firm Deluxe Harmony</a>	Cal King ExtraFirm 35 Ild Deluxe Harmony 7" Mattress -- 6" natural rubber core with thick layer of organic wool quilted to organic cotton Damask elegant outer.	\$2,378.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Full Firm 7" Harmony w/zip outer</a>	Harmony Mattress Medium Firm 31 ILD-Organic Cotton Damask/organic wool quilted outer with 6" chemical free rubber core and zip outer.	\$1,613.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Twin Firm Harmony Mattress</a>	Twin Firm 31 ILD Harmony 7" Mattress. 6" organic rubber core with organic wool/organic cotton quilted outer.	\$1,732.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Twin Extra Firm Organic Rubber Harmony</a>	Harmony Mattress Extra Firm 35 ILD with 6" organic rubber core and deluxe outer of organic wool quilted to organic cotton.	\$1,732.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Twin XL Firm Organic Rubber Harmony</a>	Twin XL Harmony Mattress Medium Firm 31 ILD 7" mattress with 6" natural rubber core and organic wool quilted to organic cotton outer.	\$1,752.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Twin XL Extra Firm Organic Rubber Harmony</a>	Harmony 7" Deluxe Organic Mattress Extra Firm 35 ILD with organic wool quilted to organic damask cotton outer and organic rubber 6" core.	\$1,752.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Queen Firm Deluxe Organic Harmony</a>	Harmony Mattress Medium Firm 31 ILD -- 6" organic natural rubber core with thick layer of organic wool quilted to organic cotton Damask elegant outer.	\$2,180.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Queen Extra Firm Organic Harmony</a>	Harmony Mattress Extra Firm 35 ILD -- 6" organic natural rubber core with thick layer of organic wool quilted to organic cotton Damask elegant outer.	\$2,180.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Full Firm 7" Organic Harmony</a>	Harmony Mattress Medium Firm 31 ILD-Organic Cotton Damask/organic wool quilted outer with 6" organic chemical free rubber core.	\$2,037.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>
<a href="#">Twin XL CUSTOM Firm</a>	Twin XL Custom Harmony Mattress Medium Firm 31 ILD 7" mattress with 6" natural rubber core and organic wool quilted to organic cotton outer.	\$1,505.00	<input type="text" value="1"/>	<input type="button" value="Add to Shopping Cart"/>

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EXHIBIT 6

All About Natural Latex

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What is Natural Latex and where does it come from?



Natural Latex also known as Natural Rubber comes from the Rubber Tree (Hevea Brasiliensis) and it's acquired through a method called "tapping" where the latex serum is collected from the latex ducts of the Rubber Tree and then used to make Natural Latex.

Unlike synthetic man made latex, Pure Natural Latex is naturally hypo-allergenic, anti-microbial, and dust mite resistant; making it perfect for allergy sufferers or anyone who needs to breathe fresh, clean air while sleeping. Its breathable qualities allow it to keep cool in the summer and warm in the winter and it is the most naturally durable and cushioning material available in nature in addition to being biodegradable.

Not all natural latex is made equally and most companies do not test for strict purity standards or fair trade practices. Purity is our priority that is why Pure-Rest Organics consistently sends our materials for third party lab testing to ensure that our products are as PURE and HEALTHY for you and your family as they can be in addition to requiring Organic Certifications for our Organic Cotton and Organic Wool. We openly share all of our certifications and test results with the public and conform to the NAOMI Standards (National Organization of Organic Mattress Industry).

Natural Latex & Natural Latex Mattresses FAQs:

1. **I have allergies, would Natural Latex be good for me?**
  - 100% Pure Natural Latex is inherently hypo-allergenic, anti-microbial, and dust mite resistant; making it perfect for anyone suffering from allergies.
2. **I have heard of Latex Allergies; how can I be sure it will not affect me?**
  - As of yet, there have NOT been any reported cases of allergies to Pure Natural Latex (or Pure Natural Rubber) and the general incidence of latex allergy is low, less than 1% of the U.S. population. People that are allergic to latex are normally allergic to the type of latex used in making latex gloves (workers who wear latex gloves most of the day have a risk of less than 10%) which is closed cell structure latex. However, we offer a free Test Kit before you purchase our Natural Latex products to ensure your safety.
3. **Where does Natural Latex come from?**
  - Natural Latex is a resin compound found in the Natural Rubber Tree (Hevea Brasiliensis), and "Tapped" from the latex ducts of the tree; contrary to popular belief it is not the tree's sap and the trees are not damaged in the process
4. **I have back or joint problems and need proper support; how can Natural Latex help?**
  - Natural Latex is a naturally cushioning but also firm material, it will naturally conform to your body and therefore provide superior back support and outstanding pressure relief; furthermore, our Natural Latex mattresses are free of chemicals therefore providing you with a clean, non-toxic, and restful sleep.
5. **Which Firmnesses are available?**
  - Pure-Rest offers several levels of firmness Extra Soft, Soft, Medium, Firm, Extra Firm, and Super Firm. If you suffer from back problems a medium to firm mattress is recommended. In addition if you and your partner require different firmness we offer a variety of customizable zip mattresses with split cores for maximum comfort.
6. **What is the exterior of your mattresses made of?**
  - Most Pure-Rest Organics Mattresses feature a Certified Organic Wool Inner quilted onto a

Complaint

**EXHIBIT 6**

Certified Organic Cotton Outer. Our Vegan version does not contain wool; however, because of its lack of a natural flame retardant a doctor's note is required.

**7. What is the difference between Natural Latex and Memory Foam?**

- Unlike the Synthetic Memory Foam which is made with chemicals and petroleum compounds, Natural Latex is manufactured with 90-95% of Natural Rubber, 2-3% Zinc Oxide, 1-2% Fatty Acids and Soaps, 1-2% Sulphur, and 1-2% Sodium. These items are required for the vulcanization, foaming, and curing process. However, most of these ingredients are baked out. The finished core is then washed several times to achieve optimum purity and the finished product is approximately 99% natural rubber.
- Also unlike Memory Foam, 100% Natural Latex Mattresses do not need to be kept in a room under 65 degrees, and because Natural Latex is firmer than memory foam you will notice that it does not leave a body impression (and will usually remain for at least 8-10 years) in addition to providing superior support.

							
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EXHIBIT 7

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ORGANIC Crib & Infant Bedding > Infant Bedding >

Our infant bedding includes natural mattresses tested to be free of ANY toxic vocs and our results posted online. Our organic cotton and wool are also tested chemical free and are certified organic. The only infant line out there that is free of chemicals, and free of boric acid and proven by third party test results.

NOTE: Organic does not guarantee purity. The regulations of Greenguard, organic and OekoTex allow 5% or more of chemicals in the products to use their certification.


Complaint

**EXHIBIT 7**

Organic Infant Bedding



Infant Bedding

<p><b>Burp Pad Pink/Pink Striped</b> Organic Cotton Pink Knit reverses to Pink Striped Knit. 14 x 18" Burp Pad with layer of organic cotton batting between for lots of absorbency. Made in USA.</p> <p>Price: \$11.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>	<p><b>Burp Pad Heart Print</b> Organic Cotton Heart Print Knit. 14 x 18" Burp Pad with layer of organic cotton batting between for lots of absorbency. Made in USA.</p> <p>Price: \$11.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>	<p><b>Burp Pad Pink/Pink Striped</b> Organic Cotton Pink Knit reverses to Pink Striped Knit. 14 x 18" Burp Pad with layer of organic cotton batting between for lots of absorbency. Made in USA.</p> <p>Price: \$11.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>
<p><b>Burp Pad Dandelion / Fleece</b> Organic Cotton Dandelion/ Organic Cotton Fleece. 14 x 18" Burp Pad with layer of organic cotton batting between for lots of absorbency. Made in USA.</p> <p>Price: \$11.00</p> <p>Quantity: <input type="text" value="1"/> <a href="#">Buy Now</a></p>		

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<p><b>COMPANY INFORMATION</b></p> <ul style="list-style-type: none"> <li>• About Us</li> <li>• Organic Certifications</li> <li>• Pure-Rest Blog</li> <li>• Pure-Rest @ Twitter</li> <li>• Pure-Rest @ YouTube</li> <li>• Message from Ginny</li> </ul>	<p><b>WHOLESALE CENTER</b></p> <ul style="list-style-type: none"> <li>• Pure-Rest Organic Online Catalog</li> <li>• EcoBaby Organics Online Catalog</li> <li>• Image Downloads</li> <li>• Price Lists</li> <li>• Wholesale Account Application</li> </ul>	<p><b>CUSTOMER SERVICE</b></p> <ul style="list-style-type: none"> <li>• Consumer Education Center</li> <li>• Contact Us</li> <li>• Products Policy &amp; Warranties</li> <li>• Other Interesting Places</li> </ul>
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Complaint

EXHIBIT 8

Organic Mattress - The Natural & Healthier Solution

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[All About Mattresses >](#)

**"The Organic Solution"**

Because of its health benefits, organic alternatives to food, clothing, and home products have become quite popular in recent years, and now the public is starting to catch on to organic mattresses as a healthier and safer alternative to chemically soaked mattresses. What are the differences between an organic mattress and a synthetic mattress, and why should you be concerned about what you are sleeping on? While they look similar, the differences lie in what they are made of. Synthetic mattresses contain hundreds of harmful chemicals including formaldehyde, a known carcinogen, while organic and natural latex (also known as natural rubber) mattresses are natural and safe as well as bio-degradable.

**The Synthetic Problem**

Synthetic mattresses contain harmful chemicals. Research has shown that the prolonged exposure to these chemicals can cause serious illness or cancer. Consider this: if you were to sleep on a synthetic mattress for eight hours a night for five years, that'd add up to over 14,600 hours of exposure time.

Below are some of the chemicals commonly used in synthetic mattresses, and the effects they can have.

**Formaldehyde**

Used in synthetic mattresses as an adhesive, formaldehyde has been linked to lung, throat, and nose cancers. Repeated exposure to formaldehyde can have serious effects on the respiratory system, cause asthma, and increase your likelihood of contracting bronchitis or pneumonia.

The National Cancer Institute (NCA) has conducted studies to determine the link between formaldehyde and an increased risk in cancer. Several NCA studies have determined that anatomists and embalmers (who are regularly exposed to formaldehyde in their work) have an increased risk of leukemia and brain cancer.

A study by the National Institute for Occupational Safety and Health (NIOSH) looked at 11,039 textile workers, who had been exposed to formaldehyde. This study corresponded with the earlier NCA studies by finding a link between exposure to formaldehyde and Leukemia.

**Polyurethane foam**

This is a petroleum-based material, which can cause respiratory problems and skin irritation. Polyurethane foam is often used in mattresses for infant's cribs, exposing babies to the harmful fumes they let off. An article in the *Archives of Environmental Health* expressed concern that the foam may be related to increasing incidents of childhood cancer.

A study on mice conducted at Anderson Laboratories in Vermont supported this theory. When the mice were exposed to the emissions from synthetic crib mattresses, their breathing was impeded. They experienced both heart and respiratory irritation, and some mice had severe, asthma-like reactions. The mice were only exposed to these fumes for two, one-hour periods. Imagine how sleeping every night on these mattresses affects children.

**Fire Retardants**

Manufacturers cover mattresses in fire retardants to counteract the flammability of their mattress chemicals. These fire retardant chemicals enter people's systems, and as studies have shown, they can disrupt normal brain development in fetuses and infants. This is bad news, because flame retardants have been found in disturbingly high concentrations in people's blood and breast milk. Mothers are passing these chemicals on to their children.

<http://www.purerest.com/All-About-Mattresses/Organic-Mattress-The-Natural-Healthier-Solution>[11/29/2011 7:35:21 AM]

## Complaint

**EXHIBIT 8**

For example, [CBS News reported](#) on woman whose blood test revealed that she had 19 different flame retardant chemicals in her body. The same CBS article quoted an Environmental Protection Agency toxicologist, who was concerned about the effects fire retardants have on developing children.

The same toxicologist said research on young, developing animals has shown fire retardants affect their brains and reproductive systems. It is safe to say the same would be true for human infants.

**The Organic Solution**

There is hope, however. Organic mattresses provide an alternative to synthetic mattresses. An organic mattress is safe, chemical free, and composed of all natural materials. Usually, an organic mattress will be made of organic wool, organic cotton, or natural latex rubber. They are naturally flame resistant; there is no need to worry about them catching fire.

Aside from preventing exposure to harmful chemicals, organic mattresses also repel dust mites, resist mold and mildew buildup, and are hypoallergenic. Because these mattresses discourage mold and mildew, sleeping on an organic mattress can improve respiration, alleviate allergies, and provide a deeper, higher quality sleep.

The banner includes the following elements:

- Social media links: Follow Pure Rest on Twitter, Watch our Videos on YouTube, Read our Blog.
- Certification logos: NAOMI, GLOBAL GREEN USA, E-OK, ADOPT GREEN.
- Footer sections:
  - COMPANY INFORMATION:** About Us, Organic Certifications, Pure Rest Blog, Pure Rest @ Twitter, Pure Rest @ YouTube, Message from Ginny.
  - WHOLESALE CENTER:** Pure Rest Organics Online Catalog, Ecobaby Organics Online Catalog, Image Downloads, Price Lists, Wholesale Account Application.
  - CUSTOMER SERVICE:** Consumer Education Center, Contact Us, Products Policy & Warranties, Other Interesting Places.
- Copyright notice: COPYRIGHT PURE-REST ORGANICS 2010. All Rights Reserved. Design by AVANT Marketing Graphics.

**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 a 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 violations of the Federal Trade Commission Act; and

The Respondent and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), which includes: a statement by Respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; 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

## Decision and Order

that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from an interested person pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34, now in further conformity with the procedure prescribed in Commission Rule 2.34, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent is a California corporation with its principal office or place of business at 9541 Ridgehaven Ct., San Diego, CA 92123.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

**ORDER****DEFINITIONS**

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

1. Unless otherwise specified, "Respondent" shall mean Ecobaby Organics, Inc., also doing business as Ecobaby and Purerest, its successors and assigns, and its officers, agents, representatives, and employees.
2. "Commerce" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. "Competent and reliable scientific evidence" shall mean tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on

## Decision and Order

standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true.

4. “Covered product” shall mean any mattress or component part.
5. “Trace” level of VOCs or chemicals shall mean:
  - A. VOCs or chemicals have not been intentionally added to the product;
  - B. The presence of VOCs or chemicals at that level does not cause material harm that consumers typically associate with VOCs or chemicals, including, but not limited to, harm to the environment or human health; and
  - C. The presence of VOCs or chemicals at that level does not result in concentrations higher than would be found at background levels in the ambient air.
6. “Volatile Organic Compound” (“VOC”) shall mean any compound of carbon that participates in atmospheric photochemical reactions, but excludes carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate, and specific compounds that the EPA has determined are of negligible photochemical reactivity, which are listed at 40 C.F.R. § 51.100(s).

**I.**

**IT IS ORDERED** that Respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

## Decision and Order

- A. The covered product is VOC-free or free of harmful VOCs, unless the VOC emission level is zero micrograms per meter cubed ( $\mu\text{g}/\text{m}^3$ ), or Respondent possesses and relies upon competent and reliable scientific evidence that the covered product contains no more than a trace level of VOCs; or
- B. The covered product is free of chemicals.

**II.**

**IT IS FURTHER ORDERED** that Respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, regarding:

- A. The VOC level of such product;
- B. Whether the product is non-toxic;
- C. Any other environmental benefit or environmental attribute of such product; or
- D. Any other health benefit or health attribute related to the VOC or chemical content of such product or exposure to such product;

unless the representation is true, not misleading, and, at the time it is made, Respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

**III.**

**IT IS FURTHER ORDERED** that Respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product in or affecting commerce, is permanently

## Decision and Order

restrained and enjoined from making or assisting others in making, expressly or by implication, orally or in writing, any misrepresentation regarding certifications, including:

- A. the fact that, or degree to which, an independent third-party certifier or organization with appropriate expertise has evaluated a covered product based on its environmental or health benefits or attributes; or
- B. that an independent third-party certifier or organization with appropriate expertise has evaluated the environmental or health benefits or attributes of a covered product based on the application of objective standards.

**IV.**

**IT IS FURTHER ORDERED** that Respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product in or affecting commerce, is hereby permanently restrained and enjoined from misrepresenting, in any manner, expressly or by implication, including through the use of any product name or endorsement, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

**V.**

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

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



## Decision and Order

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

**VI.**

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

personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments of receipt of this order obtained pursuant to this Part.

**VII.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after

## Decision and Order

obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: “Ecobaby Organics, Inc., File No. 122 3129, Docket No. C-4416.”

**VIII.**

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

**IX.**

This order will terminate on November 8, 2033, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

*Provided, further*, that if such complaint is dismissed or a federal court rules that the Respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this

## Analysis to Aid Public Comment

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

By the Commission.

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

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

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

This matter involves respondent’s marketing and sale of natural latex mattresses. According to the FTC’s complaint, respondent makes three types of claims about these mattresses. First, respondent claims that its mattresses are certified by the National Association of Organic Mattress Industry (“NAOMI”), an independent third-party certifier with appropriate expertise in evaluating whether respondent’s mattresses meet objective standards. However, the complaint alleges that NAOMI is an alter ego of respondent and not an independent third-party certifier and, indeed, awarded its seal to its own products without applying objective standards. Accordingly, the complaint alleges that such representations are deceptive practices in violation of Section 5(a) of the FTC Act.

## Analysis to Aid Public Comment

Second, respondent represents that its mattresses are chemical-free; Formaldehyde-free; free of VOCs, such as Toluene and Benzene; and without toxic substances. The complaint alleges that respondent did not possess and rely upon a reasonable basis substantiating these representations when it made them. Thus, the complaint alleges that respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

Third, respondent claims that tests show that its mattresses are VOC-free, chemical-free, and Formaldehyde-free. The complaint alleges that tests do not support these claims. Thus, the complaint alleges that respondent engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains four provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I addresses the marketing of VOC-free and chemical free mattresses. It prohibits respondent from making zero-VOC claims unless the VOC emission level is zero micrograms per meter cubed or the company possesses and relies upon competent and reliable scientific evidence that their mattresses contain no more than a trace level of VOCs based on the Green Guides' guidance on making free-of claims. It also prohibits respondent from making chemical-free claims.

Part II addresses VOC claims, non-toxic claims, environmental benefit or attribute claims, and certain health claims made about mattresses. It prohibits such representations unless the representation is true, not misleading, and substantiated by competent and reliable scientific evidence.

Part III addresses representations about third-party certifications. It prohibits any misrepresentations about the degree to which an independent third-party certifier has evaluated respondents mattresses based on environmental or health attributes, or evaluated those attributes based on the application of objective standards.

Part IV addresses claims that testing supports respondents' advertising claims for its mattresses. It prohibits any

## Analysis to Aid Public Comment

misrepresentations about the existence, contents, validity, results, conclusion, or interpretations of any test, study, or research.

Parts V through VIII require Ecobaby to: keep copies of advertisements and materials relied upon in disseminating any representation covered by the order; provide copies of the order to certain personnel, agents, and representatives having supervisory responsibilities with respect to the subject matter of the order; notify the Commission of changes in its structure that might affect compliance obligations under the order; and file a compliance report with the Commission and respond to other requests from FTC staff. Part IX provides that the order will terminate after twenty (20) years, with certain exceptions.

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

Complaint

IN THE MATTER OF

**ESSENTIA NATURAL MEMORY FOAM  
COMPANY, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4417; File No. 122 3130**Complaint, November 8, 2013 – Decision, November 8, 2013*

This consent order addresses false and misleading claims made by respondent Essentia Natural Memory Foam Company (“Essentia”) concerning its memory foam mattresses. Essentia marketed its memory foam mattresses as free of harmful volatile organic compounds (“VOCs”); chemical-free; having no chemical off-gassing or odor; and consisting of 100 percent natural materials. The complaint alleges that each of these claims are false and unsubstantiated by scientific evidence, in violation of Section 5 of the Federal Trade Commission Act. The consent order bars Essentia from making zero-VOC claims unless the VOC emission level is zero micrograms per cubic meter or unless the company possesses and relies upon competent and reliable scientific evidence that its mattresses contain no more than a trace level of VOCs, as prescribed in the Green Guides. The consent order further requires Essentia to keep copies of all advertisements and materials relating to its mattresses and to file periodic compliance reports with the Commission.

*Participants*

For the *Commission*: Thomas Goodhue and Robin Moore.

For the *Respondent*: Leonard L. Gordon, Venable LLP.

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Essentia Natural Memory Foam Company, Inc. (“Respondent”) has violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

17. Respondent is a Delaware corporation with its principal office or place of business at 2760 Daniel Johnson, Laval, Quebec, Canada H7P5Z7. It is a wholly-owned subsidiary of Verstile, Inc., a Canadian corporation, which has its principal

## Complaint

office at the same location. Respondent does business under the name Essentia.

18. Respondent manufactures, advertises, offers for sale, sells, and distributes “memory foam” mattresses, which are marketed as mattresses that conform to the sleeper’s body shape and weight. Respondent distributes these mattresses through its website and at its own stores in California, Colorado, Illinois, New York, and Washington.

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

20. Respondent has disseminated or has caused the dissemination of promotional materials for its memory foam mattresses, including, but not limited to, print advertisements and website advertisements in the attached exhibits.

21. In many instances, including but not limited to the promotional materials shown in Exhibits 1 through 7, Respondent has represented that:

- a. Its mattresses are “VOC [‘Volatile Organic Compound’] free” and “[f]ree of harmful VOC’s.” *See, e.g.*, Exhibit 1.
- b. Its mattresses have “[n]o chemical off-gassing or odor.” Exhibit 2.
- c. “Memory foam mattresses can emit up to 61 chemicals” but Essentia’s memory foam is “free from all those harmful VOC’s.” Exhibit 3.
- d. Respondent’s memory foam mattresses are chemical-free. *See, e.g.*, Exhibit 4.
- e. Respondent’s memory foam mattresses contain no Formaldehyde. *See, e.g.*, Exhibit 5.

## Complaint

- f. Respondent's memory foam does not emit chemical fumes or odors. *See, e.g.*, Exhibit 6.
- g. The memory foam in Respondent's mattresses is "made with 100% natural materials." Exhibit 6.
- h. Testing confirms that Respondent's memory foam is free of VOCs and Formaldehyde. *See, e.g.*, Exhibits 1, 5, 7.

22. A consumer acting reasonably under the circumstances is likely to interpret representations that a mattress has "[n]o chemical off-gassing or odor" or that a mattress "does not emit chemical fumes or odors" to mean that the mattress is free of VOCs.

23. In truth and in fact, Respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5 at the time that the representations were made.

24. In truth and in fact, testing does not confirm that the memory foam used in Respondent's mattresses is free of VOCs and Formaldehyde.

**COUNT I (Unsubstantiated Representations)**

25. Through the means described in Paragraphs 4 and 5, Respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 5, at the time the representations were made.

26. In truth and in fact, Respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in Paragraph 5 at the time the representations were made. Therefore, the representations set forth in Paragraph 9 are false or misleading.

**COUNT II (Establishment Claim)**



Complaint

27. Through the means described in Paragraphs 4 and 5, and as set forth in paragraph 5(h), Respondent has represented, expressly or by implication, that testing confirms that the memory foam used in Respondent's mattresses is free of VOCs and Formaldehyde.

28. In truth and in fact, testing does not confirm that the memory foam used in Respondent's mattresses was free of VOCs and Formaldehyde at the time the representations set forth in Paragraph 5(h) were made. Therefore, the representations set forth in Paragraph 11 are false or misleading.





29. Respondent's practices, as alleged in this complaint, constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.


**THEREFORE**, the Federal Trade Commission, this eighth day of November, 2013, has issued this complaint against Respondent.



By the Commission.

## Complaint

**EXHIBIT 1**


1.888.764.4116    My Cart 

  
World's Only Natural Memory Foam

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Home » Certifications



**GOTS Certified**

Certification for organic fibers, The Global Organic Textile Standard (GOTS) is a leading textile processing standard. GOTS include ecological and social criteria with independent certification of the entire textile supply chain.

Our Zebrano fabric which covers all Essentia mattresses is GOTS certified. Certificate issued by ICEA, Bologna Italy.




**Columbia Labs Tested**

Free of harmful VOC's. In Dec 2010, Essentia worked with the professor of material science and engineering at a leading U.S. university to perform independent testing of our [natural memory foam](#) for toxic emissions. Columbia Analytical Services were commissioned to perform these tests.

Tests confirmed that Essentia natural memory foam show trace VOC's (volatile organic compounds), comparable to Latex certified by the Oak Tex 100 standard (Below 0.001PPM – parts per million).

Ongoing testing is planned with the university in hopes of discovering more benefits from our material.




**EuroLatex ECO-Standard**

The EuroLatex ECO-Standard defines the maximum acceptable limits of substances considered harmful to health and tested by TFI (Deutsches Teppich-Forschungs Institut in Aachen, Germany)

The substances that are tested for include:

- Heavy metals
- Nitrosamines
- Pesticides
- Solvents
- Volatile organic components

All Dunlop latex used in Essentia mattresses meet EuroLatex ECO-Standards.



**Green America Certified**

Previously known as Co-op America, [Green America](#) is a non-profit membership organization promoting environmental sustainability, ensuring consumers that they can feel confident that businesses bearing this seal operate in such a manner that support workers, communities, and protects the environment at home and abroad.

## Complaint

### EXHIBIT 1

Essentia has successfully completed Green America's screening process and has been approved as a socially and environmentally responsible business.

In partnership with Green America, Essentia is committed to and employs extraordinary and innovative practices that benefit its workers, its customers, and the environment.



#### GreenGuard Certified

We only use a [GreenGuard](#) certified solvent-free, non-toxic adhesives by Simalfa. Our VOC (volatile organic compound) free adhesive is GREENGUARD Indoor Air Quality Certified® and GREENGUARD Children & Schools Certified.



#### Oeko Tex

Our latex is [Oeko Tex 100 Class 1](#) certified. This is Oeko Tex's strictest certification available classified safe for babies.

All Dunlop latex used in Essentia mattresses meet EuroLatex ECO-Standards.



#### Made In Canada

To create healthy & performing mattresses and pillows it is fundamental to know everything about the components which make up these products. This is why we develop and manufacture our own components.

Manufacturing and distributing Essentia products from a single common location cuts down fuel consumption in transportation, which allows for better prices and supports the North American economy as many of our ingredients are from both Canada and the United States.

All products are manufactured by hand, by the Essentia team, just outside Montreal, Quebec, Canada.

Read more about our [Canadian made mattresses](#).



#### Organic Trade Association

The [Organic Trade Association](#) promotes and protects organic trade to benefit the environment, farmers, the public, and the economy. OTA is a leader in advocating and protecting organic standards so that consumers can have confidence in certified organic production.





#### MyEssentia.com is hosted on Wind Powered Servers

Did you know that the average server produces the same emissions as a 15 mpg SUV? By hosting our website on servers powered by wind, Essentia operates its website through clean energy.

Complaint

**EXHIBIT 1**

Certifications  

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Shop	Store Locations	Customer Service	Company
<a href="#">Mattresses</a>	<a href="#">Los Angeles</a>	<a href="#">Customer Service Center</a>	<a href="#">Message from Jack</a>
<a href="#">Pillows</a>	<a href="#">New York</a>	<a href="#">Free Shipping</a>	<a href="#">Environmentalism</a>
<a href="#">Organic Sheets</a>	<a href="#">Berkeley</a>	<a href="#">Feedback</a>	<a href="#">Locations</a>
<a href="#">Organic Baby</a>	<a href="#">Toronto</a>	<a href="#">FAQ's</a>	<a href="#">Opening an Essentia Store</a>
<a href="#">Luxury Dog Bed</a>	<a href="#">Vancouver</a>	<a href="#">Contact Us</a>	<a href="#">Affiliate Program</a>
	<a href="#">Calgary</a>		<a href="#">Press</a>
	<a href="#">Montreal</a>		<a href="#">Contact Us</a>
	<a href="#">Ottawa</a>		

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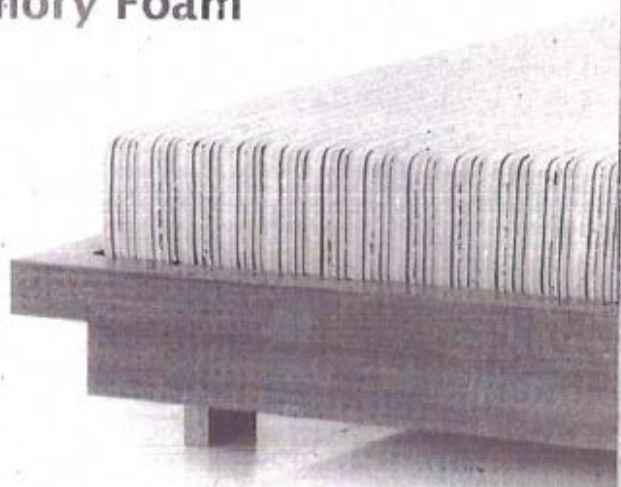
[sitemap](#) | [privacy policy](#) | [terms and conditions](#) | © Essentia 2011

Complaint

**EXHIBIT 2**


Building: 1/10/08/10/12/14/16/18/20/22/24/26/28/30/32/34/36/38/40/42/44/46/48/50/52/54/56/58/60/62/64/66/68/70/72/74/76/78/80/82/84/86/88/90/92/94/96/98/100


# World's Only Natural Memory Foam



## Supremely Comfortable & Healthy

- Luxurious and outstanding comfort
- Biodegradable
- Durable (20 year warranty)
- No chemical off-gassing or odor
- Healthy, allergy-free sleep environment
- Buy online / Free shipping



**essentia**  [www.myessentia.com](http://www.myessentia.com)

64 **KEY TO SYMBOLS:** M=Mail Order/Catalog W=Wholesale R=Retail Store B=Business to Business Services J=Online Sales ★=FREE or Special Offer

Complaint

**EXHIBIT 3**<http://www.myessentia.com/research/tempur-comparison>essentia  VS **TempurPedic****Natural** **Why Not Go Natural?**

All other memory foams are made from petroleum based chemicals. Yuck.

Essentia invented a [natural memory foam](#), free of harmful VOC's, which keeps you sleeping comfy and healthy.

**Sleeps Cool** **Skip the Sweaty Nights**

The #1 complaint among TempurPedic owners: Sleeping hot! Our natural memory foam sleeps cool, breathing 80% better than ALL the others.

**VOC Free** 

Complaint

**EXHIBIT 3**



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**Don't Hold Your Breath**

Memory foam mattresses can emit up to 61 chemicals. Care to breathe those in 8hr/night?

Our [natural foam](#) is free from all those harmful VOC's, 3rd party tested by Columbia Labs.



**Durable**



---

**Everlasting Love**

Better quality foams use more product.

More product = a longer lasting foam = One mean 20 year warranty in our case.



**Pressure Relieving**



---

**Out Cold... All Night**

Complaint

**EXHIBIT 3**

This is why memory foam mattresses are the fastest growing mattress segment in the World. They're outrageously comfortable with no pressure points.



No Body Cast 

**Move Freely**

The #2 complaint among Tempurpedic mattress owners: The Cast!

Memory foam is temperature sensitive. You get in, you heat up your spot, you sink in.

Now try getting out of that cast when all the foam around you is hard... while you're asleep.

Essentia natural memory foam is not as temperature sensitive. Move easily and freely, we won't hold you back.

## Essentia Outperforms ALL Memory Foam Mattresses

As you can see from the review grid above, Essentia outperforms other memory foam mattresses in all respects.

The strongest alternative to Tempurpedic is Essentia. Alternatives to Tempurpedic usually fall short but not us.



## Complaint

**EXHIBIT 3**

For the price of a Tempur-Pedic you can sleep on an Essentia natural [memory foam mattress](#). We're breathable, certified VOC free and with have all the comfort and pressure relief of TempurPedic mattresses.

Essentia is the only mattress company aside from Tempur-Pedic to manufacture their own memory foam. Other mattress brands purchase foam from conventional foam manufacturers.

### No-Name Mattress Brand Comparison

There are very few memory foam manufacturers in North America. Some include Tempur-Pedic, Carpenter, Foamex, and Essentia. Some are European and most are Chinese.

"Me Too" memory foam mattress retailers may buy from different suppliers but it all derives from the same manufacturers. Since most memory foams are close to identical, retailers distinguish themselves with price, reviews, marketing verbiage all-the-while piggybacking on the Tempurpedic brand. Ask any memory foam mattress company to answer the questions in our grid above and they'll fall short as well.

Greenwashing is everywhere, with companies claiming to have eco memory foam mattresses. They'll call them BiOH foams, plant based memory foam mattresses or [soy memory foam mattresses](#). Strong chemical odors or off-gassing and sleeping hot remain major issues because only 2-20% of the chemicals are replaced with natural ingredients.

Complaint

**EXHIBIT 3**

## Health Issues with Memory Foam Mattresses

The toxicity of memory foam mattresses have real health implications. Memory foam mattresses tested emitted VOC's, up to 61 toxic chemicals, including the carcinogen's benzene and naphthalene. Headaches, migraines, feeling sick, nausea, and difficulty breathing are common reactions from inhaling the fumes of chemically derived memory foam mattresses. So [are memory foam mattresses safe?](#)

## The Essentia Difference

Essentia is the only brand to successfully improve memory foam because we've solved the issues instead of masking them. We've addressed all previous issues with memory foam mattresses and health.

It took years to develop our patented VOC free [natural memory foam](#) and [molding process](#).

Comfort, Quality without Compromise. [Read our story](#).

## People who read this article also read:

- [Latex Mattresses vs Memory Foam](#)
- [How to choose a memory foam mattress](#)
- [Spring mattress or memory foam mattress?](#)



Complaint

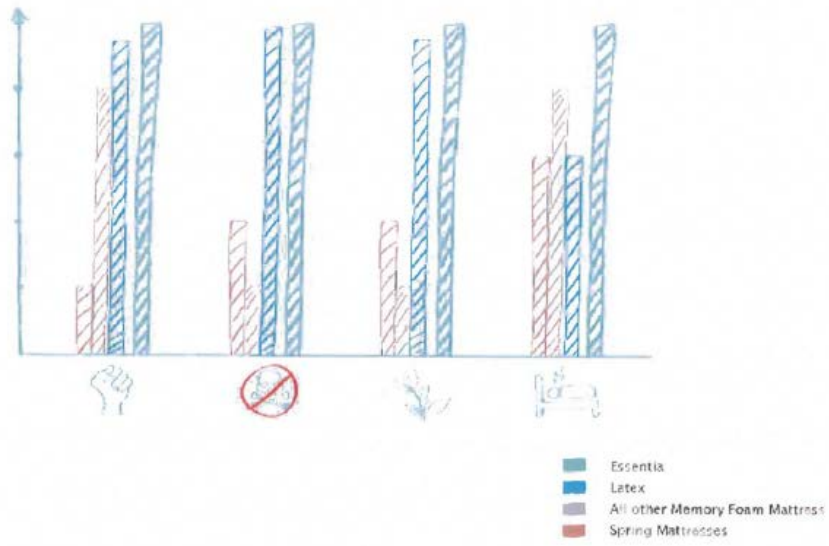
**EXHIBIT 3**

Essentia Difference

in long..

**Best Value**

When it comes to comfort, durability, health, and eco-friendliness, Essentia trumps.



Complaint

**EXHIBIT 3**

**Comfort & Support**

Our mattresses outperform all types; memory foam mattresses, latex mattresses and spring mattresses. Competition falls short in all tests.



**Pressure Relief**

Comfort is determined by pressure relief. With Essentia mattresses, pressure points are eliminated so there's proper blood circulation, no tossing and turning. The result is an undisturbed, restful nights sleep. Pressure relief for Essentia's memory foam is an astounding

Complaint

**EXHIBIT 3**

12.25 mmHg @ 200lbs, compared to the leading Tempur-Pedic measured at only 15-28 mmHg. See [Essentia and Tempur-Pedic](#).

Sleeping in the wrong position every night affects your health. **Spinal alignment** is particularly important for proper disc re-hydration, blood circulation and an overall recuperative sleep. Our medical support mattresses are engineered for superior spinal alignment, support and comfort.

Essentia mattresses are easily among the best memory foam mattresses on the market.

**Durability**

How long should a mattress be comfortably supportive? 20 years+

- Spring mattresses lose 16% of their support in the 1st year.
- Memory foam mattresses are similar to couch foam when it comes to durability. Some lose support rather quickly, others feel good for years.
- Latex foam mattresses can last almost as long as Essentia mattresses depending on their quality.

**Green**

Could it get any better than biodegradable mattresses? Read more on how [green our products and process](#) is.

Complaint

**EXHIBIT 3**

**Non-Toxic**

Mattresses are surprisingly unhealthy. Not ours.

Most mattresses are made with toxic foams, glues, chemically treated fabrics and are a breeding ground for dust mites and other allergens.

Essentia mattresses are made from a slew of natural ingredients designed to keep your sleep healthy.

**Essentia Natural Memory Foam**

Breathability is a common and major complaint among memory foam mattress owners. This is because even the best memory foam mattresses on the market are synthetic and made from petrochemicals. Essentia developed a [natural memory foam](#) which is 80% more breathable. By replacing the petrochemicals with natural ingredients such as [natural latex](#), [essential oils](#), plant extracts and water we've created a healthy alternative to petroleum based synthetic memory foam mattresses.

**Benefits of our Natural Memory Foam**

- a) 80% better breathability.  
Result: Breathes like cotton, not polyester. No trapped heat. You won't get hot and sticky.
  
- b) A foam that has no chemical odor and is [free of harmful VOC's](#). (off-gassing)



Essentia 000018

## Complaint

**EXHIBIT 3**

Off-gassing causes eye irritation, skin irritation, headaches and migraines.

Off-gassing is recognized as harmful by health care institutions for patients with respiratory problems – why should they be offered to healthy people? Read more about [chemicals in mattresses](#).

c) A product than doesn't pollute during manufacturing.

Over 1 million tons of toxic chemicals leach into the environment annually by petrochemical based memory foams and glues.

Our employees don't need protective gear and benefit from a safe work environment.

**Exclusive Molding Technology**

All mattresses are composed of layers. Both spring and memory foam mattresses are composed of layers. Some Essentia models such as our [Beausommet](#) and [Dormeuse](#) use our patented molding technology. Molding them together creates a permanent bond and [exceptional and unique comfort explained here](#). All our other mattresses contain completely safe and non-toxic VOC free natural liquid latex and acrylic resin adhesive.

**Facts:**

- Most adhesives used in mattress manufacturing emit toxic fumes for the first 2–3 years.
- Fumes from some adhesives cause cancer according to the IRTA. (Institute for Research and Technical Assistance)
- We inhale these fumes for 8 hours per night 365 days per year.



Complaint

### **EXHIBIT 3**

Visit our page on [mattress adhesives](#) for more information.

#### **Toxic Free Fire Retardant (FR)**

All mattress sold in the United States as of 2007 are required to pass an FR test. Essentia uses a Kevlar based fire retardant which is VOC free, containing no toxic chemicals. Chemicals used in other mattress manufacturers, including leading brands, have been linked to cancer, heart, lung and kidney damage etc.

Visit our page on [fire retardants in mattresses](#) for more information.

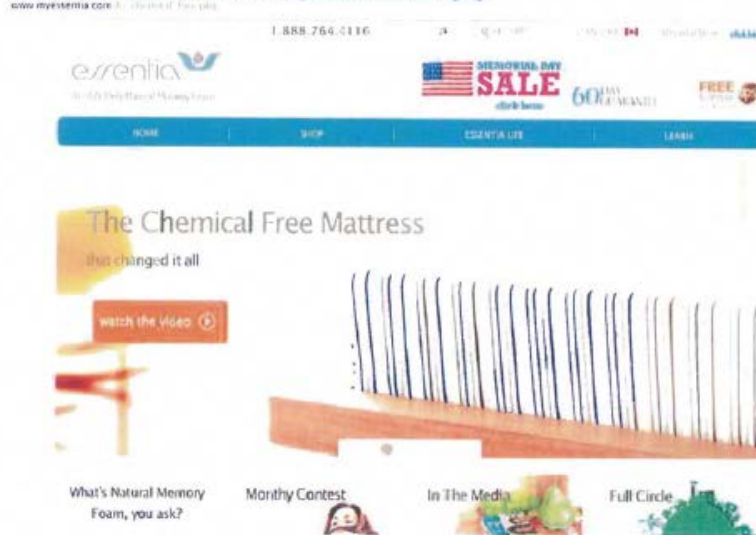
Complaint

**EXHIBIT 4**

<http://www.myessentia.com/lp-non-toxic.php>

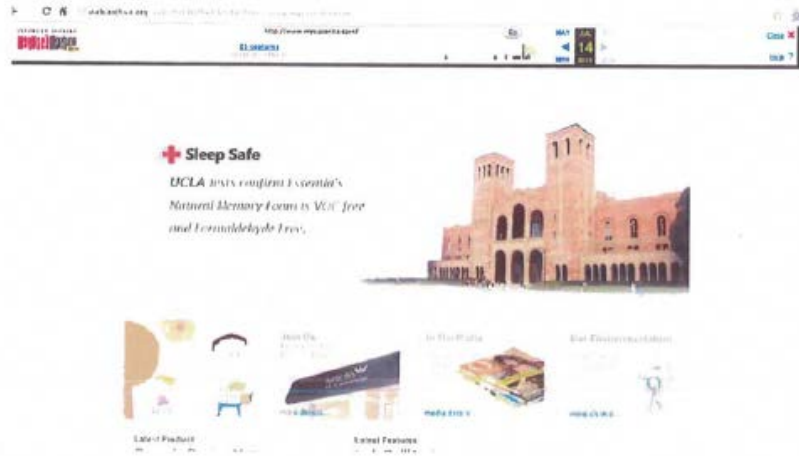


<http://www.myessentia.com/lp-chemical-free.php>



Complaint

EXHIBIT 5



Complaint

EXHIBIT 6

1.888.764.4116 [Home](#) [Shop](#) [Essential Life](#)

**BLACK FRIDAY SALE**  
60% OFF KIDNEY BACK  
FREE SHIPPING

**esentia**  
World's Only Natural Memory Foam

How to Choose a Memory Foam Mattress?

How do you choose a memory foam mattress? Memory foam mattresses are a fast-growing alternative to innerspring mattresses because they have the ability to contour the body and provide excellent comfort and support.

On today's European market, [Jumbofoam mattresses](#) for our best traditional spring mattresses.

**Tips to Choosing a Quality Memory Foam Mattress**

Knowing what to look for is key to finding the best memory foam mattress to fit your needs. Here are a few important things to know before buying a memory foam mattress:

- 1) Foam Density**  
Despite popular belief, foam density has little to do with the feel of a mattress and has more to do with its durability. A 5 pound per cubic foot memory foam mattress will outlast a 3lb. memory foam by an average of 10 years.
- Most high-end mattresses, including Tempur, have a 5-7lb density foam. See our Tempur mattresses.**
- Buyer Beware:** Many mattress companies boast a 5lb memory foam but fail to specify that this dense foam only makes up the 1st inch of the mattress while the following layers are 2 or 3lb density memory foam.

- 2) Weight**  
Weight is the unit of measurement used in determining a mattress' reaction against pressure. A low weight is ideal, however this is difficult to achieve. Good construction becomes an issue in the 300lb range. According to the healthcare industry, a standard of 32mm or lower is considered to be pressure relieving. Low pressure points = less tossing and turning.

Esentia mattresses offer 12-13 mm of 2000lb, the best rating in the industry.

[Home](#) | [Shop](#) | [Essential Life](#)

[How to Choose a Memory Foam Mattress?](#)

**The Basics**

- [What is Natural Memory Foam](#)
- [Mattress Innerspring and Foam](#)
- [About American Foam Beds](#)
- [How to Choose a Memory Mattress](#)
- [What is an organic mattress](#)
- [Versus](#)
- [Dirty Mattresses](#)
- [The Truth](#)
- [Sleep](#)
- [Baby Center](#)
- [F.A.Q.](#)

<http://www.esentia.com/blackfriday/mattress> [11/22/2011 12:43:39 PM]

Complaint

EXHIBIT 6

How to Choose Memory Foam Mattress or Bed Visco Memory?

3) Foam ILD (Indentation Load Deflection)  
A mattress ILD, or indentation load deflection, ranges from 6 to 40. The majority of quality memory foam mattresses on the market rate anywhere between 10 and 15 ILD. Many of the top memory foam mattresses have multiple layers within them, each with a different rating, which enhances a mattress' comfort level because the layers work together.

Multiple layers of memory foam with different ILDs are usually found in the best quality memory foam mattresses.

4) Where is the Mattress Made?

Many mattress companies deceptively claim that their products are made in Canada or the U.S. To cut costs, mattress components are imported from foreign countries and assembled in China or the U.S.

Tests are rarely performed on imported mattress components and there is no way of knowing what chemicals are used in the mattress composition. Any harsh chemical odors are masked prior to product expiration with industrial perfumes, or even green tea extracts.

Some materials and chemicals still in use abroad have been linked to cancer, lung disease and cellular development in the central nervous system and brain.

Essentia Natural Memory Foam vs Regular Visco Memory Foam

Regular memory foam, also known as Visco-elastic memory foam or visco foam, is made with petroleum based chemicals. Because memory foam is a synthetic material, it traps in body heat similar to the way nylon and polyester fabrics do. Heat discomfort and chemical odors are major issues for new memory foam mattresses due to their chemical composition.

Essentia's Natural Memory Foam is 80% more breathable than conventional memory foam and has no chemical odor.

If you're health conscious you'll want to consider our natural memory foam mattresses and pillows. Essentia memory foam is made with 100% natural materials, so the final product creates a more breathable, comfortable, healthy sleep environment free of chemical off-gassing or VOC's. See our [list of mattresses](http://www.essentialmattress.com).

Essentia Mattress Offer

- Among the highest foam densities on the market at 6.25lb.
- Lowest pressure distribution at 12.43 mmHg @ 200lb.
- 80% more breathable than conventional memory foam.
- Peace of mind with an emission-free product.
- A truly Canadian made and manufactured product.

See how [Essentia compares to Tempur-Pedic](http://www.essentialmattress.com).

<http://www.essentialmattress.com/barebackchoosing-a-mattress/> (1/25/2011 1:29:52 PM)

Complaint

EXHIBIT 6

How to Choose a Memory Foam Mattress or Best Visco Mattress?

People who read this article also read:

- List of Chemicals in Mattresses
- How to choose a memory foam mattress
- Spring mattress or memory foam mattress?

---

**Learning Center**

<p><b>Mattresses</b></p> <ul style="list-style-type: none"> <li>Jeanus</li> <li>Classic Slony</li> <li>Classic B</li> <li>Energy Quai</li> <li>Energy Quai</li> <li>Energy Quai</li> <li>Dominate</li> <li>Unity</li> <li>Flex Drive Adjustable</li> </ul>	<p><b>Pillows</b></p> <ul style="list-style-type: none"> <li>Ergonomic</li> <li>Roma Spa</li> <li>Classic</li> </ul>	<p><b>Baby Room</b></p> <ul style="list-style-type: none"> <li>Organic Crib Mattress</li> <li>Crib Mattress Protector</li> </ul>	<p><b>Store Locations</b></p> <ul style="list-style-type: none"> <li>Los Angeles</li> <li>New York</li> <li>Atlanta</li> <li>Phoenix</li> <li>Toronto</li> <li>Victoria</li> <li>Montreal</li> <li>Ottawa</li> </ul>	<p><b>Customer Service</b></p> <ul style="list-style-type: none"> <li>Customer Service Center</li> <li>Free Shipping</li> <li>Feedback</li> <li>Free Mattress Store</li> <li>Contact Us</li> </ul>	<p><b>Company</b></p> <ul style="list-style-type: none"> <li>Message From JACK</li> <li>Evolution/Innovation</li> <li>Locations</li> <li>Press</li> <li>Media</li> <li>Affiliate Program</li> <li>Press</li> <li>Contact Us</li> </ul>
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<http://www.esaveria.com/learn/choosing-a-mattress/> [ 1/28/2011 1:20:53 PM ]

Complaint

EXHIBIT 7

Organic Non-Toxic Mattress - Non-Toxic Latex Foam Mattress - Classic 8

1.888.764.4116

**essentia**  
World's Only Natural Memory Foam

**BLACK FRIDAY SALE**  
promo code: BLACKFRIDAY

**60 DAY MONEY BACK**

**FREE**

HOME | SHOP | ESSENTIA LIFE

Home > Shop > Mattresses > Classic 8

Gallery

20 YEAR WARRANTY 60 DAY MONEY BACK

### Classic 8

The Classic 8 is made with our natural memory foam and offers soothing contouring support and comfort.

#### Buy Online

Twin	Twin XL	Full	<b>Queen</b>	King	Cal King
39x75	39x80	54x75	60x80	76x80	72x84

No Box Spring

No Metal Rails

\$

### Classic 8

The Classic 8 is made with our natural memory foam and offers soothing contouring support and comfort.

Among our best sellers, the Classic 8 is made entirely from our natural memory foam and 100% natural latex rubber. This healthy and non-toxic mattress offers a medium-firm, yet pressure-relieving surface which delicately contours the body.

For added height, the Classic 8 is 2 inches thicker than the Classic Skinny. This added height is simply for aesthetics and functional purposes and provides the same level of comfort.

[Essentia vs Tempur-Pedic comparison.](#)  
[Essentia mattress comparison chart.](#)

Benefits

“I suspected I’d be happy but I never thought a mattress this comfortable existed. It’s my first memory foam mattress and I’m loving it. I sleep like a baby.”

Donna Lalli  
Ensigne Opus Owner  
[@valeriolatti.com](#)

Seen & Heard

<http://www.myessentia.com/product-info.php?id=classic-8.php> [11/28/2011 1:07:36 PM]

Complaint

EXHIBIT 7

**Organic-Touch Mattress - Non Toxic Latex Foam Mattress - Class II**

- Pressure relieving surface layer
- Ventilated formula keeps a fresh comfortable sleep surface
- Dust mite deterrent & hypo allergenic
- VOC Free - Columbia Labs tested.
- Compatible with adjustable bases & platform beds.
- Long lasting, 20 year warranty

[Product Details](#)  
[Layer Details](#)  
[Reviews](#)  
[Review this mattress](#)

**Layers** | Comparison | Sizing

Cover: 100% natural organic cotton

Retainer: Memory Foam on Gerbil Tech Encasement

Top part Layer: 100% natural Dunlop latex

Base: 100% Braided Organic cotton

**Certificates & Memberships**

Oeko-Tex®

YOU FREE

Organized and regulated in Canada

**Class II**

Specifications	Features	Bed & Room	Store Locations	Customer Service	Company
<ul style="list-style-type: none"> <li>Jetted</li> <li>Classic 20 Inch</li> <li>Class II</li> <li>King or Queen</li> <li>No chemical</li> <li>Dormant</li> <li>Light</li> <li>Not Size Adjustable</li> </ul>	<ul style="list-style-type: none"> <li>Organic</li> <li>Formaldehyde</li> <li>Class</li> </ul>	<ul style="list-style-type: none"> <li>Queen - 60" Mattress</li> <li>Old Mattress Protection</li> </ul>	<ul style="list-style-type: none"> <li>Los Angeles</li> <li>New York</li> <li>Seattle</li> <li>Toronto</li> <li>Vancouver</li> <li>Montreal</li> <li>Ottawa</li> </ul>	<ul style="list-style-type: none"> <li>Customer Service Center</li> <li>Free Shipping</li> <li>Free Pick up</li> <li>FAQ's</li> <li>Contact Us</li> </ul>	<ul style="list-style-type: none"> <li>Company</li> <li>Shipping &amp; Return Policy</li> <li>Store &amp; Retail Store</li> <li>Locations</li> <li>Opening an Account Now</li> <li>Warranty Program</li> <li>Reviews</li> <li>Contact Us</li> </ul>

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## 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 a 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 violations of the Federal Trade Commission Act; and

The Respondent, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), which includes: a statement by Respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in the Consent Agreement, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; and waivers and other provisions as required by the Commission’s Rules; and

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

1. Respondent is a Delaware Corporation with its principal office or place of business at 2760 Daniel Johnson, Laval, Quebec, Canada H7P5Z7.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the

## Decision and Order

Respondent, and the proceeding is in the public interest.

**ORDER****DEFINITIONS**

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

1. Unless otherwise specified, “Respondent” shall mean Essentia Natural Memory Foam Company, Inc., also doing business as Essentia, its successors and assigns, and its officers, agents, representatives, and employees.
2. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
3. “Competent and reliable scientific evidence” shall mean tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true.
4. “Covered product” shall mean any mattress or component part.
5. “Trace” level of VOCs or chemicals shall mean:
  - A. VOCs or chemicals have not been intentionally added to the product;
  - B. The presence of VOCs or chemicals at that level does not cause material harm that consumers typically associate with VOCs or chemicals,

## Decision and Order

including, but not limited to, harm to the environment or human health; and

- C. The presence of VOCs or chemicals at that level does not result in concentrations higher than would be found at background levels in the ambient air.
6. “Volatile Organic Compound” (“VOC”) shall mean any compound of carbon that participates in atmospheric photochemical reactions, but excludes carbon monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate, and specific compounds that the EPA has determined are of negligible photochemical reactivity, which are listed at 40 C.F.R. § 51.100(s).

**I.**

**IT IS ORDERED** that Respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, that:

- A. The covered product is VOC-free or free of harmful VOCs, unless the VOC emission level is zero micrograms per meter cubed ( $\mu\text{g}/\text{m}^3$ ), or Respondent possesses and relies upon competent and reliable scientific evidence that the covered product contains no more than a trace level of VOCs; or
- B. The covered product is free of chemicals.

**II.**

**IT IS FURTHER ORDERED** that Respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product in or affecting commerce, shall not make any

## Decision and Order

representation, in any manner, expressly or by implication, regarding:

- A. The VOC level of such product;
- B. The fact that such product is odorless, or the odor or smell of any such product in comparison to another mattress(es) or its component part(s);
- C. Any other environmental benefit or environmental attribute of such product;
- D. Any other health benefit or health attribute related to the VOC or chemical content of such product or exposure to such product;
- E. Whether the product is non-toxic; or
- F. Whether the product is made from natural materials;

unless the representation is true, not misleading, and, at the time it is made, Respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

**III.**

**IT IS FURTHER ORDERED** that Respondent, directly or through any corporation, subsidiary, division, trade name, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any covered product in or affecting commerce, is hereby permanently restrained and enjoined from misrepresenting, in any manner, expressly or by implication, including through the use of any product name or endorsement, the existence, contents, validity, results, conclusions, or interpretations of any test, study, or research.

**IV.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns, shall, for five (5) years after the last date of dissemination of any representation covered by this order,

## Decision and Order

maintain and upon request make available to the Federal Trade Commission for inspection and copying:

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

**V.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities. Respondent shall maintain and upon request make available to the Federal Trade Commission for inspection and copying all acknowledgments of receipt of this order obtained pursuant to this Part.

**VI.**

**IT IS FURTHER ORDERED** that Respondent and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action

## Decision and Order

that would result in the emergence of a successor; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: “Essentia Natural Memory Foam Company, Inc., File No. 122 3130.”

**VII.**

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

**VIII.**

This order will terminate on November 8, 2033, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order’s application to any Respondent that is not named as a defendant in such complaint; and

## Analysis to Aid Public Comment

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

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

By the Commission.

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Essentia Natural Memory Foam Company, Inc., a corporation (“respondent”).

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

This matter involves respondent’s marketing and sale of memory foam mattresses. According to the FTC’s complaint, respondent represented that its mattresses do not contain volatile organic compounds (“VOCs”), are chemical-free, have no VOC off-gassing, lack the odors commonly associated with memory

## Analysis to Aid Public Comment

foam, and are made with 100% natural materials. The complaint alleges that respondent did not possess and rely upon a reasonable basis substantiating these representations when it made them. Moreover, the complaint alleges that respondent claims that tests show that the memory foam used in respondent's mattresses is free of VOCs and Formaldehyde. The complaint alleges that tests do not support these claims. Thus, the complaint alleges that respondent engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act. Thus, the complaint alleges that respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act. The Commission does not typically challenge subjective claims, such as smell.<sup>1</sup> However, a consumer acting reasonably under the circumstances is likely to interpret representations that a memory foam mattress lacks the common smell associated with memory foam to mean that the mattress is free of VOCs.

The proposed consent order contains three provisions designed to prevent respondent from engaging in similar acts and practices in the future. Part I addresses the marketing of VOC-free mattresses. It prohibits respondent from making zero-VOC claims unless the VOC emission level is zero micrograms per meter cubed or the company possesses and relies upon competent and reliable scientific evidence that their mattresses contain no more than a trace level of VOCs based on the Green Guides' guidance on making free-of claims.<sup>2</sup> It also prohibits respondent from making chemical-free claims.

Part II addresses VOC claims, odor-free claims and comparative odor claims, environmental benefit or attribute claims, certain health claims made about mattresses, and natural claims. It prohibits such representations unless the representation is true, not misleading, and substantiated by competent and reliable scientific evidence.

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<sup>1</sup> See FTC, FTC POLICY STATEMENT ON DECEPTION, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984).

<sup>2</sup> See Guides for the Use of Environmental Marketing Claims, 77 Fed. Reg. 62, 122, 62,123 (Oct. 11, 2012).



## Analysis to Aid Public Comment

Part III addresses claims that testing supports respondents' advertising claims for its mattresses. It prohibits any misrepresentations about the existence, contents, validity, results, conclusion, or interpretations of any test, study, or research.

Parts IV through VII require Essentia to: keep copies of advertisements and materials relied upon in disseminating any representation covered by the order; provide copies of the order to certain personnel, agents, and representatives having supervisory responsibilities with respect to the subject matter of the order; notify the Commission of changes in its structure that might affect compliance obligations under the order; and file a compliance report with the Commission and respond to other requests from FTC staff. Part VIII provides that the order will terminate after twenty (20) years, with certain exceptions.

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

## Complaint

## IN THE MATTER OF

**HONEYWELL INTERNATIONAL, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF  
THE CLAYTON ACT*Docket No. C-4418; File No. 131 0070**Complaint, November 22, 2013 – Decision, November 22, 2013*

This consent order addresses the acquisition of Intermec Inc. by Honeywell International Inc. (“Honeywell”). In December 2012, Honeywell entered an agreement to acquire all voting securities for Intermec for approximately \$600 million. The complaint alleges that the acquisition would result in a duopoly in the market for two-dimensional scan engines (“2D scan engines”) in the United States. The consent order requires Honeywell to license all U.S. patents necessary to make 2D scan engines to Datalogic IPTECH s.r.l., a subsidiary of Datalogic S.p.A. (“Datalogic”), for the next 12 years. The consent order further prohibits Honeywell from filing infringement actions against Datalogic, its suppliers and customers. The consent order further bars Honeywell from selling or assigning the patents included in the license to anyone who does not agree to abide by the terms of the order with respect to the acquired patents.

*Participants*

For the *Commission*: Susan Huber, Michael Lovinger, David Morris, Scott Reiter, Anne Schenof, Eric Sprague and Priya Viswanath.

For the *Respondent*: Michael Antalics, Rich Parker, and Haidee Schwartz, O’Melveny & Myers LLP; and Barry Reingold, Perkins Coie LLP.

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Honeywell International Inc. (“Honeywell”), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Intermec, Inc. (“Intermec”), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and

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Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

**I. RESPONDENT**

1. Respondent Honeywell is a corporation organized, existing and doing business under, and by virtue of, the laws of the state of Delaware, with its office and principal place of business located at 101 Columbia Road, Morris Township, New Jersey, 07962. Hand Held Products, Inc. and Metrologic Instruments, Inc. are wholly-owned subsidiaries of Honeywell, doing business as Honeywell Scanning Mobility (“HSM”), with its office and principal place of business located at 9680 Old Bailes Road, Fort Mill, South Carolina, 29707. The HSM business includes the development, manufacture, and sale of two-dimensional scan engines (“2D scan engines”) and devices into which 2D scan engines are incorporated.

2. Intermec is a corporation organized, existing and doing business under, and by virtue of, the laws of the state of Delaware, with its office and principal place of business located at 6001 36th Avenue West, Everett, WA 98203-1265.

3. Respondent Honeywell and Intermec are corporations who, either directly or through owned subsidiaries, are engaged in, among other activities, the design, manufacture, and sale of scan engines, including, but not limited to, 2D scan engines, and devices into which 2D scan engines are incorporated.

4. Respondent Honeywell and Intermec are corporations and at all times relevant herein have, either directly or through their subsidiaries, been engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and are corporations whose business is in, or affects commerce, as “commerce” is defined under Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

## Complaint

**II. THE PROPOSED ACQUISITION**

5. Pursuant to an Agreement and Plan of Merger (“Merger Agreement”) dated December 9, 2012, Honeywell proposes to acquire all of Intermec for approximately \$600 million (“Acquisition”).

**III. THE RELEVANT MARKET**

6. For purposes of this Complaint, the relevant line of commerce in which to analyze the Acquisition is 2D scan engines. 2D scan engines are hardware components that include a two-dimensional (“2D”) image sensor and translate a barcode into a digital format that computer processors can interpret and analyze. 2D scan engines capture the barcode image by taking a digital photograph of it, and then use a proprietary algorithm to decode the image. Products such as retail store scanners, kiosks and rugged mobile handheld computers utilize 2D scan engines to capture and decode digital data.

7. 1D scan engines and scanning functions on smart phones and other consumer devices are not substitutes for 2D scan engines. 2D scan engines can read both one-dimensional (“1D”) and 2D barcodes. 1D scan engines are unable to read most types of 2D images, and are not viable substitutes for 2D scan engines. Due to their different functionality, the price of 2D scan engines is not constrained by the price of 1D scan engines. Scanning functions on smart phones and similar consumer devices are also not substitutes for the functionality of 2D scan engines. Although the scanning functions on some consumer devices can capture 2D barcodes, these scanners do not offer the reading range, field of view, accuracy, or speed of a 2D scan engine. Consequently, they do not constrain the price of 2D scan engines.

8. For purposes of this Complaint, the relevant geographic area in which to analyze the effects of the Acquisition on the 2D scan engine market is the United States. 2D scan engine suppliers who want to sell their scan engines to customers who intend to incorporate the scan engines into products that will be sold into the United States must own or have a license to 2D scan engine intellectual property (“IP”) rights and indemnify customers against the threat of suit. In contrast, customers do not view IP

## Complaint

rights as an impediment from buying from manufacturers other than Honeywell, Intermec and Motorola outside the U.S.

**IV. MARKET STRUCTURE**

9. The market for 2D scan engines in the United States is highly concentrated. Honeywell, Intermec and Motorola are the three most significant participants in the 2D scan engine market in the United States, as measured by the Herfindahl Hirschman Index (“HHI”). Post-Acquisition, the combined share of two firms – Honeywell and Motorola – would be in excess of 80%. Additionally, Honeywell, Intermec and Motorola are the only 2D scan engine firms in the U.S. that have deep and broad portfolios of relevant IP that insulate them and their customers from infringement suits.

10. There are a number of fringe 2D scan engine manufacturers who sell 2D scan engines that are incorporated into products sold in the United States. These fringe competitors in aggregate account for less than 20% of all 2D scan engines sold in the United States. They are constrained from expanding their sales of 2D scan engines into products that will be sold in the United States because they do not possess the relevant IP rights. Without ownership of, or a license to, the relevant IP, the fringe competitors do not act as a significant competitive constraint to Honeywell, Intermec and Motorola for the sale of 2D scan engines for use in products sold in the United States. These same fringe 2D scan engine manufacturers frequently have a greater presence outside of the United States where customers do not view IP rights as an impediment, and they serve as a more significant competitive constraint on Honeywell, Intermec and Motorola there.

**V. EXPANSION AND ENTRY BARRIERS**

11. Entry or expansion into the relevant market is not likely to occur in a timely manner sufficient to counteract the anticompetitive effects of the Acquisition. The most significant barrier to entry and expansion is IP. For example, although 2D scan engine companies other than Honeywell, Intermec and Motorola have the ability to, and do, manufacture 2D scan

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engines, customers who intend to incorporate the scan engines into products for sale into the United States are generally unwilling to purchase from them because they cannot provide customers with indemnification from IP infringement suits. In order to provide indemnification, a 2D scan engine manufacturer must either own a deep portfolio of related patents, or license IP from a holder of those patents.

**VI. EFFECTS OF THE ACQUISITION**

12. The effects of the Acquisition, if consummated, may be to substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Specifically, the Acquisition would increase the likelihood of coordinated interaction among competitors in the relevant market, resulting in increased likelihood that customers in the United States would be forced to pay higher prices and/or accept lower quality and services for 2D scan engines.

**VII. VIOLATIONS CHARGED**

13. The allegations contained in Paragraphs 1 through 12 above are hereby incorporated by reference as though fully set forth here.

14. 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.

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

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

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**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-second day of November, 2013, issues its complaint against said Respondent.

By the Commission.

**DECISION AND ORDER**

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

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondent has violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint, and having accepted the executed Consent Agreement

## Decision and Order

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

1. Respondent Honeywell is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 101 Columbia Road, Morris Township, New Jersey 07962.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

**ORDER****I.**

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

- A. “Respondent” or “Honeywell” means Honeywell International Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Honeywell International Inc. (including LXE LLC, and, after the Effective Date, Intermec) and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. Honeywell includes Hand Held Products Inc. and Metrologic Instruments, Inc., and their respective subsidiaries, doing business as Honeywell Scanning and Mobility and having a place of business at 9680 Old Bailes Road, Fort Mill, South Carolina 29707.
- B. “Intermec” means Intermec, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the state of Delaware, with its



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office and principal place of business at 6001-36th Avenue West, Everett, Washington 98203-1265.

- C. “Datalogic” means Datalogic IPTECH s.r.l., a corporation organized, existing and doing business under and by virtue of the laws of Italy, with its office and principal place of business located at Via San Vitalino, 13, 40012 Lippo de Calderara di Reno, Bologna, Italy, along with its subsidiaries and affiliates.
- D. “Acquisition” means the proposed acquisition of Intermec by Respondent pursuant to an Agreement and Plan of Merger signed on December 9, 2012.
- E. “Acquisition Date” means the date on which the Acquisition is consummated.
- F. “Acquirer” means Datalogic or any other Person approved by the Commission to enter a Remedial Agreement.
- G. “Acquirer Confidential Information” means information not in the public domain related to the Acquirer’s research, development, making, marketing and selling of a Relevant Device.
- H. “Business Day” means any day excluding Saturday, Sunday and any United States federal holiday.
- I. “Contract Manufactured” means to produce goods of another firm’s design for sale by that firm under the firm’s own label or brand.
- J. “Customer of the Acquirer” includes the direct customers of the Acquirer as well as all other customers in the chain of supply from the Acquirer to the end user of the product acquired from the Acquirer.
- K. “Datalogic-Honeywell Agreement” means the Cross-License Agreement dated September 4, 2013 between

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Honeywell Scanning and Mobility and Datalogic, attached hereto as Confidential Exhibit A, and all future amendments, exhibits, attachments, agreements, and schedules thereto that receive the prior approval of the Commission.

- L. “Design Patent(s)” means design patent(s) as provided for in 35 U.S.C. § 171 (2013).
- M. “Divestiture Trustee(s)” means any person or entity appointed by the Commission pursuant to Paragraph IV of the Decision and Order to act as a trustee in this matter.
- N. “Patent” means a patent issued by the United States Patent and Trademark Office (“USPTO”) that claims an invention or priority date on or before the Acquisition Date.
- O. “Relevant Device” means any device for reading barcodes that incorporates a two-dimensional image sensor made, in whole or part, by or for the Acquirer, other than the following devices: non-retail, fixed scanners (including but not limited to industrial automation unattended scanners and logistic over-the-belt scanners).
- P. “Relevant IP” means all Patents other than Design Patents that Honeywell has the right to license (including Patents obtained by Honeywell through the Acquisition) that contain a claim infringed directly or indirectly by a Relevant Device.
- Q. “Remedial Agreement” means
  1. The Datalogic-Honeywell Agreement as approved by the Commission, or
  2. any other agreement between the Respondent and an Acquirer (or a trustee appointed pursuant to Paragraph IV of this Order and an Acquirer) and all amendments, exhibits, attachments, agreements,

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and schedules thereto, related to the Relevant IP that has been approved by the Commission.

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

- A. Not later than ten (10) Business Days after the Acquisition Date, Respondent shall license the Relevant IP to Datalogic and execute and make effective the Datalogic-Honeywell Agreement,

*Provided that*, if, at the time the Commission determines to make this Order final, the Commission notifies Respondent that Datalogic is not an acceptable licensee of the Relevant IP, or the manner in which the Relevant IP was licensed is not acceptable, Respondent shall immediately notify Datalogic and shall as soon as practicable rescind the Datalogic-Honeywell Agreement, and within six (6) months from the date this Order becomes final, absolutely and in good faith, at no minimum price, license the Relevant IP to an Acquirer that receives the prior approval of the Commission and in a manner that receives the prior approval of the Commission.

- B. Respondent shall irrevocably license the Relevant IP to the Acquirer in a manner that receives the approval of the Commission and conforms with the following:
1. the term of the license shall be no less than twelve years;
  2. the license shall include rights to make, have made (for lease, sale, or resale by the Acquirer), lease, sell, offer for sale, import or use any Relevant Device; except that the scope of the license may exclude devices Contract Manufactured by the Acquirer, if such exclusion is agreed to by the Acquirer and approved by the Commission;

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3. the license shall extend to the incorporation and use of Relevant Devices in the products of any Customer of the Acquirer; and
  4. the license shall be fully transferrable and assignable except as explicitly agreed to by the Acquirer and approved by the Commission.
- C. Unless otherwise agreed to by the Acquirer and approved by the Commission, the Remedial Agreement shall require the Respondent to provide technical assistance and facilitate the ability of the Acquirer to hire employees of the Respondent as needed to enable the Acquirer to compete with Respondent in the United States through the manufacturing, marketing and selling of Relevant Devices.
- D. Respondent shall:
1. not join, or file, prosecute or maintain any claim of infringement against the Acquirer, a supplier to the Acquirer, or any Customer of the Acquirer, that is based on alleged infringement by the research, manufacture, sale, offer for sale, importation or use of a Relevant Device, except where the claim of infringement i) is based on an invention conceived after the date the Order is issued; or ii) is based on infringement of a Design Patent; and
  2. include in the Remedial Agreement a covenant not to sue that includes at least the provisions of this Paragraph.
- E. Respondent shall not assign or transfer the Relevant IP, or license Relevant IP under terms that give a licensee rights to sue for infringement, unless the assignee, transferee or licensee agrees in writing to assume the obligations contained in this Paragraph II with respect to such Relevant IP.

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- F. Respondent shall not require or solicit the disclosure of Acquirer Confidential Information through the operation of any Remedial Agreement; shall take all reasonable steps to prevent disclosure of Acquirer Confidential Information through operation of any Remedial Agreement; and shall not use Acquirer Confidential Information disclosed through operation of any Remedial Agreement for any purpose.
- G. The purpose of this Order is to enable the Acquirer to compete with Respondent in the United States through the manufacturing, marketing and selling of Relevant Devices and to remedy the lessening of competition alleged in the Commission's Complaint.

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

- A. The Commission may appoint a monitor or monitors ("Monitor") to assure that Respondent expeditiously complies with all obligations and performs all responsibilities required by the Order, including compliance with the Remedial Agreement. The Commission shall select the Monitor, subject to the consent of Respondent, which consent shall not be unreasonably withheld. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any proposed Monitor, Respondent shall be deemed to have consented to the selection of the proposed Monitor. If the Commission determines that the Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor using the same procedure as that for appointment of the Monitor.
- B. The Monitor shall act in a fiduciary capacity for the benefit of the Commission for such time as is

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necessary to monitor Respondent's compliance with the provisions of the Order and shall submit such compliance reports as are requested by staff of the Commission. The Commission shall require the Monitor to sign a customary confidentiality agreement.

- C. The Monitor shall serve, without bond or other security, at the expense of Respondent, on such reasonable and customary terms and conditions as the Commission approves. The Monitor shall have authority to employ, at the expense of Respondent, such assistants (including but not limited to consultants, accountants, or attorneys) as are reasonably necessary to enable the Monitor to carry out its duties and responsibilities, provided that all such assistants enter into the same customary confidentiality agreements as the Monitor.
- D. Within ten (10) days after appointment of the Monitor, Respondent shall execute an agreement that, subject to the prior approval of the Commission, grants and transfers to the Monitor all rights, powers, and authority necessary to carry out the Monitor's duties and responsibilities. Respondent may require the Monitor to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Monitor from providing any information to the Commission, require the Monitor to provide information to Respondent regarding its communications with the Commission, or provide Respondent with copies of any compliance reports submitted to the Commission.
- E. The Monitor shall have the power and authority to monitor Respondent's compliance with the terms of this Order, including the Remedial Agreement, and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor in a manner consistent with the purposes of this Order and in consultation with the Commission, including, but not limited to assuring that Respondent complies with

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all its obligations and performs all its responsibilities under the Order.

- F. Subject to any demonstrated legally recognized privilege, the Monitor shall have full and complete access to Respondent's personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Monitor may reasonably request, related to Respondent's compliance with its obligations under this Order.
- G. Respondent shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondent's compliance with this Order, including the Remedial Agreement.
- H. Respondent shall indemnify the Monitor and hold the Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel; and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance gross negligence, willful or wanton acts, or bad faith by the Monitor.
- I. The Commission may on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Order.
- J. The Monitor appointed pursuant to this Order may be the same Person appointed as a Divestiture Trustee pursuant to the relevant provisions of this Order.

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

- A. If Respondent has not fully complied with the obligations specified in Paragraph II.A and B of this Order, the Commission may appoint a Divestiture Trustee to license the Relevant IP and enter a Remedial Agreement in a manner that satisfies the requirements of Paragraph II. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondent shall consent to the appointment of a Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondent to comply with this Order.
- B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph IV.A. of this Order, Respondent shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondent, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondent has not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture Trustee within ten (10) days after notice by the staff of the Commission to Respondent of the identity of any



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proposed Divestiture Trustee, Respondent shall be deemed to have consented to the selection of the proposed Divestiture Trustee. The Commission shall require the Divestiture Trustee to sign a customary confidentiality agreement.

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to license the Relevant IP.
3. Within ten (10) days after appointment of the Divestiture Trustee, Respondent shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to license the Relevant IP and enter a Remedial Agreement in a manner that satisfies the requirements of Paragraph II of the Order.
4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph IV.B.3. to accomplish the license, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the Divestiture Trustee has submitted a plan to license or believes that the license can be achieved within a reasonable time, the divestiture 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 divestiture period only two (2) times.
5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities relating to the Relevant IP that are required to be licensed by this Order or to any other relevant information, as the Divestiture Trustee may request. Respondent shall develop

## Decision and Order

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

6. The Divestiture Trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each license that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to license at no minimum price. The license shall be made in the manner and to a Commission-approved 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 license to the acquiring entity selected by Respondent from among those approved by the Commission; provided further, however, that Respondent shall select such entity within five (5) Business Days of receiving notification of the Commission's approval.
7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies

## Decision and Order

derived from the license and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondent, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the licensing of all Relevant IP.

8. Respondent shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
9. If the Divestiture Trustee ceases to act or fails to act diligently, a substitute Divestiture Trustee shall be appointed in the same manner as provided in Paragraph IV.A. of this Order.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the license required by this Order.
11. The Divestiture Trustee shall report in writing to Respondent and the Commission every sixty (60)

## Decision and Order

days concerning the Divestiture Trustee's efforts to accomplish the license.

12. Respondent may require the Divestiture Trustee to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

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

- A. The Remedial Agreement shall be incorporated by reference into this Order and made a part hereof. Further, nothing in the Remedial Agreement shall limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of an Acquirer or to reduce any obligations of Respondent under a Remedial Agreement. Respondent shall comply with the terms of the Remedial Agreement, and a breach by Respondent of any term of the Remedial Agreement shall constitute a violation of this Order. To the extent that any term of the Remedial Agreement conflicts with a term of this Order such that Respondent cannot fully comply with both, Respondent shall comply with the term of this Order.
- B. Respondent shall include in the Remedial Agreement a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of Respondent's obligations to the Acquirer pursuant to this Order.
- C. Between the date the Commission grants approval of the Remedial Agreement and the date the Remedial Agreement becomes effective, Respondent shall not modify or amend any material term of the Remedial Agreement without the prior approval of the Commission. Further, any failure to meet any material

## Decision and Order

condition precedent to closing (whether waived or not) shall constitute a violation of this Order.

- D. During the term of the Remedial Agreement, Respondent shall not modify (materially or otherwise) the Remedial Agreement without the Commission's prior approval pursuant to Rule § 2.41(f), 16 C.F.R. § 2.41(f).

**VI.**

**IT IS FURTHER ORDERED** that:

- A. Respondent shall submit to the Commission a verified written report:
1. within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until Respondent has complied with the obligations of Paragraphs II.A and II.B of this Order; and
  2. on the first anniversary of the date on which the Order becomes final, and annually for nine (9) years, thereafter,

which report shall set forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order and the Remedial Agreement since the filing of any previous compliance report, and shall, inter alia, identify all assignments, transfers and licenses subject to Paragraph II.E and provide information sufficient to demonstrate that such assignments, transfers and licenses comply with Paragraph II.E.

- B. For purposes of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to Respondent made to its principal United States offices, registered office of its United States subsidiary, or its headquarters address,

## Decision and Order

Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

1. access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with this Order, which copying services shall be provided by Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and
2. to interview officers, directors, or employees of Respondent, who may have counsel present, regarding such matters.

**VII.**

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

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

**VIII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on November 22, 2023.

By the Commission.

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“Commission”) has accepted from Honeywell International Inc. (“Honeywell”), subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”). The Consent Agreement, which contains a proposed Decision and Order (“Order”), is designed to remedy the anticompetitive effects resulting from Honeywell’s proposed acquisition of Intermec Inc. (“Intermec”).

Pursuant to an agreement signed on December 9, 2012 (the “Agreement”), Honeywell plans to acquire 100 percent of the voting securities of Intermec for an aggregate purchase price of approximately \$600 million (the “Acquisition”). The proposed Acquisition would result in an effective duopoly in the market for two-dimensional scan engines (“2D scan engines”) in the United States. The Commission’s Complaint alleges that the proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended 15 U.S.C. § 45, by lessening competition in the market for 2D scan engines in the United States.

The Consent Agreement remedies the alleged violation by replacing the lost competition in the 2D scan engine market that would result from the proposed Acquisition. Under the terms of the Consent Agreement, Honeywell will license all of the United States patents necessary to make two-dimensional scan engines (“2D scan engines”) to Datalogic IPTECH s.r.l., a subsidiary of Datalogic S.p.A. (“Datalogic”).

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

## Analysis to Aid Public Comment

**II. The Parties**

Honeywell is a diversified technology and manufacturing company headquartered in Morristown, New Jersey with worldwide operations. Honeywell develops, manufactures and sells 2D scan engines and devices into which 2D scan engines are incorporated through its wholly-owned subsidiaries, Hand Held Products, Inc. and Metrologic Instruments, Inc. d/b/a Honeywell Scanning and Mobility.

Headquartered in Everett, Washington, Intermec is a leading manufacturer and seller of scan engines and other automated identification and data capture equipment including barcode scanners, barcode printers, RFID systems and voice recognition systems.

**III. Scan Engines**

The relevant line of commerce in which to analyze the effects of the proposed Acquisition is 2D scan engines. 2D scan engines have a 2D image sensor that captures an image (such as a barcode) through a digital photograph. The 2D scan engine then translates the image into a digital format that computer processors can interpret and analyze. Products such as retail store scanners, kiosks and rugged mobile handheld computers utilize 2D scan engines to capture and decode digital data.

Customers of 2D scan engines demand compact scanners that can accurately read all types of one-dimensional and 2D images, and that have a good field of view and reading range. 2D scan engines are the only scanning products that meet these specifications. One-dimensional scan engines are unable to read most types of 2D images and are not viable substitutes for 2D scan engines. Scanning functions on smart phones and similar consumer devices do not offer the speed, accuracy, reading range or field of view of 2D scan engines. As a result, customers would likely not switch to alternate scanning products (such as one-dimensional scan engines or smart phones) in response to a five to ten percent increase in the price of 2D scan engines in sufficient numbers to make that price increase unprofitable to a hypothetical monopolist.



## Analysis to Aid Public Comment

The relevant geographic area in which to analyze the effects of the Acquisition on the 2D scan engine market is the United States. 2D scan engine suppliers who want to sell their scan engines to customers who intend to incorporate the scan engines into products that will be sold into the United States must own or have a license to U.S. patents covering 2D scan engine technology and be able to indemnify their customers against the threat of a patent suit.

The market for 2D scan engines in the United States is highly concentrated. Honeywell, Intermec and Motorola are the three most significant participants in the 2D scan engine market in the United States. Post-Acquisition, the combined share of the two firms – Honeywell and Motorola – would be in excess of 80%. Additionally, Honeywell, Intermec and Motorola are the only 2D scan engine firms in the U.S. that have deep and broad portfolios of relevant intellectual property (“IP”) that insulate them and their customers from infringement suits.

There are a number of fringe 2D scan engine manufacturers who sell 2D scan engines to customers outside of the United States, and to a lesser extent, to customers who incorporate the scan engines into products sold in the United States. In aggregate, the fringe competitors’ account for less than 20% of all 2D scan engines sold in the United States. While the fringe competitors are increasingly important competitors to Honeywell, Intermec and Motorola outside of the United States as a result of their growing technical capabilities, they are constrained from expanding their sales of 2D scan engines into products that will be sold in the United States because they do not possess the relevant U.S. IP rights. Without ownership of, or a license to, the relevant IP, the fringe competitors are not a significant competitive constraint to Honeywell, Intermec and Motorola for the sale of 2D scan engines for use in products sold in the United States.

The proposed Acquisition increases the likelihood of coordinated interaction between Honeywell and the major remaining player in the market, Motorola. Industry participants recognize that Honeywell, Intermec and Motorola are the “Big Three” players in the market. As noted above, the fringe 2D scan

## Analysis to Aid Public Comment

engine competitors do not constrain the pricing of the “Big Three.” Accordingly, the proposed Acquisition increases the risk that the two remaining players, Honeywell and Motorola, will compete less aggressively, diminishing the level of competition in the market.

New entry, repositioning or expansion will not be sufficient to deter or counteract the anticompetitive effects of the proposed Acquisition in a timely manner. The most significant barrier to entry and expansion in the United States is IP. For example, although 2D scan engine companies other than Honeywell, Intermec and Motorola have the ability to, and do, manufacture 2D scan engines, customers who incorporate the scan engines into products for sale into the United States are generally unwilling to purchase from them because they cannot provide customers with indemnification from patent infringement suits.

#### **IV. The Consent Agreement**

The Consent Agreement eliminates the competitive concerns raised by Honeywell’s proposed acquisition of Intermec by requiring Honeywell to license Honeywell and Intermec’s U.S. patents covering technology used in 2D scan engines. The Consent Agreement requires Honeywell to license the relevant patents to Datalogic, or another licensee approved by the Commission through a license agreement approved by the Commission.

Datalogic has the industry experience, reputation and resources to replace Intermec as an effective competitor in the U.S. 2D scan engine market. It is headquartered in Bologna, Italy, with its North American design headquarters in Eugene, Oregon. Datalogic is well positioned to replace the competition that will be eliminated as a result of the proposed Acquisition. The company has developed 2D scan engines that it markets outside of the U.S. These 2D scan engines are of similar quality to those offered by Honeywell and Intermec. However, Datalogic does not currently compete against Honeywell and Intermec in the sale of 2D scan engines in the U.S. Datalogic also sells products that incorporate 2D scan engines, such as in-counter checkout scanners and airport kiosk scanners (where it is one of the global leaders), hand held scanners (where it is a top player globally),

## Analysis to Aid Public Comment

and rugged mobile computers (where it is the fourth-largest player globally).

Pursuant to the Consent Agreement, Datalogic (or another approved licensee) would receive a license to all of the Honeywell and Intermec U.S. IP covering technology used in 2D scan engines and related devices (excluding non-retail fixed scanners) necessary to produce and sell 2D scan engines in the U.S. Obtaining the proposed license from Honeywell would enable the approved licensee to sell products without fear of an IP suit and to offer the required indemnification to market 2D scan engines in the U.S. The license extends for twelve years, which is the life of the primary blocking patents owned by Honeywell. In addition to licensing the U.S. patents, the Consent Agreement prohibits Honeywell from filing infringement actions against the approved licensee, its suppliers and customers based on the approved licensee's 2D scan engines or related devices. This provides the approved licensee with global freedom to research, develop, market and sell its 2D scan engines and related devices without fear of infringement suits by Honeywell. The Consent Agreement also prohibits Honeywell from selling or assigning the patents included in the license to anyone who does not agree to abide by the terms of the Order with respect to those acquired patents.

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

## Complaint

## IN THE MATTER OF

**E.K. EKCESSORIES, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4419; File No. 132 3156*  
*Complaint, December 4, 2013 – Decision, December 4, 2013*

This consent order relates to false and misleading marketing, sale, and distribution of outdoor equipment by respondent E.K. Ekcessories, Inc. According to the complaint, E.K. Ekcessories, Inc. represented that all of its products are “Truly Made in the USA,” when, in fact, some of respondent’s products were not made in the United States. The complaint further alleges that respondent lacked a reasonable basis to substantiate its claims. The order bars respondent from making unqualified U.S.-origin claims for its products unless the product is completely or nearly completely made in the United States. The order further bars respondent from making any “Made in the USA” or other country of origin claim about a covered product unless the claim is true, not misleading, and respondent has a reasonable basis substantiating the representation. Respondent is also prohibited from providing third-party retailers with the means to make false claims regarding the origin of respondent’s products. Respondent is also required to notify all retailers of this order and to instruct them to remove deceptive “Made in the USA” claims from respondent’s products and marketing materials.

*Participants*

For the *Commission*: *Julia Ensor and Elisa Jillson.*

For the *Respondent*: *Dickson Burton, TraskBritt.*

**COMPLAINT**

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

1. Respondent E.K. Ekcessories, Inc. (“EK”), is a Utah corporation with its principal office or place of business at 575 West 3200 South, Logan, Utah 84321.

## Complaint

2. Respondent has advertised, labeled, offered for sale, and distributed products to consumers, including, but not limited to, outdoor equipment such as waterproof iPhone accessories, eyewear retainers, bottle holders, lens cleaners, ID and credential holders, dog collars and leashes, and tie-downs and tow straps (“Ekcessories”). Respondent advertises these products on its website, [www.ekusa.com](http://www.ekusa.com), and offers for sale, sells, and distributes them directly to the public throughout the United States.

3. Respondent provides third parties with marketing materials for use in the marketing and sale of Respondent’s Ekcessories.

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

5. Respondent has disseminated or has caused to be disseminated advertisements, packaging, and promotional materials for Ekcessories, including, but not necessarily limited to, the attached Exhibits A through F. These materials contain the following statements:

A. “Truly Made in the USA”;



(Exhibit A, iBob product packaging; Exhibit B, iCat Hang It product packaging; Exhibit C, [www.ekusa.com](http://www.ekusa.com) homepage)

B. “For 28 years E.K. Ekcessories has been producing superior quality made accessories in our 60,000 sq. ft facility in Logan, Utah”;  
(Exhibit C, [www.ekusa.com](http://www.ekusa.com) homepage).

C. “[O]ur source of pride and satisfaction abounds from a true ‘Made in USA’ product.”

## Complaint

(Exhibit D, EK Product Catalogue).

D. “Made in the USA”

(Exhibit D, EK Product Catalogue; Exhibit E, [www.ekusa.com](http://www.ekusa.com) product pages; Exhibit F, “News” section of [www.ekusa.com](http://www.ekusa.com)).

6. In numerous instances, including but not limited to the promotional materials shown in Exhibits A-F, Respondent has represented that its products are made in the USA.

7. In reality, Respondent’s products are not all made in the USA.

**COUNT I (False or Misleading Representation)**

8. Through the means described in Paragraphs 5 and 6, Respondent has represented, expressly or by implication, that each of its products is all or virtually all made in the United States.

9. In truth and in fact, in numerous instances, Respondent’s products were made outside the United States. Therefore, the representation set forth in Paragraph 8 is false or misleading.

**COUNT II (Unsubstantiated Representation)**

10. Through the means described in Paragraphs 5 and 6, in numerous instances, Respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representation set forth in Paragraph 8.

11. In truth and in fact, Respondent did not possess and rely upon a reasonable basis that substantiated the representation set forth in Paragraph 8, at the time the representation was made. Therefore, the representation set forth in Paragraph 10 is false or misleading.

## Decision and Order

**COUNT III (Means and Instrumentalities)**

12. Respondent has distributed the promotional materials described in Paragraphs 5 and 6 to third-party retailers for use in the marketing and sale of Respondent's products. In so doing, Respondent has provided the means and instrumentalities to these third-party retailers for the commission of deceptive acts or practices.

**VIOLATION OF SECTION 5**

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

**THEREFORE**, the Federal Trade Commission, this fourth day of December, 2013, has issued this Complaint against Respondent.

By the Commission.

**DECISION AND ORDER**

The Federal Trade Commission ("Commission"), having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of a 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, its attorney, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order ("Consent Agreement"), which includes: a statement by

## Decision and Order

Respondent that it neither admits nor denies any of the allegations in the draft complaint, except as specifically stated in this Decision and Order, and, only for purposes of this action, admits the facts necessary to establish jurisdiction; 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 E.K. Ekcessories, Inc. is a Utah corporation with its principal office or place of business at 575 West 3200 South, Logan, Utah 84321.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondent, and the proceeding is in the public interest.

**ORDER****DEFINITIONS**

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

1. "Commerce" means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
2. "Covered product" means products offered for sale by Respondent, including, but not limited to, outdoor accessories such as waterproof iPhone accessories, eyewear retainers, bottle holders, lens cleaners, ID and



## Decision and Order

credential holders, dog collars and leashes, and tie-downs and tow straps.

3. “Respondent” means E.K. Ekcessories, Inc., a corporation, and its successors and assigns.

**I.**

**IT IS ORDERED** that Respondent, Respondent’s officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any good or service are permanently restrained and enjoined from representing, expressly or by implication, that a Covered Product is made in the United States, unless the product is all or virtually all made in the United States.

**II.**

**IT IS FURTHER ORDERED** that Respondent, Respondent’s officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any good or service, shall not make any representation, in any manner, expressly or by implication, regarding the country of origin of any Covered Product unless the representation is true, not misleading, and at the time it is made, Respondent possesses and relies upon a reasonable basis for the representation.

**III.**

**IT IS FURTHER ORDERED** that Respondent, Respondent’s officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any good or service, shall not provide to others the means and instrumentalities with which to make any representation prohibited by Part I or II above. For the purposes of this Part,

## Decision and Order

“means and instrumentalities” means any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any covered product.

**IV.**

**IT IS FURTHER ORDERED** that within thirty (30) days after service of this Order, Respondent shall deliver to the Commission a searchable electronic file containing the name and contact information of all distributors who purchased or otherwise received any product from Respondent on or after January 1, 2010 and through May 1, 2013. Such file shall: (1) include each distributor’s name and address, and, if available, the telephone number and email address of each distributor; and (2) be accompanied by a sworn affidavit attesting to its accuracy.

**V.**

**IT IS FURTHER ORDERED** that within thirty (30) days after service of this Order, Respondent shall send by first-class mail, postage paid and return receipt requested, or by courier service such as FedEx with signature proof of delivery, an exact copy of the notice attached as Attachment A, showing the date of mailing, to all distributors identified pursuant to the Part IV of this Order. The notice required by this Part shall include a copy of this Order, but shall not include any other document or enclosures, and shall be sent to the principal place of business of each such distributor.

**VI.**

**IT IS FURTHER ORDERED** that Respondent shall, for five (5) years after the last date of dissemination of any representation covered by this Order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

- A. All advertisements and promotional materials containing the representation;

## Decision and Order

- B. All materials that were relied upon in disseminating the representation;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations;
- D. All signed and dated statements acknowledging receipt of the Order secured pursuant to the Order Acknowledgements provision of this Order; and
- E. Copies of all notification letters, with return receipts or signed proof of delivery if applicable, sent pursuant to Part V of this Order.

**VII.**

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

**VIII.**

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices

## Decision and Order

subject to this Order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which Respondent learns less than thirty (30) days prior to the date such action is to take place, Respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: "In re E.K. Ekcessories, Inc., File No. 1323156."

**IX.**

**IT IS FURTHER ORDERED** that Respondent, within sixty (60) days after the date of service of this Order, shall file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form of its compliance with this Order. Within ten (10) days of receipt of written notice from a representative of the Commission, it shall submit additional true and accurate written reports.

**X.**

This order will terminate on December 4, 2033, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a Complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however,* that the filing of such a Complaint will not affect the duration of:

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

## Decision and Order

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

By the Commission.

## Decision and Order

**ATTACHMENT A**

## IMPORTANT NOTICE ABOUT E.K. EKCESSORIES

## ADVERTISING AND MARKETING

Dear Distributor:

In response to a settlement with the Federal Trade Commission (FTC), E.K. Ekcessories, Inc. (EK) has agreed not to make claims that products are made in the United States unless the referenced product is **all or virtually all made** in the United States. This is because the FTC has alleged that EK marketed certain products as made in the United States, when, in some instances, the products or certain components of those products were made outside the United States. Therefore, EK requests that you immediately stop using existing E.K. Ekcessories marketing materials, if any, that either: (1) describe all EK products, or (2) specifically describe [affected products], as made in the United States, of U.S.-origin, or "Truly Made in the USA." Where applicable, EK will make revised marketing materials available to you shortly.

Furthermore, to the extent that you have EK-packaged products that are part of the **iCat, Dri Cat, Key biner, Card Holder, or Bottle Cat** lines in your possession with U.S.-origin claims on the packaging materials, we have included stickers that you should affix to the product packaging to cover claims that the items are made in the United States. Please find the enclosed instruction sheet, which will provide you with directions as to how to apply the stickers correctly.

Should you have any questions about compliance with this notification, please contact [Randall Anderson or Cort Saxton]. In addition, further information about this settlement can be obtained by visiting [www.ftc.gov](http://www.ftc.gov) and searching for "E.K. Ekcessories."

Sincerely,

Randall Anderson

Chief Operating Officer

E.K. Ekcessories

**EK EKCESSORIES**

575 West 3200 South

Logan, Utah

435-753-8448

Attachment A

Decision and Order

**EXHIBIT A**



Decision and Order

**EXHIBIT A**





Decision and Order

**EXHIBIT B**



Decision and Order

**EXHIBIT B**



Decision and Order

EXHIBIT C

SHOP YOUR FAV. BRANDS

**EK USA** Cart Log In / Sign Up TRULY MADE IN THE USA

**iCAT** **EK USA** **EK USA** **EK USA** **EK USA** **EK USA**

**iCAT** IPHONE, IPOD, IPAD RETAINERS iPhone iPod touch iPad

SHIELDED FIPS 201 CARD HOLDERS, ID BADGE HOLDERS, LANYARDS CREDENTIAL HOLDERS **EK USA**

EYEWEAR RETAINERS 3 WAYS, KEY RETAINERS, BOTTLE HOLDERS, KITT OFF BELTS, CAT CRAP ANTI FOG LENS CLEANER **EK USA**

**iCAT** WATERPROOF IPHONE CASE **DRI CAT**

DOG COLLARS AND LEASHES **EK USA**

TIG DOWNS CRAB HANDLES **EK USA**

GET YOUR NAME ON HERE AND KEEP IT OUT THERE **EK USA**

Top

**EK Excessories Inc.**  
575 West 3200 South

**EKCESSORIES** **ABOUT EK USA**

Good Causes  
About EK  
Private Labeling  
OEM & Licensed Products  
Shipping, Terms & Conditions  
Contact EK  
News

For 28 years E.K. Excessories has been producing superior quality made accessories in our 60,000 sq. ft facility in Logan, Utah. E.K. accessories are distributed in over 40 countries and across 9 industries.

Logan, Utah 84321  
P: 435-753-8448 F: 435-753-2411  
Toll Free: 800-338-2030

**TRULY MADE IN THE USA**

Decision and Order

**EXHIBIT D**

Quality in each EK Ekcessorie is reflected by our people, our expanded production facility, and our ultimate product. Here, there's a working environment that fosters creativity, efficiency, sound manufacturing and marketing principles. Together with great staff and employees, plus a great facility, more than great things happen. Moreover, our source of pride and satisfaction abounds from a true "Made in USA" product.

**1993** EK expands its facility by over 5,000 square ft.

**1994** #1 On-Time delivery recognition by REL.

**1995** Making The Cut Thanks to the Owners Follow. A 1956 Tucker Snow Cat is purchased from Alfa Ski Resort, commemorating and branding EK's 10th anniversary.

Turning heads while writing up orders in our 20' x 30' smoking log cabin trade show booth.

Decision and Order

**EXHIBIT D**



Decision and Order

**EXHIBIT E**

iBob

<http://ekusa.com/ibob>



Cart Log In / Sign Up

Search



**IBOB**



11015P- Additional protection for your device. Attach the iBob to your Dri Cat and keep your device afloat. Retention is loss prevention. Compatible with the iPhone 4/4s/5 and Galaxy S III cases. Case not included. Made in the USA.

11015P- Additional protection for your device. Attach the iBob to your Dri Cat and keep your device afloat. Retention is loss prevention. Compatible with the iPhone 4/4s/5 and Galaxy S III cases. Case not included. Made in the USA.

[Read Less](#)

**\$15.99**



Quantity

**ADD TO CART**

**EKCESSORIES ABOUT EK USA**

Good Causes  
About EK  
Private Labeling  
OEM & Licensed Products  
Shipping, Terms & Conditions  
Contact EK  
News

For 28 years E.K. Ekcessories has been producing superior quality made accessories in our 60,000 sq. ft facility in Logan, Utah. E.K. accessories are distributed in over 40 countries and across 9 industries.

[Top](#)

EK Ekcessories Inc.  
675 West 3200 South  
Logan, Utah 84321  
P: 435-753-8448 F: 435-753-2411  
Toll Free: 800-338-2030

Decision and Order


EXHIBIT E

SHOP YOUR FAV. BRANDS

**EK USA** Cart Log In / Sign Up

ICAT EK EK EK EK EK EK

### ICAT HANG IT- IPHONE 3/4/4S, IPOD AND IPAD



Item #11015C The patent pending iCat Hang It is designed to keep your iPhone, iPod or iPad close at hand while significantly reducing loss. The Hang It offers a secure attachment, connected to 100% nylon braid and carabiner that can easily be attached to belt loops, purses or backpacks. Available in over 20 colors. Made in the USA. Compatible with the iPhone 3,4 and 4S, iPad, iPod classic and 4th generation or any Apple device with the 30 pin connector.

[Read More](#)

**\$24.99**

Color \*


Quantity \*

**Add to Cart**

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**EKCESSORIES ABOUT EK USA**

Good Causes  
About EK  
Private Labeling  
OEM & Licensed Products  
Shipping, Terms & Conditions  
Contact EK  
News

For 28 years E.K. Ekcessories has been producing superior quality made accessories in our 60,000 sq. ft facility in Logan, Utah. E.K. accessories are distributed in over 40 countries and across 9 industries.

**EK Ekcessories Inc.**  
575 West 2200 South  
Logan, Utah 84321  
P. 435-753-9448 F. 435-753-2411  
Toll Free: 800-338-2030

Top ▲

Decision and Order

**EXHIBIT E**



## Decision and Order

## EXHIBIT F

The screenshot shows the EK USA website interface. At the top, there is a navigation bar with the EK USA logo, a search bar, and links for 'Cart', 'Log In / Sign Up', and 'MADE IN THE USA'. Below the navigation bar is a banner for 'SHOP YOUR FAV. BRANDS' featuring logos for iCAT, EK, and other brands. A left sidebar contains a menu with links: 'Good Causes', 'About EK', 'Private Labeling', 'OEM & Licensed Products', 'Shipping, Terms & Conditions', 'Contact EK', and 'News'. The main content area displays a news article titled 'Utah Accessories Maker EK Celebrates 25 Years'.

**News**

**Utah Accessories Maker EK Celebrates 25 Years**

Ed Kalbach wouldn't describe his personality as "intense." Instead, he pauses, and quickly retorts: "No, I'd describe myself as obsessive-compulsive—but in a good way." Thanks to his obsessive focus on product innovation, he's grown EK Accessories into a multi-million dollar operation with some 7,000 SKUs in a half-dozen catalogs.

Today, 25 years after launching his company at Booth #32043, Kalbach employs more than 100 people in Logan, Utah. His 30,000-square-foot factory and makes everything from the ubiquitous Cat Strap to private label tie-down straps for Harley-Davidson and Honda. All Made in the USA.

Kalbach, who admits he skimmed through high school and never went to college, launched EK Accessories and his first product, Cat Flaps, at an SIA show in 1985. Cat Flaps flopped, but his next two products, Cat Crap, a lens anti-fogging film, and Cat Straps, sunglass retainers, caught fire. He's never looked back.

Today, Kalbach sells products into seven separate industries ranging from pet stores to the safety and security industry. Southwest Airline employees sport EK lanyards, the U.S. Army buys his key rings, he makes grab handles and roll-bar accessories for the four-wheel crowd, and then there's his promotional products catalog.

Kalbach, a self-described motor-head, holds more than two dozen patents and when he looks back on his 25 years building the company it was the Cat Strap that put him on the map. And it was simple, he said. He took a piece of climbing cord, stuck some rubber gas-line tubing off a motorcycle engine on both ends, and then jammed sunglass temples into the gas-line. Call it a Cat Strap.

He went to SIA to hawk them and left with a \$60,000 order from some Oakley reps. Not bad for a 21-year-old ski bum living on \$125 a week who had rolled into Utah driving an old Chevy Blazer. Kalbach, however, wanted a bit more cash to live on. He opened a motorcycle repair shop and added a ski exchange. And then he got inventive.

It was the Cat Strap that helped spawn dozens of outdoor accessories. He soon took 3- and 5-millimeter climbing cord and added lanyards, key retainers, wristwatch bands and zipper pulls to his line. And in 1988 he introduced patterned webbing into the outdoor market, and he defies anyone to prove differently.

In 1991 he built a new factory in Logan and later, keeping his eye on developing trends, moved away from the neon craze into earth-tone patterns in rope and webbing—another first, he said.

Over the years, REI named his company number one for on-time delivery; EK was picked as Utah's fastest

## Decision and Order

**EXHIBIT F**

growing company and Kalbach was later named Utah's Small Business Person of the Year. Kiplinger's Personal Finance Magazine put him on its cover in 1998 and EK was picked as an official licensee for the 2002 Salt Lake Winter Olympics. He's received more honors than there's space to list them.

But Kalbach is proud of two things when discussing his company: First, he's most proud of his employees, many of whom have worked with him for years. And he readily admits that it's their work that has helped make the company successful. No one has been laid off in what most now call the Great Recession.

Next, Kalbach makes everything in Logan, Utah. "Some people tell me I can't compete with China, and I go ballistic. China will never kick my butt," he says, as a quick smile spreads across his face.

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**25 Years and Still Growing!**

Logan, UT - January 6, 2010 - Since its founding in 1985 EK Excessories has grown into the world leader in outdoor accessories. From a humble beginning in a small ski shop on Main Street in Logan, Utah where EK owner Ed Kalbach developed his first of countless creations, beginning with the Cat Flap side shield for Cat Eye style sunglasses, that opened the door for the ever popular Cat Strap Eyewear Retainer and Cat Crap Lens Cleaner/Anti Fog that were soon to follow.

Over the years EK Excessories has received numerous awards and supported countless organizations. All of which have contributed to its success as a company.

EK Excessories uses and will continue to use only the highest quality materials to create its outstanding lines of accessories and will continue to make them here in the USA. This is not just any accessories company but, a global leader with quality consumer products in the Outdoor, Pet, Safety Security, Motor Sport, and Ad specialty industries with market presentation in over 40 countries worldwide. EK Excessories has provided thousands of accessories to companies and individuals who seek quality durability and performance.

EK Excessories looks forward to the coming years, continued growth, and is committed to continuing to provide a superior quality accessories line.

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**EK MOTORSPORTS NAMED OFFICIAL LICENSEE OF AMERICAN HONDA MOTOR CO. PRODUCTS**

Logan UT— March 15, 2007. Logan, UT based EK Motorsports, a division of EK Excessories and a leading manufacturer for off-road accessories is now an official licensee for American Honda.

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from E.K. Ekcessories, Inc. (“respondent”).

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

This matter involves respondent’s marketing, sale, and distribution of outdoor equipment with claims that the products are of U.S.-origin. According to the FTC’s complaint, respondent represented that all of its products are “Truly Made in the USA.” In fact, some of respondent’s products are not made in the USA.

The complaint alleges that respondent’s claims that all of its products are “Truly Made in the USA,” made in Logan, Utah, or “Made in the USA” were false and misleading for some products. The complaint also alleges that respondent did not possess and rely upon a reasonable basis to substantiate its claims, and that respondent distributed deceptive promotional materials to third-party retailers for use in the marketing and sale of its products. Accordingly, the complaint alleges that respondent engaged in deceptive acts or practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains provisions designed to prevent respondent from engaging in similar acts and practices in the future. Consistent with the FTC’s Enforcement Policy Statement on U.S. Origin Claims, Part I forbids respondent from making unqualified U.S.-origin claims for its products unless the product is all or virtually all made in the USA.

Part II prohibits respondent from making any “Made in the USA” or other country of origin claim about a covered product

## Analysis to Aid Public Comment

unless the claim is true, not misleading, and respondent has a reasonable basis substantiating the representation.

Part III prohibits respondent from providing third-party retailers with the means and instrumentalities to make the claims prohibited in Parts I and II.

Parts IV and V require respondent to identify its third-party retailers and deliver a letter to them that instructs them to remove deceptive “Made in the USA” claims from respondent’s products or marketing materials.

Parts VI through X are reporting and compliance provisions. Part VI requires respondent to keep and make available to the Commission on request: copies of advertisements, labeling, packaging, and promotional materials containing the representations identified in Part I; materials relied upon in disseminating those representations; evidence that contradicts, qualifies, or calls into question the representations, or the basis relied upon for the representations; all acknowledgments of receipt of the order; and all notification orders sent pursuant to Part V. Part VII requires respondent to disseminate the order to principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of the order. Part VIII requires notification to the FTC of changes in respondent’s corporate status. Part IX requires respondent to submit an initial compliance report to the FTC within sixty (60) days of service and subsequent reports upon request.

Finally, Part X is a “sunset” provision, terminating the order after twenty (20) years, with certain exceptions.

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

## Complaint

## IN THE MATTER OF

**MACNEILL ENGINEERING COMPANY, INC.  
D/B/A CHAMP**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4422; File No. 122 3292**Complaint, December 11, 2013 – Decision, December 11, 2013*

This consent order addresses allegations that respondent MacNeill Engineering Company, Inc., doing business as CHAMP, violated the Federal Trade Commission Act in its marketing, sale, and distribution of plastic golf tees. According to the complaint, CHAMP represented that its plastic golf tee products were biodegradable and, upon disposal, would completely break down and decompose into elements found in nature within a reasonably short time. The complaint alleges these claims were false and misleading and that respondent did not possess any substantiation for its claims. The order bars respondent from representing any of its products or packaging are biodegradable unless (1) the entire item will completely decompose into elements found in nature within one year after disposal; or (2) respondent clearly and prominently states the time to complete decomposition or explains the extent to which the item will decompose. The order further requires respondent to implement scientific protocols that replicates the physical conditions found in a landfill or existing using the method or facility stated in respondent's representations regarding its product's biodegradability.

*Participants*

For the *Commission*: *Korin Felix, Elisa Jillson, and Katherine Johnson.*

For the *Respondent*: *Kerry Timbers, Sunstein Kann Murphy & Timbers, LLP.*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that MacNeill Engineering Company, Inc., also d/b/a CHAMP ("respondent"), has violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

## Complaint

1. Respondent MacNeill Engineering Company, Inc., is a Massachusetts corporation with its principal office or place of business at 140 Locke Drive, Marlborough, MA 01752.

2. Respondent advertises, offers for sale, sells, and distributes athletic gear, including ZARMA FLYTees golf tees (“FLYTees”), to the public throughout the United States. Respondent advertises these goods on its website, www.champspikes.com. Respondent also offers for sale, sells, and distributes these goods through various online and brick-and-mortar retailers throughout the United States. Respondent advertises that FLYTees are biodegradable because of an additive from ECM Biofilms, Inc.

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

4. To induce consumers to purchase FLYTees golf tees, respondent disseminates, has disseminated, or has caused to be disseminated advertisements, including, but not limited to, the attached Exhibits 1-2.

5. In its advertising, including, but not limited to, those shown in Exhibits 1-2, respondent has made the following statements and depictions:

A. Respondent’s Website (Exhibit 1):

i. Combi-Pack Product Page:

“Made with environmentally friendly biodegradable materials . . . .” (Ex. 1, at 1).

ii. Biodegradability Information Page:

## Complaint



“FLYTEes are completely biodegradable!” (Id., at 3).

“The CHAMP FLYTee is from a specially formulated sustainable bio-plastic that enables the material to maintain durability and performance, while still breaking down into CO<sub>2</sub> and water when it is done being used. Our plastic has a market proven bio-agent additive created by ECM Biofilms, Inc. ECM’s technology is a process which enables the microorganisms in the environment to metabolize the molecular structure of plastic products into humus that is beneficial to the environment.” (Id.).

## iii. FLYTEes Sell Sheet:

“The CHAMP FLYTee is made from a specially formulated sustainable bio-plastic that enables the material to maintain durability and performance, while still breaking down into CO<sub>2</sub> and water when it is done being used. Our plastic has a market proven bio-agent additive created by ECM Biofilms, Inc. ECM’s technology is a process which enables the microorganisms in the environment to metabolize the molecular structure of plastic products into humus that is beneficial to the environment.” (Id., at 4).

“Material tested with ECM has been tested and proved as biodegradable and safe for the

## Complaint

environment by using the following: ASTM D5209  
. . . ASTM 5511 . . .  
ISO 14855 / ASTM D5338.” (Id.).

iv. ECM Certificate of Biodegradability of Plastic Products:

“This is to certify that numerous plastic samples, submitted by ECM BioFilms, Inc., have been tested by independent laboratories in accordance with standard test methods . . . . The results of these tests and the related biodegradation and ecological impact experiments are contained in the Ecological Assessment of ECM Plastic report dated February 16, 1999, which certifies that plastic products manufactured with ECM additives can be marketed as biodegradable . . . . This Certificate and the Ecological Assessment of ECM Plastic report, along with Scanning Electron Microscope and other studies that have been conducted since the publication of the Ecological Assessment . . . may be used by [the certificate holder] to validate its [sic] claims to the biodegradability and environmental safety of plastic products that it manufactures . . . .” (Id., at 5).

B. Respondent’s Product Packaging (Exhibit 2):



(Ex. 2, at 1).



### Complaint

6. Approximately 92 percent of total municipal solid waste in the United States is disposed of either in landfills, incinerators, or recycling facilities. These customary disposal methods do not present conditions that would allow FLYTees to completely break down and decompose into elements found in nature within a reasonably short period of time.

7. Consumers likely interpret unqualified degradable claims to mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.

8. The Ecological Assessment of ECM Plastic, American Society for Testing and Materials (“ASTM”) International D5511, Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions (“ASTM D5511”), and other scientific tests relied on by respondent do not assure complete decomposition of FLYTees in a reasonably short period of time or in respondent’s stated timeframes, e.g., nine months to five years, and do not replicate, i.e., simulate, the physical conditions of either landfills, where most trash is disposed, or other disposal facilities stated in the representations.

## **VIOLATIONS OF SECTION 5 OF THE FTC ACT**

### **FALSE OR MISLEADING REPRESENTATIONS**

9. Through the means described in Paragraphs 2, 4, and 5, respondent has represented, expressly or by implication, that:

- A. FLYTees are biodegradable, i.e., will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;
- B. FLYTees are biodegradable as a result of an additive from ECM Biofilms, Inc.; and

## Complaint

- C. FLYTees have been shown to be biodegradable under various scientific tests including, but not limited to, ASTM D5511.

## 10. In truth and in fact:

- A. FLYTees will not completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;
- B. FLYTees will not completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal as a result of respondent's use of an additive from ECM Biofilms, Inc.;
- C. FLYTees have not been shown to completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal under various scientific tests, including, but not limited to, ASTM D5511.

11. Therefore, the representations set forth in Paragraph 9 were, and are, false or misleading.

**UNSUBSTANTIATED REPRESENTATIONS**

12. Through the means described in Paragraphs 2, 4, and 5, in numerous instances respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 9, at the time the representations were made.

13. In truth and in fact, at the time respondent made the representations referred to in Paragraph 9, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in Paragraph 12 is false or misleading.

14. Respondent's practices, as alleged in this complaint, therefore, constitute deceptive acts or practices in or affecting

Complaint

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

**IN WITNESS WHEREOF**, the Federal Trade Commission has issued this complaint against respondent and has caused it to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C. this eleventh day of December, 2013.

By the Commission.

Complaint

EXHIBIT 1

CHAMP | Zarma FLYtee™ Combi-Pak

[Home](#)
Distributors [Retailers](#)

**CHAMP** The World Leader in Sport Cleat Technology®
 NEWS & EVENTS   PRODUCT INFORMATION   WHY CHAMP SPIKES?   WHERE TO BUY

FLYtees™
 
[Golf](#)
[Football](#)
[Soccer](#)
[Track](#)
[Baseball](#)
[Rugby](#)
[Lacrosse](#)
[Cricket](#)

FLYtees™ Industrial

- Zarma FLYtee™ MyHit™ Tee
- Zarma FLYtee™ 3 1/2"
- Zarma FLYtee™ 2 1/2"
- Zarma FLYtee™ 1 1/2"
- Zarma FLYtee™ Combi-Pak
- Zarma FLYtee™ Multi-Color Pack 2 1/2"
- Custom Printed FLYtees
- ZARMA FLYtee™ Biodegradability Information

CHAMP Tee-It-Up™

Wrenches

Divot Tools

Other Accessories

Ball Markers



Zarma FLYtee™ Combi-Pak

CHAMP GOLF ACCESSORIES

White/Orange Combination Pak

Buy Now

- Overview
- Specifications
- Part Numbers

Finally a performance Tee that Performs!

The CHAMP® Zarma FLYtee™ is a new performance tee that will increase your distance and accuracy from tee to green. Made with environmentally friendly biodegradable materials, a durable plastic design and a 5 prong head makes it easier to place the ball on the tee and keep it stable. With its added durability and contoured cup, this tee gives top performance to all golfers, from amateurs to professionals.

Specifications

A combination pack of 15 white 2 1/2" (63mm) length tees and 8 orange 1 1/2" (44mm) length tees. Package contains 23 tees.

Product not available in the US.

> Download Sell Sheet

> Download High Res Product Images

Part Numbers

Pack of 23 Combi-Pak No.82561

White 2 1/2" (15)  
Orange 1 1/2" (8)

Product not Available in the US

Complaint

EXHIBIT 1

CHAMP | ZARMA FLYtee™ Biodegradability Information

Distributors   Retailers   OEM   Contact   1 800 OK CHAMP

**CHAMP** The World Leader in Sport Cleat Technology®

NEWS & EVENTS   PRODUCT INFORMATION   WHY CHAMP SPIKES?   WHERE TO BUY

**Golf**   **Football**   **Baseball**   **Rugby**   **Lacrosse**   **Cricket**

Home   Products   Golf   Golf Accessories   FLYtees™   ZARMA FLYtee™ Biodegradability Information

**Industrial**

**FLYtees™**

- Zarma FLYtee™ MyHite™ Tee
- Zarma FLYtee™ 3 1/2"
- Zarma FLYtee™ 2 3/4"
- Zarma FLYtee™ 1 1/2"
- Zarma FLYtee™ Combi-Pak
- Zarma FLYtee™ Multi-Color Pak 2 3/4"
- Custom Printed FLYtees
- ZARMA FLYtee™ Biodegradability Information

**CHAMP Tee-It-Up™**

- Wrenches
- Divot Tools
- Other Accessories
- Ball Markers




**ZARMA FLYtee™ Biodegradability Information**  
CHAMP GOLF ACCESSORIES

FLYtees are completely biodegradable!

Overview

Specifications

Part Numbers

FLYtees are completely biodegradable!

The CHAMP FLYtee is from a specially formulated sustainable bio-plastic that enables the material to maintain durability and performance, while still breaking down into CO2 and water when it is done being used. Our plastic has a market proven bio-agent additive created by ECM Biotech, Inc. ECM's technology is a process which enables the microorganisms in the environment to metabolize the molecular structure of plastic products into humus that is beneficial to the environment.

Specifications

- Download Sell Sheet
- Download Technical Sheet

Part Numbers

Reduce...Reuse...Recycle

Copyright © 2012 MacNeill Engineering Worldwide, Site by Biosa Design

Press   Site Map   Terms of Use   Product Policies   Privacy Policy   Contact Us

Connect with us:   

Complaint

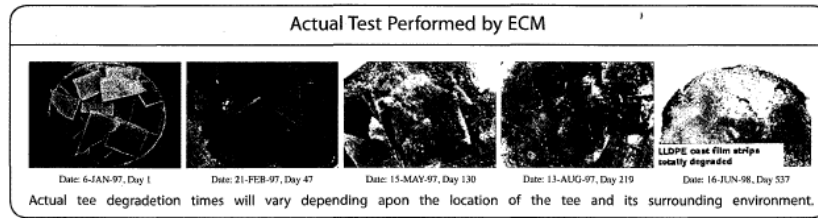
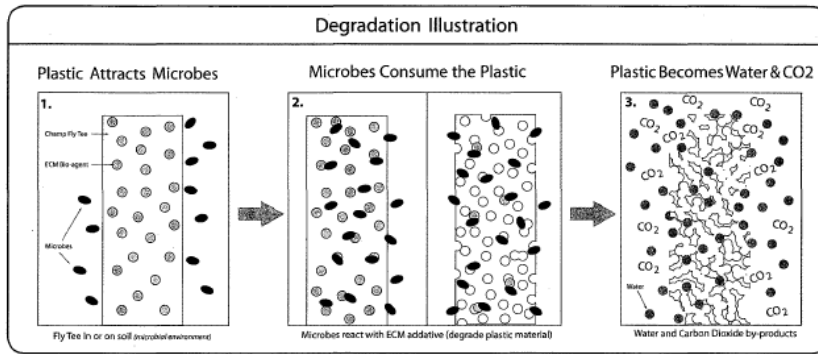
EXHIBIT 1



Sustainable Design .....



The Champ Fly Tee is made from a specially formulated sustainable bio-plastic that enables the material to maintain durability and performance, while still breaking down into CO<sub>2</sub> and Water when it is done being used. Our plastic has a market proven bio-agent additive created by ECM Biofilms, Inc. ECM's technology is a process which enables the microorganisms in the environment to metabolize the molecular structure of plastic products into humus that is beneficial to the environment.



www.ecmbiofilms.com

Material treated with ECM has been tested and proved as biodegradable and safe for the environment by using the following:

ASTM D5209  
\*Standard Test Method for Determining the Aerobic Biodegradation of Plastic Materials in the Presence of Municipal Sewage Sludge\*

ASTM 5511  
\*Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic Digestion Conditions\*

ISO 14855 / ASTM D5338  
\*Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials under Controlled Composting Conditions\*

www.champgolf.com



800.OK.CHAMP

## Complaint

## EXHIBIT 1



Complaint

EXHIBIT 2





## Decision and Order

**DECISION AND ORDER**

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), a statement that respondent neither admits nor denies any of the allegations in the draft complaint except as specifically stated in the consent agreement, an admission by the respondent of facts necessary to establish jurisdiction for purposes of this action, and waivers and other provisions as required by the Commission’s Rules; and

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

1. Respondent MacNeill Engineering Company, Inc. is a Massachusetts corporation with its principal office or place of business at 140 Locke Drive, Marlborough, Massachusetts 01752.
2. The 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:

1. “Clearly and Prominently” means as follows:
  - A. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;
  - B. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read and comprehend it; and

## Decision and Order

- C. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.
2. “Close proximity” means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.
  3. “Commerce” means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
  4. “Competent and reliable scientific evidence” means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true. Specifically:
    - A. For unqualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must assure complete decomposition within one year and replicate, i.e., simulate, the physical conditions found in landfills, where most trash is disposed.
    - B. For qualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must both:
      - i. assure the entire product will (1) completely decompose into elements found in nature in the stated timeframe or, if not qualified by time, within one year; or (2) decompose into

## Decision and Order

elements found in nature at the rate and to the extent stated in the representation; and

- ii. replicate, i.e., simulate, the physical conditions found in the type of disposal facility or method stated in the representation or, if not qualified by disposal facility or method, the conditions found in landfills, where most trash is disposed.

For example, results from ASTM (American Society for Testing and Materials) International D5511-12, Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions, or any prior version thereof, are not competent and reliable scientific evidence supporting unqualified claims, or claims of outcomes beyond the parameters and results of the actual test performed.

5. “Customary disposal” means any disposal method whereby respondent’s products ultimately will be disposed of in a landfill, in an incinerator, or in a recycling facility.
6. “Degradable” includes biodegradable, oxo-biodegradable, oxo-degradable, or photodegradable, or any variation thereof.
7. “Landfill” means a municipal solid waste landfill that receives household waste. “Landfill” does not include landfills that are operated as bioreactors or those that are actively managed to enhance decomposition.
8. Unless otherwise specified, “respondent” means MacNeill Engineering Company, Inc., a corporation, and its successors and assigns.

**I.**

**IT IS ORDERED** that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, or other device, in

## Decision and Order

connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, package, or service, in or affecting commerce, shall not represent, in any manner, directly or indirectly, expressly or by implication:

- A. That any product or package is degradable, unless:
- i. the entire item will completely decompose into elements found in nature within one year after customary disposal; or
  - ii. the representation is clearly and prominently and in close proximity qualified by:
    - a. Either (1) the time to complete decomposition into elements found in nature; or (2) the rate and extent of decomposition into elements found in nature, provided that such qualification must disclose that the stated rate and extent of decomposition does not mean that the product or package will continue to decompose; and
    - b. If the product will not decompose in a customary disposal facility or by a customary method of disposal, both (1) the type of non-customary disposal facility or method and (2) the availability of such disposal facility or method to consumers where the product or package is marketed or sold

and such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

- B. That any such product, package, or service offers any environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be

## Decision and Order

competent and reliable scientific evidence, that substantiates the representation.

**II.**

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

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

**III.**

**IT IS FURTHER ORDERED** that respondent shall deliver a copy of this order to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having decision-making authority relating to the subject matter of this order. Respondent shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* Respondent shall deliver this order to such current personnel within thirty (30) days after the date of service of this order, and to such future personnel within

## Decision and Order

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 that may affect compliance obligations arising under this order, including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. *Provided, however,* that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop M-8102B, Washington, DC 20580. The subject line must begin: “MacNeill Engineering Company, Inc., File No. 1223292.”

**V.**

**IT IS FURTHER ORDERED** that respondent shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not the U.S. Postal Service) to:

## Decision and Order

Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop 8102-B, Washington, DC 20580. The subject line must begin: “MacNeill Engineering Company, Inc., File No. 1223292.”

**VI.**

This order will terminate on December 11, 2033, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

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

By the Commission.



## Analysis to Aid Public Comment

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from CHAMP/MacNeill Engineering Company, Inc., a corporation (“respondent”).

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

This matter involves respondent’s marketing, sale, and distribution of purportedly biodegradable plastic golf tees to the public. According to the FTC complaint, respondent represented that its plastic products are completely biodegradable (i.e., will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal). Respondent further represented that its plastic products are biodegradable in a landfill; are biodegradable in a stated qualified timeframe; and are biodegradable, biodegradable in a landfill, or biodegradable in a stated qualified timeframe as a result of respondent’s use of a plastic additive manufactured by ECM Biofilms, Inc.

The complaint alleges that each of these degradable claims is false and misleading. In addition, the complaint alleges that, although respondent represented (expressly or implicitly) that it could substantiate its degradable claims, respondent did not in fact possess or rely upon a reasonable basis to substantiate these representations of biodegradability. Thus, the complaint alleges that respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

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

## Analysis to Aid Public Comment

representation that a product or package is degradable, unless one of two conditions is met. The first condition is that the entire item will completely decompose into elements found in nature within one year after customary disposal. The second condition is that the representation will be clearly and prominently and in close proximity qualified by either the time to complete decomposition or the rate and extent of decomposition (although this qualification must disclose that the stated rate and extent of decomposition does not mean that the item will continue to decompose). In addition, if the product will not decompose in (or by) a customary disposal facility/method, the representation must be qualified regarding the type of disposal, and the availability of such disposal facility or method to consumers where the item is marketed and sold.

Part I also requires that, at the time of any such representation, respondent must possess and rely upon competent and reliable scientific evidence from a scientific technical protocol (or protocols) that does two things. First, the protocol must assure that the entire product will either completely decompose in one year or the stated timeframe, or that it will decompose at the rate and to the extent stated in the representation. Second, such protocol must replicate (i.e., simulate) the physical conditions found in a landfill or the disposal facility or method stated in the representation. Part I further prohibits respondent from marketing any products, packages, or services as offering any environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence that substantiates the representation.

Parts II through V are reporting and compliance provisions. Part II requires respondent to keep (and make available to the Commission on request): copies of advertisements, labeling, packaging and promotional materials containing the representations identified in Part I; materials relied upon in disseminating those representations; evidence that contradicts, qualifies, or calls into question the representation, or the basis relied upon for the representation, specified in Part I; and all acknowledgments of receipt of the order. Part III requires dissemination of the order now and in the future to subsidiaries, principals, officers, directors, and managers, and to all current and

Analysis to Aid Public Comment

future employees, agents, and representatives having decision-making authority relating to the subject matter of the order. Part IV requires notification to the FTC of changes in corporate status. Part V mandates that respondent 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 aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

Complaint

IN THE MATTER OF

**CARNIE CAP, INC.**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4421; File No. 122 3290**Complaint, December 11, 2013 – Decision, December 11, 2013*

The consent order addresses respondent Carnie Cap, Inc.'s marketing, sale, and distribution of plastic rebar cap covers that prevent accidental impalement at construction sites. Carnie Cap represented that its plastic rebar cap covers are completely biodegradable and would completely break down and decompose into elements found in nature within a reasonably short time. Carnie Cap further represented that its plastic products are biodegradable in a landfill and are biodegradable within a certain timeframe as a result of Carnie Cap's use of Eco-One, a plastic additive. The complaint alleges that all of these claims were false and misleading, in violation of the FTC Act, and that respondent did not possess any substantiation for its claims. The order bars respondent from representing any of its products or packaging are biodegradable unless (1) the entire item will completely decompose into elements found in nature within one year after disposal; or (2) respondent clearly and prominently states the time to complete decomposition or explains the extent to which the item will decompose. The order further requires respondent to implement scientific protocols that replicates the physical conditions found in a landfill or existing using the method or facility stated in respondent's representations regarding its product's biodegradability. Additionally, the order requires respondent to submit an initial compliance report to the Commission and make subsequent reports available to the Commission.

*Participants*

For the *Commission*: *Korin Felix, Elisa Jillson and Katherine Johnson.*

For the *Respondent*: *Not represented by counsel.*

**COMPLAINT**

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

## Complaint

1. Respondent Carnie Cap, Inc., is an Illinois corporation with its registered place of business at 1100 13th Street, Moline, IL 61265.

2. Respondent advertises, offers for sale, sells and distributes rebar impalement protection systems, including the “Carnie Cap System” (“Carnie Caps”) to the public throughout the United States. Respondent advertises these goods through the Internet site [www.carniecap.com](http://www.carniecap.com), and offers for sale, sells, and distributes these goods through various distributors located throughout the United States. Respondent advertises that Carnie Caps are biodegradable because of an additive known as Eco-One.

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

4. To induce consumers to purchase Carnie Caps, respondent disseminates, has disseminated, or has caused to be disseminated advertisements and promotional materials, including, but not limited to, those attached in Exhibits 1-5.

5. In its advertising and promotional materials, including, but not limited to, those shown in Exhibits 1-5, Respondent has made the following statements and depictions:

A. Respondent’s Website (Exhibit 1):

Home Page and Product Information Biodegradability Facts Page:

“Carnie Caps are now 100% Biodegradable

Most of us agree that our planets resources are worth saving. We at Carnie Cap have refined our product to ensure that once disposed of in landfill, they will cause the minimum impact to the environment by fully biodegrading over time to help ensure that we pass on a cleaner planet to future generations.” (Ex. 1, at 1).

B. Respondent’s Print Materials:

## Complaint

## i. Carnie Cap Biodegradability Flyer (Exhibit 2):



(Ex. 2, at 1).

## ii. Eco-One Product Brochure (Exhibit 3):



100% BIODEGRADABLE

(Ex. 3, at 1).

“Eco-One® is an organic additive that renders products manufactured from plastic resins biodegradable in landfills and composting environments. Biodegradation facilitated by Eco-One® has been confirmed using ASTM D5511 which validates methane off-gassing, a critical output of biodegradation in landfills.” (Id.).

## iii. Eco-One Frequently Asked Questions (Exhibit 4):

How long does it take these products to biodegrade in landfills?

This will depend on the amount of Eco-One® in the product, the conditions of the landfill, and the thickness and composition of the product. The average landfill is a very good environment for biodegradation because it is warm, moist, and full of soil micro-organisms and food waste that cause the micro-organisms to eat the plastic. We believe complete biodegradation will take place on average between 9 months to 5 years. (Ex. 4, at 2).

## iv. Eco-One Technical Overview Page (Exhibit 5):

## Complaint



(Ex. 5, at 1).

6. Approximately 92 percent of total municipal solid waste in the United States is disposed of either in landfills, incinerators, or recycling facilities. These disposal methods do not present conditions that would allow respondent's Carnie Caps to completely break down and decompose into elements found in nature within a reasonably short period of time.

7. Consumers likely interpret unqualified degradable claims to mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.

8. American Society for Testing and Materials ("ASTM") International D5511, *Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions* ("ASTM D5511"), and other scientific tests relied on by respondent do not assure complete decomposition of Carnie Caps in a reasonably short period of time or in respondent's stated timeframes, e.g., nine months to five years, and do not replicate, i.e., simulate, the physical conditions of either landfills, where most trash is disposed, or other disposal facilities stated in the representations.

## **VIOLATIONS OF SECTION 5 OF THE FTC ACT**

### **FALSE OR MISLEADING REPRESENTATIONS**

9. Through the means described in Paragraphs 2, 4, and 5, respondent has represented, expressly or by implication, that:

- A. Carnie Caps are biodegradable, i.e., will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;

## Complaint

- B. Carnie Caps are biodegradable in a landfill;
  - C. Carnie Caps are biodegradable in a stated qualified timeframe;
  - D. Carnie Caps are biodegradable, biodegradable in a landfill, or biodegradable in a stated qualified timeframe as a result of an additive known as Eco-One; and
  - E. Carnie Caps have been shown to be biodegradable, biodegradable in a landfill, or biodegradable in a stated qualified timeframe under various scientific tests including, but not limited to, ASTM D5511.
10. In truth and in fact:
- A. Carnie Caps will not completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;
  - B. Carnie Caps will not completely break down and decompose into elements found in nature within a reasonably short period of time after disposal in a landfill;
  - C. Carnie Caps will not completely break down and decompose into elements found in nature within respondent's stated qualified timeframes after customary disposal;
  - D. Carnie Caps will not completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal, after disposal in a landfill, or within respondent's stated qualified timeframe, as a result of respondent's use of an additive known as Eco-One; and
  - E. Carnie Caps have not been shown to completely break down and decompose into elements found in nature



## Complaint

within a reasonably short period of time after customary disposal, after disposal in a landfill, or within respondent's stated qualified timeframe, under various scientific tests, including, but not limited to, ASTM D5511.

11. Therefore, the representations set forth in Paragraph 9 were, and are, false or misleading.

**UNSUBSTANTIATED REPRESENTATIONS**

12. Through the means described in Paragraphs 2, 4, and 5, in numerous instances respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 9, at the time the representations were made.

13. In truth and in fact, at the time respondent made the representations referred to in Paragraph 9, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in Paragraph 12 is false or misleading.

14. Respondent's practices, as alleged in this complaint, therefore constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

**IN WITNESS WHEREOF**, the Federal Trade Commission has issued this complaint against respondent and has caused it to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C. this eleventh day of December, 2013.

By the Commission.

Complaint

**EXHIBIT 1**

Carnie Cap - Protection from Rebar Impalement

**CARNIE CAP**

- HOME
- ABOUT US
- PRODUCT INFORMATION
- PRODUCT CATALOG
- ORDERING INFORMATION
- LINKS
- EVENTS
- CONTACT US

Patent #6282316  
#0272415  
CAL-0904 #C7121-00

### Rebar Safety need not cost our Earth

Carnie Caps are now 100% Biodegradable

Most of us agree that our planet's resources are worth saving. We at Carnie Cap have refined our product to ensure that once disposed of in landfill, they will cause the minimum impact to the environment by fully biodegrading over time to help ensure that we pass on a cleaner planet to future generations.

With many private and municipal clients awarding contracts based not just on price, but also on the green practices and materials that contractors use, isn't it nice that Carnie Cap can now assist you with both?

### Watch how easily they are fitted!

### Call us for more examples

Correctly installed, the Carnie Cap system will withstand a 250-pound weight, dropped from 10ft without the rebar protruding, thus considerably reducing the possibility of impalement.


CARNIE CAP INC. • P.O. Box 38 • East Moline, IL 61234

http://www.carniecap.com/[8/10/2012 9:14:32 AM]

Complaint

**EXHIBIT 2**

**NO MORE CAPPING EVERY REBAR!**  
Guard against impalement and remain OSHA compliant  
with the one & only Carnie Cap™ system.



**BIO  
DEGRADABLE**

**The Cutting EDGE  
in Impalement  
Protection**

**CAL-OSHA APPROVAL #C-1721-AG • National OSHA Compliant**

CARNIE CAP™ is the most effective way to cap exposed rebar and the danger it can create at your job site - worker impalement. When subject to impact, the weight is distributed over the entire protective system. Works with horizontal, vertical and incline applications and is easily assembled by your crew using 2x4 or 2x6 lumber. Weighted by the lumber, these caps rarely fall off or become part of the back fill. Fits rebar sizes 3-9 and 5-19.

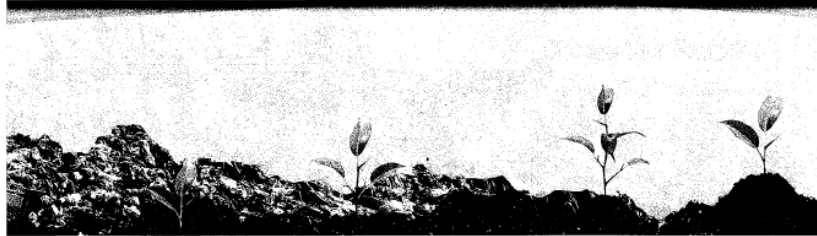
**Patent #5826398 & #6073415**  
Visit our website: [www.carniecap.com](http://www.carniecap.com)  
Phone: 888-743-7725 • FAX: 888-308-3836

Complaint

**EXHIBIT 3**



Product Overview



**A world without plastic – hard to imagine.**

Most companies that make or use plastic products share our environmental concerns about the production and disposal of plastic. Everyone is looking for a solution that maintains the benefits of traditional plastics and yet reduces their company's environmental footprint in a practical and cost-effective way. **We have your solution.**



Eco-One® is an organic additive that renders products manufactured from plastic resins biodegradable in landfills and composting environments. Biodegradation facilitated by Eco-One® has been confirmed using ASTM D5511 which validates methane off-gassing, a critical output of biodegradation in landfills.

A proprietary blend of organic compounds, Eco-One® is melt-compounded into a masterbatch carrier resin and then pelletized.

Finally, there is a cost-effective, easy-to-use solution for brand owners to provide consumers truly biodegradable plastic packaging.



100% BIODEGRADABLE



100% ORGANIC & NON-STARCH BASED



100% RECYCLABLE



ASTM TESTED & VALIDATED



RENEWABLE ENERGY SOURCE  
Methane Off-Gassing for Alternative Energy Use



COMPLIANT with Food Additive Provisions in the Federal Food, Drug, and Cosmetic Act

## Complaint

**EXHIBIT 3**

## Change your footprint, not your process.

It is easy to use and will run under existing processing conditions. The addition of Eco-One® does not change the manufacturing process. Approximately 1% Eco-One® is added into the plastic production process in the same manner as a color concentrate.

Your product, just better.

**SAME PROPERTIES**

Eco-One® becomes part of the polymer matrix. There is no effect to the chemical or physical properties of the plastic. Plastic products have the same tensile strength and identical performance, requiring limited shelf-life testing.

**PERFORMANCE UNCHANGED**

Products will perform just as well in their intended applications and usage conditions. Attributes last until the product is discarded into an active microbial environment.

**BIODEGRADATION**

Through a series of chemical and biological processes in a microbe-rich environment, Eco-One® ultimately breaks down the plastic into inert humus (makes soil richer), methane (can be converted to energy), and carbon dioxide.

*Formed in January 2010, EcoLogic(SM) owns, manufactures and markets Eco-One® brand of additives for plastic products worldwide.*

*Our goal is to drive value for our customers by providing solutions to meet increasing government, industry, and consumer demands for environmental sustainability and biodegradability.*

**eco one®**

Let us help you build a greener future.

For more information contact:

Sachin Shah at 630.869.0492 | [sshah@ecologic-llc.com](mailto:sshah@ecologic-llc.com) or

Galen Killam at 920.558.4903 | [gkillam@ecologic-llc.com](mailto:gkillam@ecologic-llc.com)

Visit us at [www.ecologic-llc.com](http://www.ecologic-llc.com)

Proud members of National Recycling Association, Flexible Packaging Association and Project Network Members of EPA's Methane-to-Markets Program.  
Corporate Headquarters: One Lincoln Centre 18W140 Butterfield Road, STE 1180, Oakbrook Terrace, IL 60181  
[www.ecologic-llc.com](http://www.ecologic-llc.com) 630.869.0490

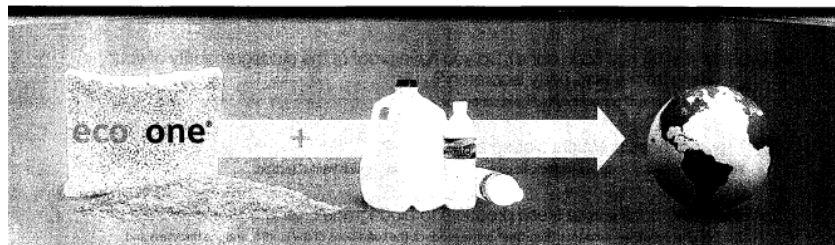


## Complaint

## EXHIBIT 4



Frequently Asked Questions

**1** What does ECOLOGIC<sup>SM</sup> do?

Ecologic owns, manufactures and markets Eco-One® brand of additives for plastic products worldwide. Eco-One® is an organic additive which renders traditional plastic biodegradable in landfills and composting environments.

**2** Are these products the same as starch or sugar based plastics (examples: PLA, PHA, PHB, etc.)?

No. Eco-One® based plastics are not similar to corn or sugar based plastics in their properties, how they function or how they biodegrade.

**3** Is the plastic with Eco-One® the same as oxo-biodegradable plastic?

No. Oxo-biodegradable plastics require oxygen and UV light or heat to biodegrade and thus will not biodegrade in landfills. Products using Eco-One® do not require either UV light or oxygen to biodegrade and will biodegrade at any depth in landfills.

**4** Are these products recyclable?

Yes. Products using our Eco-One® additive are 100% recyclable. There is no change in intrinsic viscosity of the plastic after adding Eco-One®.

**5** Is your organic additive FDA compliant?

Yes. Our additive is FDA compliant for contact with food in polystyrene (PS), polyolefin (all polyethylenes and polypropylenes) and polyethylene terephthalate (PET) applications. It has 3rd party verification by Keller and Heckman LLP.

**6** Does Eco-One® and/or products made with Eco-One® have a limited shelf life?

No. Unlike both PLA and Oxo products, Eco-One® has a very long shelf life and products made with Eco-One® have the same shelf life as they would have had without Eco-One®.

## Complaint

**EXHIBIT 4**

- 7.** Does Eco-One® have any special storage requirements?  
No. Unlike Oxo or PLA, Eco-One® does not have special storage requirements.
- 8.** What testing has been done? Do you have proof of the biodegradability of your products from a third party laboratory?  
Yes. We can furnish all testing results. Please contact us.
- 9.** How do these products biodegrade?  
For details, please go to [www.ecologic-llc.com](http://www.ecologic-llc.com) and check-out our "How It Works" section.
- 10.** How long does it take these products to biodegrade in landfills?  
This will depend on the amount of Eco-One® in the product, the conditions of the landfill, and the thickness and composition of the product. The average landfill is a very good environment for biodegradation because it is warm, moist, and full of soil micro-organisms and food waste that cause the micro-organisms to eat the plastic. We believe complete biodegradation will take place on average between 9 months to 5 years.
- 11.** Are any of the ingredients in the additive harmful to people or to the environment?  
No. Our additive is 100% organic and is in compliance with FDA standards for contact with food.
- 12.** Will active microbes in food (meat, cheese, etc.) or lawn care products start the biodegradation process in normal storage conditions such as a warehouse or store shelf?  
No. Eco-One® attracts oleophilic bacteria (oil eating bacteria) that are present in landfills. The active microbes in food or dairy products or lawn care products are not oleophilic and not the "super" colony of microbes you find in landfills, composting sites, or waste water sludge plants.

Let us help you build a greener future.

For more information contact:

Sachin Shah at 630.869.0492 | [sshah@ecologic-llc.com](mailto:sshah@ecologic-llc.com) or

Galen Killam at 920.558.4903 | [gkillam@ecologic-llc.com](mailto:gkillam@ecologic-llc.com)

Visit us at [www.ecologic-llc.com](http://www.ecologic-llc.com)

eco one®

Proud members of National Recycling Association, Flexible Packaging Association and Project Network Members of EPA's Methane-to-Markets Program.  
Corporate Headquarters: One Lincoln Centre 18W140 Butterfield Road, STE 1180, Oakbrook Terrace, IL 60181  
[www.ecologic-llc.com](http://www.ecologic-llc.com) 833.558.0460

ECO LOGIC

Complaint

**EXHIBIT 5**



Technical Overview



The Mechanism of Biodegradation using Eco-One®

Plastics (or polymers) are made of long molecular chains of organic molecules called monomers. Polymers do not exist naturally and most are designed to be incredibly stable – as a result they do not easily biodegrade and will last in the environment for centuries and possibly forever. They are air-tight and water-tight.

Eco-One® is an organic additive that causes plastic to biodegrade through a series of chemical and biological processes when disposed of in a microbe-rich environment such as a landfill or composting site. It allows the plastic to be consumed (as a food and energy source) by the microbes.

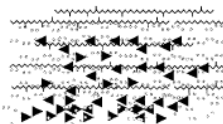
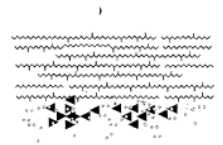
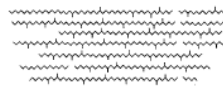
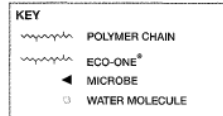
1. FORMATION OF BIOFILM

Eco-One®, acting like a surface-active agent, renders the hydrophobic base resin much more hydrophilic in the presence of microbes. This facilitates a rapid formation of a moisture-borne and microbe-rich biofilm on the surface of the plastic.

Enzymes secreted by microbes activate the hygroscopic properties of Eco-One®, This allows moisture to be retained thus facilitating an intimate adhesion of the biofilm to the plastic.

2. EXPANSION OF THE POLYMER MATRIX

Aggressive accumulation of water expands the plastic matrix and gives the microbes access to the entire polymer matrix. The most likely points of attack on hydrocarbon polymers are at or near the chain ends.



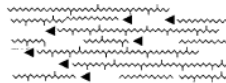


Complaint

**EXHIBIT 5**

**3. INITIAL BREAKDOWN OF POLYMER CHAINS**

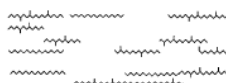
The microbes break down the larger "synthetic" polymer chains into simpler "organic" monomers thus allowing for the consumption of the entire polymer matrix. In the process, they secrete certain signaling molecules that other microbes can detect. This signaling process, called quorum sensing, is an invitation to others to come join the feast.



Volatile organic fatty acids, hydrogen, and carbon dioxide are formed in the initial stages.

**4. BREAKDOWN CONTINUES**

Different types of microbes join the feast. Each one uses different elements of the polymer and/or various by-products of the intermediate biological reactions as a food source, breaking down the complex polymer chains.



Certain enzymes (from microbes) begin reducing the complex polymer branching while others look for bulkier chains similar to fatty acids.

A syntrophic environment containing diverse species of microbes is established to complete the complex chemical steps of biodegradation. Throughout this process, microbes continue to multiply through quorum sensing.

**5. FINAL STAGES OF BREAKDOWN**

The molecular weight reduction has occurred on chains of all lengths in the original plastic material matrix. During the biodegradation process the molecular weight of the plastic material is reduced and the molecular weight distribution is broadened.



As individual polymer chains completely biodegrade, biomass (humus), and biogases (methane and carbon dioxide) are left behind. The carbon dioxide produced in the intermediate steps is being consumed in each subsequent step; therefore, not much is left at the end. The methane can then be captured for energy use.



Let us help you build a greener future.

For more information contact:  
 Sachin Shah at 630.869.0492 | sshah@ecologic-llc.com or  
 Galen Killam at 920.558.4903 | gkillam@ecologic-llc.com  
 Visit us at [www.ecologic-llc.com](http://www.ecologic-llc.com)



Proud members of National Recycling Association, Flexible Packaging Association and Project Network Members of EPA's Methane-to-Markets Program.  
 Corporate Headquarters: One Lincoln Centre 18W140 Butterfield Road, STE 1180, Oakbrook Terrace, IL 60181  
[www.ecologic-llc.com](http://www.ecologic-llc.com) 630.859.0490



## Decision and Order

**DECISION AND ORDER**

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

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), a statement that respondent neither admits nor denies any of the allegations in the draft complaint except as specifically stated in the consent agreement, an admission by the respondent of facts necessary to establish jurisdiction for purposes of this action, and waivers and other provisions as required by the Commission’s Rules; and

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

- 1 Respondent Carnie Cap, Inc. is an Illinois corporation with its registered place of business at 1100 13th Street, Moline, Illinois 61265.
2. The 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:

- 1 “Clearly and Prominently” means as follows:
  - A. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;
  - B. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read and comprehend it; and

## Decision and Order

- C. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.
- 2 “Close proximity” means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.
- 3 “Commerce” means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- 4 “Competent and reliable scientific evidence” means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true. Specifically:
- A. For unqualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must assure complete decomposition within one year and replicate, i.e., simulate, the physical conditions found in landfills, where most trash is disposed.
- B. For qualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must both:
- i. assure the entire product will (1) completely decompose into elements found in nature in the stated timeframe or, if not qualified by time, within one year; or (2) decompose into

## Decision and Order

elements found in nature at the rate and to the extent stated in the representation; and

- ii. replicate, i.e., simulate, the physical conditions found in the type of disposal facility or method stated in the representation or, if not qualified by disposal facility or method, the conditions found in landfills, where most trash is disposed.

For example, results from ASTM (American Society for Testing and Materials) International D5511-12, Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions, or any prior version thereof, are not competent and reliable scientific evidence supporting unqualified claims, or claims of outcomes beyond the parameters and results of the actual test performed.

- 5 “Customary disposal” means any disposal method whereby respondent’s products ultimately will be disposed of in a landfill, in an incinerator, or in a recycling facility.
- 6 “Degradable” includes biodegradable, oxo-biodegradable, oxo-degradable, or photodegradable, or any variation thereof.
- 7 “Landfill” means a municipal solid waste landfill that receives household waste. “Landfill” does not include landfills that are operated as bioreactors or those that are actively managed to enhance decomposition.
- 8 Unless otherwise specified, “respondent” means Carnie Cap, Inc., a corporation, and its successors and assigns.

**I.**

**IT IS ORDERED** that respondent, and its officers, agents, representatives, and employees, directly or through any

## Decision and Order

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

- A. That any product or package is degradable, unless:
  - i. the entire item will completely decompose into elements found in nature within one year after customary disposal; or
  - ii. the representation is clearly and prominently and in close proximity qualified by:
    - a. Either (1) the time to complete decomposition into elements found in nature; or (2) the rate and extent of decomposition into elements found in nature, provided that such qualification must disclose that the stated rate and extent of decomposition does not mean that the product or package will continue to decompose; and
    - b. If the product will not decompose in a customary disposal facility or by a customary method of disposal, both (1) the type of non-customary disposal facility or method and (2) the availability of such disposal facility or method to consumers where the product or package is marketed or sold

and such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

- B. That any such product, package, or service offers any environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be

## Decision and Order

competent and reliable scientific evidence, that substantiates the representation.

**II.**

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

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

**III.**

**IT IS FURTHER ORDERED** that respondent shall deliver a copy of this order to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* Respondent shall deliver this order to current personnel within thirty (30) days after the date of service

## Decision and Order

of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

**IV.**

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

Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop M-8102B, Washington, DC 20580. The subject line must begin: "Carnie Cap, Inc., File No. 1223290."

**V.**

**IT IS FURTHER ORDERED** that respondent shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer



## Decision and Order

Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop 8102-B, Washington, DC 20580. The subject line must begin: “Carnie Cap, Inc., File No. 1223290.”

**VI.**

This order will terminate on December 11, 2033, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

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

By the Commission.

Analysis to Aid Public Comment

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

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

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

This matter involves respondent’s marketing, sale, and distribution of purportedly biodegradable plastic rebar cap covers that prevent accidental impalement at construction sites. According to the FTC complaint, respondent represented that its plastic products are completely biodegradable (i.e., will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal). Respondent further represented that its plastic products are biodegradable in a landfill; are biodegradable in a stated qualified timeframe; and are biodegradable, biodegradable in a landfill, or biodegradable in a stated qualified timeframe as a result of respondent’s use of Eco-One, a plastic additive manufactured by EcoLogic Solutions, LLC.

The complaint alleges that each of these degradable claims is false and misleading. In addition, the complaint alleges that, although respondent represented (expressly or implicitly) that it could substantiate its degradable claims, respondent did not in fact possess or rely upon a reasonable basis to substantiate these representations of biodegradability. Thus, the complaint alleges that respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

The proposed consent order contains a provision designed to prevent respondent from engaging in similar acts and practices in

## Analysis to Aid Public Comment

the future. Part I prohibits respondent from making any representation that a product or package is degradable, unless one of two conditions is met. The first condition is that the entire item will completely decompose into elements found in nature within one year after customary disposal. The second condition is that the representation will be clearly and prominently and in close proximity qualified by either the time to complete decomposition or the rate and extent of decomposition (although this qualification must disclose that the stated rate and extent of decomposition does not mean that the item will continue to decompose). In addition, if the product will not decompose in (or by) a customary disposal facility/method, the representation must be qualified regarding the type of disposal, and the availability of such disposal facility or method to consumers where the item is marketed and sold.

Part I also requires that, at the time of any such representation, respondent must possess and rely upon competent and reliable scientific evidence from a scientific technical protocol (or protocols) that does two things. First, the protocol must assure that the entire product will either completely decompose in one year or the stated timeframe, or that it will decompose at the rate and to the extent stated in the representation. Second, such protocol must replicate (i.e., simulate) the physical conditions found in a landfill or the disposal facility or method stated in the representation. Part I further prohibits respondent from marketing any products, packages, or services as offering any environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence that substantiates the representation.

Parts II through V are reporting and compliance provisions. Part II requires respondent to keep (and make available to the Commission on request): copies of advertisements, labeling, packaging and promotional materials containing the representations identified in Part I; materials relied upon in disseminating those representations; evidence that contradicts, qualifies, or calls into question the representation, or the basis relied upon for the representation, specified in Part I; and all acknowledgments of receipt of the order. Part III requires

## Analysis to Aid Public Comment

dissemination of the order now and in the future to subsidiaries, principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having supervisory responsibilities relating to the subject matter of the order. Part IV requires notification to the FTC of changes in corporate status. Part V mandates that respondent 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 aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

## Complaint

## IN THE MATTER OF

**CLEAR CHOICE HOUSEWARES, INC. D/B/A  
FARBERWARE® ECOFRESH**CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

*Docket No. C-4420; File No. 122 3288  
Complaint, December 11, 2013 – Decision, December 11, 2013*

This consent order addresses allegations that Clear Choice Housewares, Inc., doing business as Farberware EcoFresh, made false and misleading claims concerning the biodegradability of its reusable plastic food storage containers. According to the complaint, respondent represented that its plastic products were completely biodegradable and would completely break down and decompose into elements found in nature within a reasonably short time period after customary disposal. The complaint alleges that each of its degradable claims were false and misleading and that respondent did not possess any substantiation for its claims. The order bars respondent from representing any of its products or packaging are biodegradable unless (1) the entire item will completely decompose into elements found in nature within one year after disposal; or (2) respondent clearly and prominently states the time to complete decomposition or explains the extent to which the item will decompose. The order further requires respondent to implement scientific protocols that replicates the physical conditions found in a landfill or existing using the method or facility stated in respondent's representations regarding its product's biodegradability. Additionally, the order requires respondent to submit an initial compliance report to the Commission and make subsequent reports available to the Commission.

*Participants*

For the *Commission*: *Korin Felix, Elisa Jillson, and Katherine Johnson.*

For the *Respondent*: *Not represented by counsel.*

**COMPLAINT**

The Federal Trade Commission, having reason to believe that Clear Choice Housewares, Inc., also d/b/a FARBERWARE® EcoFresh ("respondent"), has violated provisions of the Federal Trade Commission Act, and it appearing to the Commission that this proceeding is in the public interest, alleges:

## Complaint

1. Respondent Clear Choice Housewares, Inc., also d/b/a FARBERWARE® EcoFresh, is a Massachusetts corporation with its registered place of business at 163 Pioneer Drive Suite 201, Leominster, MA 01453.

2. Respondent advertises, offers for sale, sells and distributes food storage containers, including “FARBERWARE® EcoFresh Containers,” to the public throughout the United States. Respondent advertises these goods through the Internet site [www.farberwarefoodstorage.com](http://www.farberwarefoodstorage.com). Respondent also offers for sale, sells, and distributes these goods through various online and brick-and-mortar retail locations throughout the United States. Respondent advertises that FARBERWARE® EcoFresh Containers are biodegradable because of an additive known as EcoPure.

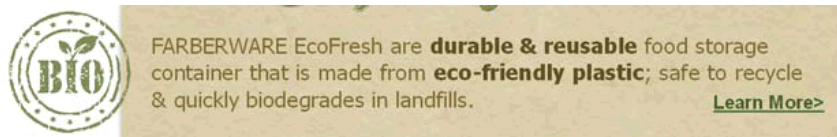
3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act.

4. To induce consumers to purchase FARBERWARE® EcoFresh Containers, respondent disseminates, has disseminated, or has caused to be disseminated advertisements and promotional materials, including, but not limited to, those attached in Exhibit 1.

5. In its advertising and promotional materials, including, but not limited to, those shown in Exhibit 1, respondent has made the following statements and depictions:

## Respondent’s Website (Exhibit 1):

## i. Homepage:



(Ex. 1, at 1).

## ii. FAQs Page:

## Complaint

“What makes your products biodegrade? EcoPure, a patented blend of organic ingredients, is the catalyst that promotes microbial activity to devour and biodegrade the plastic.” (Id., at 2).

## iii. EcoPure® Page:

1. “FARBERWARE® EcoFresh has the exclusive rights to a revolutionary biodegradable additive, EcoPure, making our containers the first ever biodegradable, recyclable & reusable food storage container system in the world.” (Id., at 3).

2. “EcoPure® is a second generation additive, which once added to a resin type during the manufacturing process, renders plastics biodegradable.” (Id.).

3. “Various ASTM (American Society for Testing and Materials) testing methods have proven that EcoPure is biodegradable, including the ASTM D5511-02, which confirms that products will biodegrade when placed into an aerobic or anaerobic environment, such as a landfill.” (Ex. 1, at 3).

4. “EcoPure only begins biodegrading once it is in a landfill environment, and takes approximately 2-10 years to fully biodegrade, depending on gram weight and microbial enrichment in the landfill. Tests have shown that as little as 1% (by gram weight) of EcoPure is needed to make a product biodegradable.” (Id.).

## iv. Products Pages:

Each FARBERWARE® EcoFresh Container is described as “biodegradable.” (Id., at 4-8).

6. Approximately 92 percent of total municipal solid waste in the United States is disposed of either in landfills, incinerators, or recycling facilities. These disposal methods do not present conditions that would allow respondent’s FARBERWARE®

## Complaint

EcoFresh Containers to completely break down and decompose into elements found in nature within a reasonably short period of time.

7. Consumers likely interpret unqualified degradable claims to mean that the entire product or package will completely decompose into elements found in nature within a reasonably short period of time after customary disposal.

8. American Society for Testing and Materials (“ASTM”) International D5511, Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions (“ASTM D5511”), and other scientific tests relied on by respondent do not assure complete decomposition of FARBERWARE® EcoFresh Containers in a reasonably short period of time or in respondent’s stated timeframes, e.g., 2-10 years, and do not replicate, i.e., simulate, the physical conditions of either landfills, where most trash is disposed, or other disposal facilities stated in the representations.

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

9. Through the means described in Paragraphs 2, 4, and 5, respondent has represented, expressly or by implication, that:

- A. FARBERWARE® EcoFresh Containers are biodegradable, i.e., will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;
- B. FARBERWARE® EcoFresh Containers are biodegradable in a landfill;
- C. FARBERWARE® EcoFresh Containers are biodegradable in a stated qualified timeframe;
- D. FARBERWARE® EcoFresh Containers are biodegradable, biodegradable in a landfill, or



## Complaint

biodegradable in a stated qualified timeframe as a result of an additive known as EcoPure; and

- E. FARBERWARE® EcoFresh Containers have been shown to be biodegradable, biodegradable in a landfill, or biodegradable in a stated qualified timeframe under various scientific tests including, but not limited to, ASTM D5511.

## 10. In truth and in fact:

- A. FARBERWARE® EcoFresh Containers will not completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal;
- B. FARBERWARE® EcoFresh Containers will not completely break down and decompose into elements found in nature within a reasonably short period of time after disposal in a landfill;
- C. FARBERWARE® EcoFresh Containers will not completely break down and decompose into elements found in nature within respondent's stated qualified timeframes after customary disposal;
- D. FARBERWARE® EcoFresh Containers will not completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal, after disposal in a landfill, or within respondent's stated qualified timeframe as a result of respondent's use of an additive known as EcoPure; and
- E. FARBERWARE® EcoFresh Containers have not been shown to completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal, after disposal in a landfill, or within respondent's stated qualified timeframe, under various scientific tests, including, but not limited to, ASTM D5511.

## Complaint

11. Therefore, the representations set forth in Paragraph 9 were, and are, false or misleading.

**UNSUBSTANTIATED REPRESENTATIONS**

12. Through the means described in Paragraphs 2, 4, and 5, in numerous instances respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in Paragraph 9, at the time the representations were made.

13. In truth and in fact, at the time respondent made the representations referred to in Paragraph 9, respondent did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in Paragraph 12 is false or misleading.

14. Respondent's practices, as alleged in this complaint, therefore, constitute deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

**IN WITNESS WHEREOF**, the Federal Trade Commission has issued this complaint against respondent and has caused it to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C. this eleventh day of December, 2013.

By the Commission.

Complaint

EXHIBIT 1

CHAMP | Zarma FLYtee™ Combi-Pak

[Home](#)
[Distributors](#) [Retailers](#)

**CHAMP** The World Leader in Sport Cleat Technology®
 
[NEWS & EVENTS](#)
[PRODUCT INFORMATION](#)
[WHY CHAMP SPIKES?](#)
[WHERE TO BUY](#)

[FLYtees™](#)

[Golf](#)
[Football](#)
[Soccer](#)
[Track](#)
[Baseball](#)
[Rugby](#)
[Lacrosse](#)
[Cricket](#)

[Zarma FLYtee™ Multi-Pack 2 1/2"](#)

- FLYtees™ **Industrial**
- Zarma FLYtee™ MySite™ Tee
  - Zarma FLYtee™ 3 1/2"
  - Zarma FLYtee™ 2 1/2"
  - Zarma FLYtee™ 1 1/2"
  - Zarma FLYtee™ Combi-Pak
  - Zarma FLYtee™ Multi-Color Pack 2 1/2"
  - Custom Printed FLYtees
  - ZARMA FLYtee™ Biodegradability Information
- [CHAMP Tee-It-Up™](#)  
[Wrenches](#)  
[Divot Tools](#)  
[Other Accessories](#)  
[Ball Markers](#)



**Zarma FLYtee™ Combi-Pak**  
 CHAMP GOLF ACCESSORIES  
 White/Orange Combination Pak

- Buy Now
- Overview
  - Specifications
  - Part Numbers

Finally a performance Tee that Performs!

The CHAMP Zarma FLYtee™ is a new performance tee that will increase your distance and accuracy from tee to green. Made with environmentally friendly biodegradable materials, a durable plastic design and a 6 prong head makes it easier to place the ball on the tee and keep it stable. With its added durability and contoured cup, this tee gives top performance to all golfers, from amateurs to professionals.

**Specifications**

A combination pack of 15 white 2 1/2" (63mm) length tees and 8 orange 1 1/2" (44mm) length tees. Package contains 23 tees.

Product not available in the US.

- [Download Sell Sheet](#)
- [Download High Res Product Images](#)

**Part Numbers**

<b>Pack of 23 Combi-Pak</b>	No.92551
White 2 1/2" (15)	
Orange 1 1/2" (8)	

Product not Available in the US

<http://www.champspikes.com/products/golf/accessories/ty-tees/zarma-flytee-combi-pak/> [8/10/2012 9:43:46 AM]  
 CHAMP | Zarma FLYtee™ Combi-Pak

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Contact with us:

Complaint

EXHIBIT 1

CHAMP | ZARMA FLYtee™ Biodegradability Information

Distributions   Retailers   OEM   Contact   1.800.OK.CHAMP

**CHAMP** The World Leader in Sport Cleat Technology™

NEWS & EVENTS   PRODUCT INFORMATION   WHY CHAMP SPIKES?   WHERE TO BUY

**Golf**   **Football**   **Soccer**   **Track**   **Baseball**   **Rugby**   **Lacrosse**   **Cricket**

**Industrial**

Home / Products / Golf / Golf Accessories / FLYtees™ / ZARMA FLYtee™ Biodegradability Information

**FLYtees™**

- Zarma FLYtee™ MyHite™ Tee
- Zarma FLYtee™ 3 1/2"
- Zarma FLYtee™ 2.5"
- Zarma FLYtee™ 1 1/2"
- Zarma FLYtee™ Comb-Pak
- Zarma FLYtee™ Multi-Color Pack 2 1/2"
- Custom Printed FLYtees
- ZARMA FLYtee™ Biodegradability Information



CHAMP Tee-it-Up™

Wrenches

Divot Tools

Other Accessories

Ball Markers

**ZARMA FLYtee™ Biodegradability Information**  
CHAMP GOLF ACCESSORIES

FLYtees are completely biodegradable!

Overview

Specifications

Part Numbers

FLYtees are completely biodegradable!

The CHAMP FLYtee is from a specially formulated sustainable bio-plastic that enables the material to maintain durability and performance, while still breaking down into CO2 and water when it is done being used. Our plastic has a market proven bio-agent additive created by ECM Bioline, Inc. ECM's technology is a process which enables the microorganisms in the environment to metabolize the molecular structure of plastic products into humus that is beneficial to the environment.

Specifications

- Download Sell Sheet
- Download Technical Sheet

Part Numbers

Reduce...Reuse...Recycle

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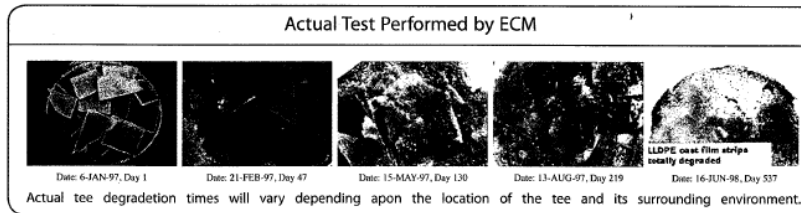
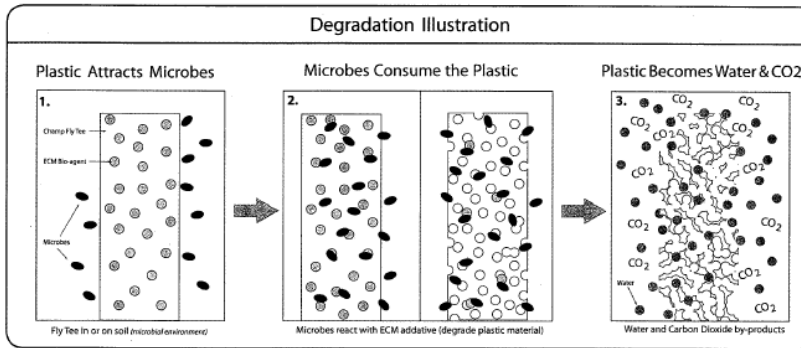
EXHIBIT 1



Sustainable Design .....



The Champ Fly Tee is made from a specially formulated sustainable bio-plastic that enables the material to maintain durability and performance, while still breaking down into CO2 and Water when it is done being used. Our plastic has a market proven bio-agent additive created by ECM Biofilms, Inc. ECM's technology is a process which enables the microorganisms in the environment to metabolize the molecular structure of plastic products into humus that is beneficial to the environment.



www.ecmbiofilms.com

Material treated with ECM has been tested and proved as biodegradable and safe for the environment by using the following:

ASTM D5209

\*Standard Test Method for Determining the Aerobic Biodegradation of Plastic Materials in the Presence of Municipal Sewage Sludge\*

ASTM 5511

\*Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic Digestion Conditions\*

ISO 14855 / ASTM D5338

\*Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials under Controlled Composting Conditions\*



www.champgolf.com



800.OK.CHAMP

## Complaint

## EXHIBIT 1

**CERTIFICATE**  
of  
the Biodegradability of Plastic Products Made by  
**SL Plastic Co. LTD**  
that Incorporate the  
ECM MasterBatch Pellet Technology

*This is to certify that numerous plastic samples, submitted by ECM BioFibres, Inc., have been tested by independent laboratories in accordance with standard test methods approved by ASTM, ISO and other such standardization bodies to determine the rate and extent of biodegradation of plastic materials.*

*A Degradable Plastic is defined (ASTM D1991) as a plastic that is designed to undergo a significant change in its chemical structure under specific environmental conditions resulting in a loss of some properties that may vary as measured by standard test methods appropriate to the plastic and the application in a period of time that determines its classification. A Biodegradable Plastic is defined as a degradable plastic in which the degradation results from the action of naturally occurring microorganisms such as bacteria, fungi and algae.*

*The biodegradation of the submitted plastic samples were tested using ASTM D5209-91, "Standard Test Method for Determining the Aerobic Biodegradation of Plastic Materials in the Presence of Municipal Sewage Sludge"; ASTM D3338-98, "Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials under Controlled Composting Conditions", which is equivalent to CEN prEN 171261085, and the ISO 14855 method. "Evaluation of the Ultimate Aerobic Biodegradability and Disintegration of Plastics under Controlled Composting Conditions"; ASTM D5511, "Standard Test Method for Determining Aqueous Biodegradation of Plastic Materials Under High-Solids, Anaerobic Digestion Conditions." The results of these tests and the related biodegradation and ecological impact experiments in various environments are contained in the Ecological Assessment of L-CM Plastic report dated February 16, 1999, which certifies that plastic products manufactured with ECM additives can be marketed as biodegradable, safe for the environment and complying with 94/62 EC for the EU.*

*This Certificate and the Ecological Assessment of ECM Plastic report, along with Scanning Electron Microscope and other studies that have been conducted since the publication of the Ecological Assessment, all of which use a one percent loading rate for the ECM MasterBatch Pellets rather than the higher additive levels used earlier, have been presented to SL Plastic Co. LTD, and may be used by it to validate claims to the biodegradability and environmental safety of plastic products that it manufactures that are made consistent with the manufacturing guidelines for uses of ECM MasterBatch Pellets, presented to it by ECM BioFibres, Inc.*

Dated: February 8, 2011

Certified by: \_\_\_\_\_  
Robert Sinclair, President  
ECM BioFibres, Inc.

Complaint

EXHIBIT 2



## Decision and Order

**DECISION AND ORDER**

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

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order (“consent agreement”), a statement that respondent neither admits nor denies any of the allegations in the draft complaint except as specifically stated in the consent agreement, an admission by the respondent of facts necessary to establish jurisdiction for purposes of this action, and waivers and other provisions as required by the Commission’s Rules; and

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

- 1 Respondent Clear Choice Housewares, Inc. is a Massachusetts corporation with its registered place of business at 163 Pioneer Drive Suite 201, Leominster, Massachusetts 01453.
2. The 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:

- 1 “Clearly and Prominently” means as follows:
  - A. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;
  - B. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read and comprehend it; and

## Decision and Order

- C. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.
- 2.. “Close proximity” means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.
3. “Commerce” means as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
- 4 “Competent and reliable scientific evidence” means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true. Specifically:
- A. For unqualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must assure complete decomposition within one year and replicate, i.e., simulate, the physical conditions found in landfills, where most trash is disposed.
- B. For qualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must both:
- i. assure the entire product will (1) completely decompose into elements found in nature in the stated timeframe or, if not qualified by time, within one year; or (2) decompose into

## Decision and Order

elements found in nature at the rate and to the extent stated in the representation; and

- ii. replicate, i.e., simulate, the physical conditions found in the type of disposal facility or method stated in the representation or, if not qualified by disposal facility or method, the conditions found in landfills, where most trash is disposed.

For example, results from ASTM (American Society for Testing and Materials) International D5511-12, Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions, or any prior version thereof, are not competent and reliable scientific evidence supporting unqualified claims, or claims of outcomes beyond the parameters and results of the actual test performed.

- 5 .”Customary disposal” means any disposal method whereby respondent’s products ultimately will be disposed of in a landfill, in an incinerator, or in a recycling facility.
- 6 .”Degradable” includes biodegradable, oxo-biodegradable, oxo-degradable, or photodegradable, or any variation thereof.
- 7 .”Landfill” means a municipal solid waste landfill that receives household waste. “Landfill” does not include landfills that are operated as bioreactors or those that are actively managed to enhance decomposition.
- 8 .Unless otherwise specified, “respondent” means Clear Choice Housewares, Inc., a corporation, and its successors and assigns.

**I.**

**IT IS ORDERED** that respondent, and its officers, agents, representatives, and employees, directly or through any

## Decision and Order

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

- A. That any product or package is degradable, unless:
1. the entire item will completely decompose into elements found in nature within one year after customary disposal; or
  2. the representation is clearly and prominently and in close proximity qualified by:
    - a. Either (1) the time to complete decomposition into elements found in nature; or (2) the rate and extent of decomposition into elements found in nature, provided that such qualification must disclose that the stated rate and extent of decomposition does not mean that the product or package will continue to decompose; and
    - b. If the product will not decompose in a customary disposal facility or by a customary method of disposal, both (1) the type of non-customary disposal facility or method and (2) the availability of such disposal facility or method to consumers where the product or package is marketed or sold
- and such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.
- B. That any such product, package, or service offers any environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be

## Decision and Order

competent and reliable scientific evidence, that substantiates the representation.

**II.**

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

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

**III.**

**IT IS FURTHER ORDERED** that respondent shall deliver a copy of this order to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order. Respondent shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* Respondent shall deliver this order to current personnel within thirty (30) days after the date of service

## Decision and Order

of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

**IV.**

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

Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop M-8102B, Washington, DC 20580. The subject line must begin: "Clear Choice Housewares, Inc., File No. 1223288."

**V.**

**IT IS FURTHER ORDERED** that respondent shall, within sixty (60) days after the date of service of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order. Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to [Debrief@ftc.gov](mailto:Debrief@ftc.gov) or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer

## Decision and Order

Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Mail Stop 8102-B, Washington, DC 20580. The subject line must begin: "Clear Choice Housewares, Inc., File No. 1223288."

**VI.**

This order will terminate on December 11, 2033, or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

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

By the Commission.

Analysis to Aid Public Comment

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

The Federal Trade Commission (“FTC” or “Commission”) has accepted, subject to final approval, an agreement containing a consent order from Clear Choice Housewares d/b/a FARBERWARE® EcoFresh, a corporation (“respondent”).

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

This matter involves respondent’s marketing, sale, and distribution of purportedly biodegradable reusable plastic food storage containers to the public. According to the FTC complaint, respondent represented that its plastic products are completely biodegradable (i.e., will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal). Respondent further represented that its plastic products are biodegradable in a landfill; are biodegradable in a stated qualified timeframe; and are biodegradable, biodegradable in a landfill, or biodegradable in a stated qualified timeframe as a result of respondent’s use of EcoPure, a plastic additive manufactured by Bio-Tec Environmental, LLC.

The complaint alleges that each of these degradable claims is false and misleading. In addition, the complaint alleges that, although respondent represented (expressly or implicitly) that it could substantiate its degradable claims, respondent did not in fact possess or rely upon a reasonable basis to substantiate these representations of biodegradability. Thus, the complaint alleges that respondent engaged in deceptive practices in violation of Section 5(a) of the FTC Act.

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



## Analysis to Aid Public Comment

representation that a product or package is degradable, unless one of two conditions is met. The first condition is that the entire item will completely decompose into elements found in nature within one year after customary disposal. The second condition is that the representation will be clearly and prominently and in close proximity qualified by either the time to complete decomposition or the rate and extent of decomposition (although this qualification must disclose that the stated rate and extent of decomposition does not mean that the item will continue to decompose). In addition, if the product will not decompose in (or by) a customary disposal facility/method, the representation must be qualified regarding the type of disposal, and the availability of such disposal facility or method to consumers where the item is marketed and sold.

Part I also requires that, at the time of any such representation, respondent must possess and rely upon competent and reliable scientific evidence from a scientific technical protocol (or protocols) that does two things. First, the protocol must assure that the entire product will either completely decompose in one year or the stated timeframe, or that it will decompose at the rate and to the extent stated in the representation. Second, such protocol must replicate (i.e., simulate) the physical conditions found in a landfill or the disposal facility or method stated in the representation. Part I further prohibits respondent from marketing any products, packages, or services as offering any environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence that substantiates the representation.

Parts II through V are reporting and compliance provisions. Part II requires respondent to keep (and make available to the Commission on request): copies of advertisements, labeling, packaging and promotional materials containing the representations identified in Part I; materials relied upon in disseminating those representations; evidence that contradicts, qualifies, or calls into question the representation, or the basis relied upon for the representation, specified in Part I; and all acknowledgments of receipt of the order. Part III requires dissemination of the order now and in the future to subsidiaries,

## Analysis to Aid Public Comment

principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having supervisory responsibilities relating to the subject matter of the order. Part IV requires notification to the FTC of changes in corporate status. Part V mandates that respondent 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 aid public comment on the proposed order. It is not intended to constitute an official interpretation of the proposed order or to modify its terms in any way.

## Complaint

## IN THE MATTER OF

**MYLAN INC., AGILA SPECIALTIES  
GLOBAL PTE. LIMITED, AGILA SPECIAL  
PRIVATE LIMITED, AND STRIDES ARCOLAB  
LIMITED**

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

*Docket No. C-4413; File No. 131 0112*

*Complaint, September 26, 2013 – Decision, December 12, 2013*

This consent order addresses the \$1.85 billion acquisition by Mylan Inc. (“Mylan”) of Agila Specialties Global Pte. Limited (“Agila”) from Strides Arcolab, Ltd. The complaint alleges that the acquisition would violate Section 7 of the Clayton Act by substantially lessening competition in eleven product markets relating to generic injectable pharmaceutical drugs. Injectable drugs are administered intravenously, usually via a syringe or hollow needle. Generic versions of injectable drugs are usually launched after a branded product’s patents have expired. As the number of generic suppliers increases, prices for these generic drugs generally decrease. The complaint alleges that Mylan and Agila are two of a limited number of current or likely future competitors in several markets for generic injectable pharmaceutical drugs. Specifically, the complaint alleges that the acquisition would eliminate existing competition in the market for the following six generic drugs: (1) amiodarone hydrochloride injection, an anti-arrhythmic heart drug used to treat patients with frequently recurring ventricular fibrillation or unstable ventricular tachycardia; (2) etomidate injection, an anesthetic; (3) fluorouracil injection, used to treat cancer; (4) labetalol hydrochloride injection, used to treat hypertension; (5) mesna injection, used to prevent urinary tract damage; and (6) methotrexate sodium, used to treat types of pediatric cancer. The complaint further alleges that the acquisition would reduce future competition by allowing the combined company to forego or delay the launch of generic products in the following four drug markets: (1) acetylcysteine, used to prevent or minimize liver damage caused by acetaminophen overdose; (2) fomepizole, which is used to treat accidental poisoning caused by ethylene glycol or methanol; (3) ganciclovir, an antiviral drug used to treat patients with weakened immune systems to slow the growth of a form of herpes that can lead to blindness; and (4) meropenem, an antibiotic used to treat serious bacterial infections. The complaint further alleges that the acquisition likely would reduce competition in the future market for generic mycophenolate mofetil injection, which is currently available as a branded drug. Mycophenolate mofetil is used in transplant medicine to reduce the chance of organ transplant rejection. Because Mylan and Agila would likely be among a limited number of suppliers when generic drugs enter the market, the acquisition is likely to reduce the number of generic competitors or otherwise reduce important price competition. The consent

## Complaint

order requires Mylan to divest either Mylan or Agila products in the following markets and to the following buyers: (a) fluorouracil and methotrexate sodium preservative-free injections to Intas Pharmaceuticals Ltd.; (b) Mylan's etomidate, ganciclovir, meropenem, and mycophenolate mofetil injections, as well as Agila's amiodarone hydrochloride and fomepizole injections to JHP Pharmaceuticals, LLC; and (c) Agila's acetylcysteine and mesna injections to Sagent Pharmaceuticals. The order also requires Mylan to release all of its rights relating to labetalol hydrochloride injection to Gland Pharma Ltd. Finally, the order contains supply and technology provisions to ensure each acquirer can immediately and effectively compete in the marketplace.

*Participants*

For the *Commission*: David L. Inglefield, Amy S. Posner, and Hyun Lee Son.

For the *Respondents*: David Wales, Jones Day; and Matthew Hendrickson and Steven Sunshine, Skadden, Arps, Slate, Meagher & Flom LLP.

**COMPLAINT**

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Mylan Inc. ("Mylan"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Agila Specialties Global Pte. Limited and Agila Specialties Private Limited (collectively, "Agila"), entities subject to the jurisdiction of the Commission, from Strides Arcolab Ltd. ("Strides") in violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, and that such acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45, 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 Mylan is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Pennsylvania, with its corporate office and principal place of

## Complaint

business located at 1500 Corporate Drive, Canonsburg, Pennsylvania 15317.

2. Respondent Agila Specialties Global Pte. Limited, a wholly owned subsidiary of Strides, is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of Singapore, with its corporate office and principal place of business located at 3 Tuas South Avenue 4, Singapore 637610.

3. Respondent Agila Specialties Private Limited, a wholly owned subsidiary of Strides, is a corporation organized, existing, and doing business under and by virtue of the laws of the Republic of India, having its corporate office and principal place of business at Strides House, Bilekahalli, Bannerghatta Road, Bangalore 560-076, India.

4. Respondent Strides is a corporation organized, existing, and doing business under and by virtue of the laws of India, having its corporate office and principal place of business at Strides House, Bilekahalli, Bannerghatta Road, Bangalore 560-076, India.

5. Each Respondent is, and at all times relevant herein has been, engaged in commerce, as “commerce” is defined in Section 1 of the Clayton Act as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affects commerce, as “commerce” is defined in Section 4 of the FTC Act, as amended, 15 U.S.C. § 44.

## II. THE PROPOSED ACQUISITION

6. Under the terms of a Sale and Purchase Agreement with an effective date of February 27, 2013 (“Agreement”), Mylan proposes to acquire all of the voting securities of Agila for approximately \$1.85 billion from Strides (the “Acquisition”). The Acquisition is subject to Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

## Complaint

**III. THE RELEVANT PRODUCT MARKETS**

7. For the purposes of this Complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are the development, license, manufacture, marketing, distribution, and sale of the following generic injectable pharmaceutical products:

- a. amiodarone hydrochloride injection;
- b. etomidate injection;
- c. fluorouracil injection;
- d. labetalol hydrochloride injection;
- e. mesna injection;
- f. methotrexate sodium preservative-free injection;
- g. acetylcysteine injection;
- h. fomepizole injection;
- i. ganciclovir injection;
- j. meropenem injection; and
- k. mycophenolate mofetil injection.

**IV. THE RELEVANT GEOGRAPHIC MARKET**

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

**V. THE STRUCTURE OF THE MARKETS**

9. Amiodarone hydrochloride injection is an anti-arrhythmic cardiac drug of last resort used to treat patients with frequently recurring ventricular fibrillation or unstable ventricular

## Complaint

tachycardia. The market for amiodarone hydrochloride injection is highly concentrated with only three current suppliers for the drug – Mylan, Fresenius Kabi AG (“Fresenius”), and Hikma Pharmaceuticals PLC. Mylan has a 60% share of the market. Agila has an approved Abbreviated New Drug Application (“ANDA”) from the U.S. Food and Drug Administration (“FDA”) and is about to enter this market, as is one other firm. Thus, the Acquisition would reduce the number of suppliers of generic amiodarone hydrochloride injection from five to four.

10. Etomidate injection is an anesthetic agent used to induce general anesthesia and sedation for surgical procedures. There are currently four significant suppliers in this highly concentrated market – Mylan, Agila (which distributes its product through Pfizer Inc. and Sagent), Hospira, Inc. (“Hospira”), and American Regent, Inc. The Acquisition would substantially increase concentration in this market and reduce the number of suppliers of generic etomidate injection from four to three.

11. Fluorouracil injection treats colon, rectal, breast, stomach, and pancreatic cancers. Four firms currently supply fluorouracil injection in this highly concentrated market – Mylan, Fresenius, Teva Pharmaceutical Industries Ltd. (“Teva”), and Sandoz International GmbH. (“Sandoz”). Agila is the only other company that currently holds an approved ANDA to sell generic fluorouracil in the United States. As a result, the Acquisition would reduce the number of firms capable of supplying generic fluorouracil injection from five to four.

12. Labetalol hydrochloride injection treats severe hypertension. The market for labetalol hydrochloride injection is highly concentrated. Only Mylan, Agila, Hospira, Akorn, Inc., and Apotex Inc. have approved ANDAs and manufacturing facilities currently capable of producing generic labetalol hydrochloride injection. The Acquisition would reduce the number of firms capable of supplying generic labetalol hydrochloride injection from five to four.

13. Mesna injection is a detoxifying agent used to prevent damage to the urinary tract caused by ifosfamide, a third-line chemotherapy drug used to treat germ cell testicular cancer.

## Complaint

There are four current, significant suppliers of generic mesna injection – Mylan, Agila, Fresenius, and Baxter International Inc. The Acquisition would increase concentration in this market substantially, and reduce the number of current suppliers of generic mesna injection from four to three.

14. Methotrexate sodium preservative-free injection treats several types of pediatric cancers, as well as certain autoimmune disorders such as rheumatoid arthritis and multiple sclerosis. Five firms currently supply the market with methotrexate sodium preservative-free injection – Mylan, Agila, Fresenius, Teva, and Hospira. The Acquisition would reduce the number of current suppliers of the drug from five to four.

15. Acetylcysteine injection prevents or minimizes liver damage resulting from acetaminophen overdose. There are two generic acetylcysteine injection products currently on the market, and Mylan and Agila are two of only a limited number of firms that have generic products in development. Therefore, the Acquisition would reduce the number of likely future suppliers of generic acetylcysteine injection.

16. Injectable fomepizole treats accidental poisoning caused by ethylene glycol or methanol ingestion. Three firms currently supply the highly concentrated market for generic fomepizole injection – Mylan, X-Gen Pharmaceuticals, Inc., and Sandoz. Agila is developing its own generic fomepizole injection product and likely would be the next firm to enter the market. As a result, the Acquisition would reduce the number of suppliers of generic fomepizole injection in the near future.

17. Ganciclovir injection is an antiviral medication used to treat patients with weakened immune systems, such as patients with HIV-AIDS and transplant recipients, to slow the growth of cytomegalovirus, a form of herpes virus that can lead to blindness. Currently, Roche Palo Alto, LLC (“Roche”) sells a branded product, Cytovene, and Fresenius is the only generic competitor. Mylan and Agila are two of only a limited number of firms that have this drug in development. Therefore, the Acquisition would reduce the number of likely future suppliers of generic ganciclovir injection.



### Complaint

18. Meropenem injection is an ultra-broad spectrum antibiotic used as a last resort to treat serious bacterial infections in an intensive care setting. There are currently four suppliers of the drug – AstraZeneca PLC, Fresenius, Hospira, and Sandoz. All four of these companies, however, obtain their supplies of meropenem from only two manufacturing facilities. Mylan and Agila are two of only a limited number of firms that have a generic meropenem injection product in development and plan to procure their meropenem supplies from different manufacturing facilities. As a result, the Acquisition would reduce the number of marketers, as well as the sources of manufacturing, of generic meropenem injection in the future.

19. Mycophenolate mofetil injection is an immunosuppressant used in transplant medicine to subdue T-cell and B-cell production, reducing the risk of transplant rejection. The market for generic mycophenolate mofetil injection does not yet exist. Roche currently sells a branded version of the product, CellCept. When generic entry occurs, Mylan and Agila would likely be among a limited number of suppliers. Thus, the Acquisition would reduce the number of likely future suppliers of generic mycophenolate mofetil injection.

## **VI. ENTRY CONDITIONS**

20. Entry into the relevant markets described in Paragraphs 7 and 8 would not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the anticompetitive effects of the Acquisition. De novo entry would not take place in a timely manner because the combination of drug development times and FDA approval requirements would delay entry by at least two years. Although a limited number of firms other than Respondents plan to begin competing in some relevant markets in the future, such entry would not be sufficient to prevent the competitive harm likely to result from the Acquisition. In addition, no other entry is likely to occur for a substantial amount of time that would eliminate the price increases that will occur after consummation of the Acquisition.

## **VII. EFFECTS OF THE ACQUISITION**

## Complaint

21. The effects of the Acquisition, if consummated, would likely 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 FTC Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

- a. by eliminating actual, direct, and substantial competition between Mylan and Agila and reducing the number of competitors in the markets for (1) amiodarone hydrochloride injection; (2) etomidate injection; (3) fluorouracil injection; (4) labetalol hydrochloride injection; (5) mesna injection; and (6) methotrexate sodium preservative-free injection, thereby: (a) increasing the likelihood that Mylan will be able to unilaterally exercise market power in these markets; (b) increasing the likelihood and degree of coordinated interaction between or among the remaining competitors; and (c) increasing the likelihood that customers would be forced to pay higher prices; and
- b. by eliminating future competition between Mylan and Agila and reducing the number of generic competitors in the markets for (1) acetylcysteine injection; (2) fomepizole injection; (3) ganciclovir injection; (4) meropenem injection; and (5) mycophenolate mofetil injection, thereby: (a) increasing the likelihood that the combined entity would forego or delay the launch of these products, and (b) increasing the likelihood that the combined entity would delay, eliminate, or otherwise reduce the substantial additional price competition that would have resulted from an additional supplier of these products.

**VIII. VIOLATIONS CHARGED**

22. The Agreement described in Paragraph 6 constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

## Complaint

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

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this twenty-sixth day of September 2013, issues its Complaint against said Respondent.

By the Commission.

## Order to Maintain Assets

**ORDER TO MAINTAIN ASSETS**

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

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

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

1. Respondent Mylan Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its headquarters address located at 1500 Corporate Drive, Suite 400, Canonsburg, Pennsylvania 15317.

## Order to Maintain Assets

2. Respondent Agila includes Agila Specialties Global Pte. Limited, a corporation organized, existing and doing business under and by virtue of the laws of the Republic of Singapore with its headquarters address located at 3 Tuas South Avenue 4, Singapore 637610, and Agila Specialties Private Limited, a corporation organized, existing and doing business under and by virtue of the laws of the Republic of India with its headquarters address located at Strides House, Bilekahali, Bannerghatta Road, Bangalore India 560 076.
3. Respondent Strides Arcolab Limited is a corporation organized, existing and doing business under and by virtue of the laws of the Republic of India with its headquarters address located at 201, Devavrata, Sector 17, Vashi, New Mumbai, India 400705. Strides Arcolab Limited is the ultimate parent entity of Agila Specialties Global Pte. Ltd and Agila Specialties Private Limited.
4. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

**ORDER****I.**

**IT IS ORDERED** that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final and effective, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

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

## Order to Maintain Assets

agents, representatives, successors, and assigns of each. After the Acquisition, Mylan shall include Agila.

- B. “Agila” means: (i) Agila Specialties Global Pte. Limited, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Agila Specialties Global Pte. Limited, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; and (ii) Agila Specialties Private Limited, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Agila Specialties Private Limited, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Strides” means Strides Arcolab Limited, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Strides Arcolab Limited, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Respondents” means Mylan, Agila, and Strides, individually and collectively. After the Acquisition, “Respondents” means Mylan and Agila, individually and collectively.
- E. “Commission” means the Federal Trade Commission.
- F. “Decision and Order” means the:
  - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and

## Order to Maintain Assets

2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- G. “Divestiture Product Business(es)” means the Business of Respondents within the Geographic Territory specified in the Decision and Order related to each of the Divestiture Products to the extent that such Business is owned, controlled, or managed by the Respondents and the assets related to such Business to the extent such assets are owned by, controlled by, managed by, or licensed to, the Respondents.
- H. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph III of the Decision and Order.
- I. “Orders” means the Decision and Order and this Order to Maintain Assets.

**II.**

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

- A. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of each of the related Divestiture Product Businesses, to minimize any risk of loss of competitive potential for such Divestiture Product Businesses, and to prevent the destruction, removal, wasting, deterioration, or impairment of such Divestiture Product Businesses except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Divestiture Product Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability,

## Order to Maintain Assets

marketability or competitiveness of the related Divestiture Product Businesses.

- B. Until Respondents fully transfer and deliver each of the respective Divestiture Product Assets to an Acquirer, Respondents shall maintain the operations of the related Divestiture Product Businesses in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of such Divestiture Product Businesses and shall use their best efforts to preserve the existing relationships with the following: suppliers; vendors and distributors; the High Volume Accounts; customers; Agencies; employees; and others having business relations with each of the respective Divestiture Product Businesses. Respondents' responsibilities shall include, but are not limited to, the following:
1. providing each of the respective Divestiture Product Businesses with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such business and to carry on, at least at their scheduled pace, all capital projects, business plans and promotional activities for such Divestiture Product Business;
  2. continuing, at least at their scheduled pace, any additional expenditures for each of the respective Divestiture Product Businesses authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all research, Development, manufacturing, distribution, marketing and sales expenditures;
  3. providing such resources as may be necessary to respond to competition against each of the Divestiture Products and/or to prevent any diminution in sales of each of the Divestiture Products during and after the Acquisition process



## Order to Maintain Assets

and prior to the complete transfer and delivery of the related Divestiture Product Assets to an Acquirer;

4. providing such resources as may be necessary to maintain the competitive strength and positioning of each of the Divestiture Products that were marketed or sold by Respondents prior to February 27, 2013, at the related High Volume Accounts;
  5. making available for use by each of the respective Divestiture Product Businesses funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, the assets related to such business;
  6. providing each of the respective Divestiture Product Businesses with such funds as are necessary to maintain the full economic viability, marketability and competitiveness of such Divestiture Product Business; and
  7. providing such support services to each of the respective Divestiture Product Businesses as were being provided to such business by Respondents as of the date the Consent Agreement was signed by Respondents.
- C. Until Respondents fully transfer and deliver the each of the respective Divestiture Product Assets to an Acquirer, Respondents shall maintain a work force at least as equivalent in size, training, and expertise to what has been associated with the Divestiture Products for the relevant Divestiture Product's last fiscal year.
- D. For each of the Divestiture Products that is a Contract Manufacture Product, until the Closing Date for the related Divestiture Product Assets, Respondents shall provide all the related Divestiture Product Core Employees with reasonable financial incentives to

## Order to Maintain Assets

continue in their positions and to research, Develop, and manufacture the relevant Divestiture Products consistent with past practices and as may be necessary to preserve the marketability, viability and competitiveness of such Divestiture Products pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondents until the Closing Date for the divestiture of the above-described assets has occurred, including regularly scheduled raises, bonuses, vesting of pension benefits (as permitted by Law), and additional incentives as may be necessary to prevent any diminution of the relevant Divestiture Product=s competitiveness.

## E. Respondents shall:

1. for each Divestiture Product, for a period of six (6) months from the Closing Date or until the hiring of twenty (20) Divestiture Product Core Employees by the relevant Acquirer, whichever occurs earlier, provide the relevant Acquirer with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by such Acquirer. Each of these periods is hereinafter referred to as the “Divestiture Product Core Employee Access Period(s)”;
2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondents to provide the Product Employee Information; or (ii) ten (10) days after written request by an Acquirer, provide such Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondents to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with

## Order to Maintain Assets

respect to that employee in an amount equal to the delay;

3. during the Divestiture Product Employee Access Period, not interfere with the hiring or employing by the Acquirer of Divestiture Product Core Employees, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondents that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Divestiture Product Core Employee who receives a written offer of employment from the Acquirer;

*provided, however,* that, subject to the conditions of continued employment prescribed in this Order, this Paragraph I.E.3. shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee under the terms of such employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer to such employee.

- F. Pending divestiture of the Divestiture Product Assets, Respondents shall:
  1. not use, directly or indirectly, any Confidential Business Information related to the Business of the Divestiture Products other than as necessary to comply with the following:
    - a. the requirements of this Order;
    - b. Respondents' obligations to each respective Acquirer under the terms of any related Remedial Agreement; or

## Order to Maintain Assets

- c. applicable Law;
2. not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer of the particular Divestiture Assets, (ii) other Persons specifically authorized by such Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed);
  3. not provide, disclose or otherwise make available, directly or indirectly, any such Confidential Business Information related to the marketing or sales of the Divestiture Products to the employees associated with the Business related to those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products; and
  4. institute procedures and requirements to ensure that the above-described employees:
    - a. do not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and
    - b. do not solicit, access or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.
- G. Not later than thirty (30) days from the earlier of (i) the Closing Date or (ii) the date this Order to Maintain Assets is issued by the Commission, Respondents Mylan and Agila shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by Respondent Mylan's and Respondent Agila's personnel to all of their employees who (i) may be in possession of such Confidential

## Order to Maintain Assets

Business Information or (ii) may have access to such Confidential Business Information.

- H. Respondents Mylan and Agila shall give the above-described notification by e mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Closing Date. Respondent Mylan shall provide a copy of the notification to the relevant Acquirer. Respondent Mylan shall maintain complete records of all such notifications at Respondent Mylan's registered office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. Respondent Mylan shall provide the relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondent Mylan and Respondent Agila's personnel.
- I. Respondents shall monitor the implementation by its employees and other personnel of all applicable restrictions, and take corrective actions for the failure of such employees and personnel to comply with such restrictions or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets.
- J. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Divestiture Product Businesses within the Geographic Territory through their full transfer and delivery to an Acquirer, to minimize any risk of loss of competitive potential for the Divestiture Product Businesses within the Geographic Territory, and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Divestiture Product Assets except for ordinary wear and tear.

**III.**

**IT IS FURTHER ORDERED** that:

## Order to Maintain Assets

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

## Order to Maintain Assets

2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. The Interim Monitor shall serve until the date of completion by the Respondents of the divestiture of all Divestiture Product Assets and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of this Order and, with respect to each Divestiture Product that is a Contract Manufacture Product, until the earliest of:
  - a. the date the Acquirer of that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture that Divestiture Product and able to manufacture the Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of the Respondents Mylan and Agila;
  - b. the date the Acquirer of that Divestiture Product notifies the Commission and Respondent Mylan of its intention to abandon its efforts to manufacture such Divestiture Product; or
  - c. the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the relevant Acquirer has abandoned its efforts to manufacture such Divestiture Product;

*provided, however,* that, with respect to each Divestiture Product, the Interim Monitor's service shall not exceed five (5) years from the Order Date;

## Order to Maintain Assets

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

- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.
- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondents, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
- G. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.



## Order to Maintain Assets

- H. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by each Acquirer with respect to the performance of Respondents' obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders; provided, however, beginning ninety (90) days after Respondents have filed their final report pursuant to Paragraph VII.B. of the Decision and Order, and ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by each Acquirer toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.
- I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; provided, however, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

## Order to Maintain Assets

- K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- M. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same person appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

**IV.**

**IT IS FURTHER ORDERED** that within thirty (30) days after the date this Order to Maintain Assets is issued by the Commission, and every sixty (60) days thereafter until Respondents have fully complied with Paragraphs II.A., II.B., II.C., II.D., II.E., II.F.1. - II.F.3, II.G., II.H., II.I., II.J., II.K., and II.L. of the related Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the Orders. Respondents shall submit at the same time a copy of their report concerning compliance with the Orders to the Interim Monitor, if any Interim Monitor has been appointed. Respondents shall include in their reports, among other things that are required from time to time, a detailed description of their efforts to comply with the relevant paragraphs of the Orders, including:

- A. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional services being provided by the Respondents to the relevant Acquirer, and (iii) the agreement(s) to Contract Manufacture; and

## Order to Maintain Assets

- B. a detailed description of the timing for the completion of such obligations.

*provided, however,* that, after the Decision and Order in this matter becomes final and effective, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondents pursuant to Paragraph VII of the Decision and Order.

**V.**

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

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

**VI.**

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

- A. access, during business office hours of the Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of the

## Order to Maintain Assets

Respondent related to compliance with this Order, which copying services shall be provided by the Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent; and

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

**VII.**

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

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

By the Commission.

## Decision and Order

**DECISION AND ORDER**

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

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

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

## Decision and Order

1. Respondent Mylan is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its headquarters address located at 1500 Corporate Drive, Suite 400, Canonsburg, Pennsylvania 15317.
2. Respondent Agila includes (i) Agila Specialties Global Pte. Limited, a corporation organized, existing and doing business under and by virtue of the laws of the Republic of Singapore with its headquarters address located at 3 Tuas South Avenue 4, Singapore 637610, and (ii) Agila Specialties Private Limited, a corporation organized, existing and doing business under and by virtue of the laws of the Republic of India with its headquarters address located at Strides House, Bilekahali, Bannerghatta Road, Bangalore India 560 076.
3. Respondent Strides Arcolab Limited is a corporation organized, existing and doing business under and by virtue of the laws of the Republic of India with its headquarters address located at 201, Devavrata, Sector 17, Vashi, New Mumbai, India 400705. Strides Arcolab Limited is the ultimate parent entity of Agila Specialties Global Pte. Limited and Agila Specialties Private Limited.
4. The Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

**ORDER****I.**

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

- A. "Mylan" means Mylan Inc., its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Mylan

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Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each. After the Acquisition, Mylan shall include Agila.

- B. “Agila” means: (i) Agila Specialties Global Pte. Limited, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Agila Specialties Global Pte. Limited, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each; and (ii) Agila Specialties Private Limited, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Agila Specialties Private Limited, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Strides” means Strides Arcolab Limited, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Strides Arcolab Limited, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Respondents” means Mylan, Agila and Strides, individually and collectively. After the Acquisition, “Respondents” means Mylan and Agila, individually and collectively.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer(s)” means the following:
1. a Person specified by name in this Order to acquire particular assets or rights that a Respondent(s) is required to assign, grant, license, divest, transfer,

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deliver, or otherwise convey pursuant to this Order and that has been approved by the Commission to accomplish the requirements of this Order in connection with the Commission's determination to make this Order final and effective; or

2. a Person approved by the Commission to acquire particular assets or rights that a Respondent(s) is required to assign, grant, license, divest, transfer, deliver, or otherwise convey pursuant to this Order.
- G. "Acetylcysteine Products" means the following: all Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Agila pursuant to ANDA No. 091684, and any supplements, amendments, or revisions thereto.
- H. "Acquisition" means Respondent Mylan's acquisition of the voting securities of Agila. The acquisition is contemplated pursuant to a Sale and Purchase Agreement among Agila Specialties Asia Pte. Limited, Mylan Inc., Arun Kumar and Pronomz Ventures LLP, dated as of February 27, 2013, and a Sale and Purchase Agreement among Strides Arcolab Limited, Mylan Inc., Arun Kumar and Pronomz Ventures LLP, dated as of February 27, 2013, submitted to the Commission.
- I. "Acquisition Date" means the date on which the Acquisition is consummated.
- J. "Agency(ies)" means any government regulatory authority or authorities in the world responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the research, Development, manufacture, marketing, distribution, or sale of a Product. The term "Agency" includes, without limitation, the United States Food and Drug Administration (AFDA").
- K. "Amiodarone Products" means the following: all Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Agila



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pursuant to ANDA No. 076394, and any supplements, amendments, or revisions thereto.

- L. “Application(s)” means all of the following: “New Drug Application” (ANDA), “Abbreviated New Drug Application” (AANDA), “Supplemental New Drug Application” (“SNDA”), or AMarketing Authorization Application” (“MAA”), the applications for a Product filed or to be filed with the FDA pursuant to 21 C.F.R. Part 314 et seq., and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto. The term “Application” also includes an “Investigational New Drug Application” (“IND”) filed or to be filed with the FDA pursuant to 21 C.F.R. Part 312, and all supplements, amendments, and revisions thereto, any preparatory work, registration dossier, drafts and data necessary for the preparation thereof, and all correspondence between the Respondent and the FDA related thereto.
- M. “Business” means the research, Development, manufacture, commercialization, distribution, marketing, importation, advertisement and sale of a Product.
- N. “Categorized Assets” means the following assets and rights of the specified Respondent (as that Respondent is identified in the definition of the specified Divestiture Product):
1. all rights to all of the Applications related to the specified Divestiture Product;
  2. all Product Intellectual Property related to the specified Divestiture Product that is not Product Licensed Intellectual Property;

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3. all Product Approvals related to the specified Divestiture Product;
4. all Product Manufacturing Technology related to the specified Divestiture Product that is not Product Licensed Intellectual Property;
5. all Product Marketing Materials related to the specified Divestiture Product;
6. all Product Scientific and Regulatory Material related to the specified Divestiture Product;
7. all Website(s) related exclusively to the specified Divestiture Product;
8. the content related exclusively to the specified Divestiture Product that is displayed on any Website that is not dedicated exclusively to the specified Divestiture Product;
9. a list of all of the NDC Numbers related to the specified Divestiture Product, and rights, to the extent permitted by Law:
  - a. to require Respondent to discontinue the use of those NDC Numbers in the sale or marketing of the specified Divestiture Product except for returns, rebates, allowances, and adjustments for such Product sold prior to the Closing Date and except as may be required by applicable Law or as permitted in the applicable Remedial Agreement;
  - b. to prohibit Respondent from seeking from any customer any type of cross- referencing of those NDC Numbers with any Retained Product(s) except for returns, rebates, allowances, and adjustments for such Product sold prior to the Closing Date and except as may be required by applicable Law;

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- c. to seek to change any cross-referencing by a customer of those NDC Numbers with a Retained Product (including the right to receive notification from the Respondent of any such cross-referencing that is discovered by Respondent);
  - d. to seek cross-referencing from a customer of the Respondent's NDC Numbers related to such Divestiture Product with the Acquirer's NDC Numbers related to such Divestiture Product;
  - e. to approve the timing of Respondent's discontinued use of those NDC Numbers in the sale or marketing of such Divestiture Product except for returns, rebates, allowances, and adjustments for such Divestiture Product sold prior to the Closing Date and except as may be required by applicable Law or as permitted in the applicable Remedial Agreement; and
  - f. to approve any notification(s) from Respondent to any customer(s) regarding the use or discontinued use of such NDC numbers by the Respondent prior to such notification(s) being disseminated to the customer(s);
10. all Product Development Reports related to the specified Divestiture Product;
  11. at the option of the Acquirer of the specified Divestiture Product, all Product Assumed Contracts related to the specified Divestiture Product (copies to be provided to that Acquirer on or before the Closing Date);
  12. all patient registries related to the specified Divestiture Product, and any other systematic active post-marketing surveillance program to collect patient data, laboratory data and

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identification information required to be maintained by the FDA to facilitate the investigation of adverse effects related to the specified Divestiture Product (including, without limitation, any Risk Evaluation Mitigation Strategy as defined by the FDA);

13. for any specified Divestiture Product that has been marketed or sold by a Respondent prior to the Closing Date, a list of all customers and targeted customers for the specified Divestiture Product and a listing of the net sales (in either units or dollars) of the specified Divestiture Product to such customers on either an annual, quarterly, or monthly basis including, but not limited to, a separate list specifying the above-described information for the High Volume Accounts and including the name of the employee(s) for each High Volume Account that is or has been responsible for the purchase of the specified Divestiture Product on behalf of the High Volume Account and his or her business contact information;
14. for each specified Divestiture Product that is a Contract Manufacture Product:
  - a. a list of the inventory levels (weeks of supply) for each customer (i.e., retailer, group purchasing organization, wholesaler or distributor) as of the Closing Date; and
  - b. anticipated reorder dates for each customer as of the Closing Date;
15. at the option of the Acquirer of the specified Divestiture Product and to the extent approved by the Commission in the relevant Remedial Agreement, all inventory in existence as of the Closing Date including, but not limited to, raw materials, packaging materials, work-in-process

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and finished goods related to the specified Divestiture Product;

16. copies of all unfilled customer purchase orders for the specified Divestiture Product as of the Closing Date, to be provided to the Acquirer of the specified Divestiture Product not later than five (5) days after the Closing Date;
17. at the option of the Acquirer of the specified Divestiture Product, all unfilled customer purchase orders for the specified Divestiture Product; and
18. all of the Respondent's books, records, and files directly related to the foregoing;

*provided, however,* that "Categorized Assets" shall not include: (i) documents relating to the specified Respondent's general business strategies or practices relating to the conduct of its Business of generic pharmaceutical Products, where such documents do not discuss with particularity the specified Divestiture Product; (ii) administrative, financial, and accounting records; (iii) quality control records that are determined not to be material to the manufacture of the specified Divestiture Product by the Interim Monitor or the Acquirer of the specified Divestiture Product; (iv) formulas used to determine the final pricing of any Divestiture Product and/or Retained Products to customers and competitively sensitive pricing information that is exclusively related to the Retained Products; (v) any real estate and the buildings and other permanent structures located on such real estate; and (vi) all Product Licensed Intellectual Property;

*provided further, however,* that in cases in which documents or other materials included in the assets to be divested contain information: (i) that relates both to the specified Divestiture Product and to Retained Products or Businesses of the specified Respondent and cannot be segregated in a manner that preserves

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the usefulness of the information as it relates to the specified Divestiture Product; or (ii) for which the specified Respondent has a legal obligation to retain the original copies, the Respondent shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer of the specified Divestiture Product, the Respondent shall provide that Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this provision is to ensure that the specified Respondent provides the Acquirer with the above-described information without requiring the Respondent completely to divest itself of information that, in content, also relates to Retained Product(s).

- O. “cGMP” means current Good Manufacturing Practice as set forth in the United States Federal Food, Drug, and Cosmetic Act, as amended, and includes all rules and regulations promulgated by the FDA thereunder.
- P. “Clinical Trial(s)” means a controlled study in humans of the safety or efficacy of a Product, and includes, without limitation, such clinical trials as are designed to support expanded labeling or to satisfy the requirements of an Agency in connection with any Product Approval and any other human study used in research and Development of a Product.
- Q. “Closing Date” means, as to each Divestiture Product, the date on which a Respondent (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey assets related to such Divestiture Product to an Acquirer pursuant to this Order.
- R. “Confidential Business Information” means all information owned by, or in the possession or control of, any Respondent that is not in the public domain and that is directly related to the conduct of the Business

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related to a Divestiture Product(s). The term “Confidential Business Information” excludes the following:

1. information relating to any Respondent’s general business strategies or practices that does not discuss with particularity the Divestiture Products;
2. information specifically excluded from the Divestiture Product Assets conveyed to the Acquirer of the related Divestiture Product(s);
3. information that is contained in documents, records or books of any Respondent that is provided to an Acquirer by a Respondent that is unrelated to the Divestiture Products acquired by that Acquirer or that is exclusively related to Retained Product(s); and
4. information that is protected by the attorney work product, attorney-client, joint defense or other privilege prepared in connection with the Acquisition and relating to any United States, state, or foreign antitrust or competition Laws.

S. “Contract Manufacture” means, the following:

1. to manufacture, or to cause to be manufactured, a Contract Manufacture Product on behalf of an Acquirer;
2. to manufacture, or to cause to be manufactured, a Product that is the therapeutic equivalent (as that term is defined by the FDA) and in the identical dosage strength, formulation and presentation as a Contract Manufacture Product on behalf of an Acquirer;
3. to provide, or to cause to be provided, any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of a

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Contract Manufacture Product on behalf of an Acquirer.

- T. “Contract Manufacture Product(s)” means:
1. the Acetylcysteine Products;
  2. the Amiodarone Products;
  3. the Etomidate Products; and
  4. the Fomepizole Products;
  5. the Mesna Products; and
  6. any ingredient, material, or component used in the manufacture of any of the foregoing Products including the active pharmaceutical ingredient, excipients or packaging materials;
- provided however*, that with the consent of the Acquirer of the specified Product, a Respondent may substitute a therapeutic equivalent (as that term is defined by the FDA) form of such Product in performance of that Respondent’s agreement to Contract Manufacture.
- U. “Development” means all preclinical and clinical drug development activities (including formulation), including test method development and stability testing, toxicology, formulation, process development, manufacturing scale-up, development-stage manufacturing, quality assurance/quality control development, statistical analysis and report writing, conducting Clinical Trials for the purpose of obtaining any and all approvals, licenses, registrations or authorizations from any Agency necessary for the manufacture, use, storage, import, export, transport, promotion, marketing, and sale of a Product (including any government price or reimbursement approvals), Product approval and registration, and regulatory



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affairs related to the foregoing. “Develop” means to engage in Development.

- V. “Direct Cost” means a cost not to exceed the cost of labor, material, travel and other expenditures to the extent the costs are directly incurred to provide the relevant assistance or service. “Direct Cost” to the Acquirer for its use of any of a Respondent’s employees’ labor shall not exceed the average hourly wage rate for such employee;

*provided, however*, in each instance where: (i) an agreement to divest relevant assets is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, “Direct Cost” means such cost as is provided in such Remedial Agreement for that Divestiture Product.

- W. “Divestiture Product(s)” means, the following, individually and collectively:
1. the Acetylcysteine Products;
  2. the Amiodarone Products;
  3. the Etomidate Products;
  4. the Fluorouracil Products;
  5. the Fomepizole Products;
  6. the Ganciclovir Products;
  7. the Labetalol Products;
  8. the Meropenem Products;
  9. the Mesna Products;
  10. the Methotrexate Products; and,

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11. the Mycophenolate Mofetil Products.

- X. “Divestiture Product Assets” means, the following, individually and collectively:
1. the Group A Divestiture Product Assets;
  2. the Group B Divestiture Product Assets;
  3. the Group C Divestiture Product Assets; and
  4. the Lebetalol Divestiture Product Assets.
- Y. “Divestiture Product Core Employees” means the Product Research and Development Employees and the Product Manufacturing Employees related to each Divestiture Product.
- Z. “Divestiture Product License” means a perpetual, non-exclusive, fully paid-up and royalty-free license(s) with rights to sublicense to all Product Licensed Intellectual Property and all Product Manufacturing Technology related to general manufacturing know-how that was owned, licensed, or controlled by the specified Respondent (as that Respondent is identified in the definition of the specified Divestiture Product):
1. to research and Develop the specified Divestiture Products for marketing, distribution or sale within the Geographic Territory;
  2. to use, make, have made, distribute, offer for sale, promote, advertise, or sell the specified Divestiture Products within the Geographic Territory;
  3. to import or export the specified Divestiture Products to or from the Geographic Territory to the extent related to the marketing, distribution or sale of the specified Divestiture Products in the Geographic Territory; and

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4. to have the specified Divestiture Products made anywhere in the World for distribution or sale within, or import into the Geographic Territory;

*provided however*, that for any Product Licensed Intellectual Property that is the subject of a license from a Third Party entered into by a Respondent prior to the Acquisition, the scope of the rights granted hereunder shall only be required to be equal to the scope of the rights granted by the Third Party to that Respondent.

- AA. “Divestiture Product Releasee(s)” means the following Persons:
1. the Acquirer for the assets related to a particular Divestiture Product;
  2. any Person controlled by or under common control with that Acquirer; and
  3. any Manufacturing Designees, licensees, sublicensees, manufacturers, suppliers, distributors, and customers of that Acquirer, or of such Acquirer-affiliated entities.
- BB. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph IV of this Order.
- CC. “Domain Name” means the domain name(s) (universal resource locators), and registration(s) thereof, issued by any Person or authority that issues and maintains the domain name registration. A Domain Name” shall not include any trademark or service mark rights to such domain names other than the rights to the Product Trademarks required to be divested.
- DD. “Drug Master Files” means the information submitted to the FDA as described in 21 C.F.R. Part 314.420 related to a Product.

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- EE. “Etomidate Products” means the following: all Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Mylan pursuant to ANDA No. 091297, and any supplements, amendments, or revisions thereto.
- FF. “Fluorouracil Product(s)” means the following: all Products in Development, manufactured, marketed or sold by Respondent Mylan pursuant to the following ANDAs:
1. ANDA No. 040798;
  2. ANDA No. 040743; and
  3. any supplements, amendments, or revisions thereto.
- GG. “Fomepizole Products” means the following: all Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Agila pursuant to ANDA No. 205283, and any supplements, amendments, or revisions thereto.
- HH. “Ganciclovir Products” means the following: all Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Mylan pursuant to ANDA No. 204950, and any supplements, amendments, or revisions thereto.
- II. “Geographic Territory” shall mean the United States of America, including all of its territories and possessions, unless otherwise specified.
- JJ. “Gland” means Gland Pharma Limited, a corporation organized, existing and doing business under and by virtue of the laws of the Republic of India, with its headquarters address located at 6-3-862, Ameerpet, Hyderabad 500 016 India.

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- KK. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- LL. “Group A Divestiture Products” means:
1. the Flourouracil Products; and
  2. the Methotrexate Products.
- MM. “Group A Divestiture Product Agreement(s)” means, the following:
1. the Asset Purchase Agreement among Mylan Inc., Accord Healthcare, Inc. and Intas Pharmaceuticals Limited, dated as of August 30, 2013;
  2. the Disclosure Letter to the Asset Purchase Agreement among Mylan Inc., Accord Healthcare, Inc. and Intas Pharmaceuticals Limited, dated as of August 30, 2013;
  3. Amendment No. 3 to Supply Agreement (to that certain the Supply Agreement, dated as of April 28, 2005, between GeneraMedix and Intas Pharmaceuticals, Ltd.) by and between Vinovia Enterprises Limited and Intas Pharmaceuticals, Ltd., which is to be executed on the Closing Date for the Group A Divestiture Assets;
  4. Termination of Technical/ Quality Agreement (in respect of that certain Technical/Quality Agreement effective as of June 28, 2013, by and between Intas Pharmaceuticals Ltd. and Mylan Teoranta d/b/a Mylan Institutional) by and between Intas Pharmaceuticals Ltd. and Mylan Institutional, which is to be executed on the Closing Date for the Group A Divestiture Assets; and

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5. all amendments, exhibits, attachments, agreements, and schedules thereto,

related to the Group A Divestiture Assets that have been approved by the Commission to accomplish the requirements of this Order. The Group A Divestiture Product Agreements are contained in Non-Public Appendix I.

NN. “Group A Divestiture Product Assets” means all rights, title and interest in and to all assets related to the Business within the Geographic Territory of the specified Respondent (as that Respondent is identified in the definition of the respective Divestiture Product) related to each of the respective Group A Divestiture Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Group A Divestiture Products.

OO. “Group B Divestiture Products” means the following:

1. the Amiodarone Products;
2. the Etomidate Products;
3. the Fomepizole Products;
4. the Ganciclovir Products;
5. the Meropenem Products; and
6. the Mychophenolate Mofetil Products.

PP. “Group B Divestiture Product Agreement(s)” means, the following:

1. the Asset Purchase Agreement between Mylan Inc. and JHP Pharmaceuticals, LLC, dated as of September 2, 2013;

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2. the Disclosure Letter to Asset Purchase Agreement between Mylan Inc. and JHP Pharmaceuticals, LLC dated as of September 2, 2013;
3. the Supply and Technology Transfer Agreement between Mylan Inc. and JHP Pharmaceuticals, LLC which is to be executed on the Closing Date for the Group B Divestiture Product Assets;
4. the Quality Agreement For Contract Manufacture, Bulk Packaging, Package (Assembly), Testing and Batch Release by and between JHP Pharmaceuticals, LLC and Mylan Inc. which is to be executed on the Closing Date for the Group B Divestiture Product Assets; and
5. all amendments, exhibits, attachments, agreements, and schedules thereto,

related to the Group B Divestiture Assets that have been approved by the Commission to accomplish the requirements of this Order. The Group B Divestiture Product Agreements are contained in Non-Public Appendix I.

QQ. “Group B Divestiture Product Assets: means all rights, title and interest in and to all assets related to the Business within the Geographic Territory of the specified Respondent (as that Respondent is identified in the definition of the respective Divestiture Product) related to each of the respective Group B Divestiture Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Group B Divestiture Products.

RR. “Group C Divestiture Products” means:

1. the Acetylcysteine Products; and
2. the Mesna Products.

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- SS. “Group C Divestiture Product Agreement(s)” means, the following:
1. the Master Agreement between Mylan Inc. and Sagent Pharmaceuticals, Inc., dated as of August 30, 2013;
  2. the 2013 Amendment to Dossier Sale, Manufacture and Supply Agreement (with respect to that certain Dossier Sale, Manufacture and Supply Agreement by and between Sagent Agila LLC and Agila Specialties Private Limited, dated as of September 12, 2007) by and between Sagent Agila LLC and Agila Specialties Private Limited, which is to be executed on the Closing Date for the Group C Divestiture Product Assets;
  3. the Supply and Technology Transfer Agreement by and between Sagent Pharmaceuticals, Inc. and Agila Specialties Private Limited, which is to be executed as of the Closing Date for the Group C Divestiture Product Assets;
  4. the Bill of Sale Assignment and Assumption Agreement by and between Sagent Agila LLC and Sagent Pharmaceuticals, Inc., which is to be executed on the Closing Date for the Group C Divestiture Product Assets;
  5. the Bill of Sale Assignment and Assumption Agreement by and between Agila Specialties Private Limited and Sagent Pharmaceuticals, Inc. which is to be executed on the Closing Date for the Group C Divestiture Product Assets; and,
  6. all amendments, exhibits, attachments, agreements, and schedules thereto,
- related to the Group C Divestiture Assets that have been approved by the Commission to accomplish the requirements of this Order. The Group C Divestiture



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Product Agreements are contained in Non-Public Appendix I.

- TT. “Group C Divestiture Product Assets” means all rights, title and interest in and to all assets related to the Business within the Geographic Territory of the specified Respondent (as that Respondent is identified in the definition of the respective Divestiture Product) related to each of the respective Group C Divestiture Products, to the extent legally transferable, including, without limitation, the Categorized Assets related to the Group C Divestiture Products.
- UU. “High Volume Account(s)” means any retailer, wholesaler or distributor whose annual or projected annual aggregate purchase amounts (on a company-wide level), in units or in dollars, of a Divestiture Product in the United States of America from the Respondent was, or is projected to be among the top twenty highest of such purchase amounts by the Respondent’s U.S. customers on any of the following dates: (i) the end of the last quarter that immediately preceded the date of the public announcement of the proposed Acquisition; (ii) the end of the last quarter that immediately preceded the Acquisition Date; (iii) the end of the last quarter that immediately preceded the Closing Date for the relevant assets; or (iv) the end of the last quarter following the Acquisition or the Closing Date.
- VV. “Intas” means Intas Pharmaceuticals Ltd., a corporation organized, existing and doing business under and by virtue of the laws of the Republic of India with its headquarters address located at Chinubhai Center, Off. Nehru Bridge, Ashram Road, Ahmedabad, 380009, Gujarat, India.
- WW. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order or Paragraph III of the related Order to Maintain Assets.

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- XX. “JHP” means JHP Pharmaceuticals, LLC, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters address located at Morris Corporate Center 2, One Upper Pond Road, Building D 3rd Floor, Parsippany, New Jersey 07054.
- YY. “Labetalol Products” means all Products in Development, manufactured, marketed or sold that are the subject of the License, Manufacturing and Supply Agreement, by and between Bioniche Teoranta and Gland Pharma Limited, dated as of January 3, 2012, including without limitation, those Products that are the subject of ANDA No. 090699, and any supplements, amendments, or revisions thereto.
- ZZ. “Labetalol Product Divestiture Assets” means all of Respondent Mylan’s rights, title and interest in and to all assets related to Respondent Mylan’s Business within the Geographic Territory related to each of the respective Labetalol Products to the extent legally transferable, including, without limitation, all such rights acquired or held by Respondent Mylan as a result of the License, Manufacturing and Supply Agreement, by and between Bioniche Teoranta and Gland Pharma Limited, dated as of January 3, 2012.
- AAA. “Labetalol Product Divestiture Agreement” means the Termination of the License, Manufacturing and Supply Agreement in respect of that certain License, Manufacturing and Supply Agreement, dated as of January 3, 2012( by and between Mylan Teoranta d/b/a Mylan Institutional and f/k/a Bioniche Teoranta (“Mylan Institutional”) and Gland Pharma Limited), by and between Mylan Institutional and Gland Pharma Limited, dated as of August 23, 2013, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Labetalol Product Divestiture Assets that have been approved by the Commission to accomplish the requirements of this Order. The Labetalol Product Divestiture Agreement and the related License, Manufacturing and Supply

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Agreement, dated as of January 3, 2012 are contained in Non-Public Appendix I.

- BBB. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- CCC. “Manufacturing Designee” means any Person other than a Respondent that has been designated by an Acquirer to manufacture a Divestiture Product for that Acquirer.
- DDD. “Meropenem Products” means the following: all Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Mylan pursuant to ANDA No. 204139, and any supplements, amendments, or revisions thereto.
- EEE. “Mesna Products” means the following: all Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Agila pursuant to ANDA No. 090913, and any supplements, amendments, or revisions thereto.
- FFF. “Methotrexate Products” means the following: all Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Mylan pursuant to the following ANDAs:
1. ANDA No. 040716;
  2. ANDA No. 040767;
  3. ANDA No. 040768; and,
  4. any supplements, amendments, or revisions thereto.
- GGG. “Mycophenolate Mofetil Products” means the following: all Products in Development, manufactured, marketed, sold, owned or controlled by Respondent Mylan pursuant to ANDA No. 203575,

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and any supplements, amendments, or revisions thereto.

- HHH. “NDC Numbers” means the National Drug Code numbers, including both the labeler code assigned by the FDA and the additional numbers assigned by an Application holder as a product code for a specific Product.
- III. “Orders” means this Decision and Order and the related Order to Maintain Assets.
- JJJ. “Order Date” means the date on which the final Decision and Order in this matter is issued by the Commission.
- KKK. “Order to Maintain Assets” means the Order to Maintain Assets incorporated into and made a part of the Agreement Containing Consent Orders.
- LLL. “Patent(s)” means all patents, patent applications, including provisional patent applications, invention disclosures, certificates of invention and applications for certificates of invention and statutory invention registrations, in each case filed, or in existence, on or before the Closing Date (except where this Order specifies a different time), and includes all reissues, additions, divisions, continuations, continuations-in-part, supplementary protection certificates, extensions and reexaminations thereof, all inventions disclosed therein, and all rights therein provided by international treaties and conventions.
- MMM. “Person” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.
- NNN. “Product(s)” means any pharmaceutical, biological, or genetic composition containing any formulation or dosage of a compound referenced as its

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pharmaceutically, biologically, or genetically active ingredient and/or that is the subject of an Application.

OOO. “Product Approval(s)” means any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests therefor, required by applicable Agencies related to the research, Development, manufacture, distribution, finishing, packaging, marketing, sale, storage or transport of a Product within the United States of America, and includes, without limitation, all approvals, registrations, licenses or authorizations granted in connection with any Application related to that Product.

PPP. “Product Assumed Contracts” means all of the following contracts or agreements (copies of each such contract to be provided to the Acquirer on or before the Closing Date and segregated in a manner that clearly identifies the purpose(s) of each such contract):

1. that make specific reference to the specified Divestiture Product and pursuant to which any Third Party is obligated to purchase, or has the option to purchase without further negotiation of terms, the specified Divestiture Product from the Respondent unless such contract applies generally to the Respondent’s sales of Products to that Third Party;
2. pursuant to which the Respondent purchases the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) or had planned to purchase the active pharmaceutical ingredient(s) or other necessary ingredient(s) or component(s) from any Third Party for use in connection with the manufacture of the specified Divestiture Product;

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3. relating to any Clinical Trials involving the specified Divestiture Product;
4. with universities or other research institutions for the use of the specified Divestiture Product in scientific research;
5. relating to the particularized marketing of the specified Divestiture Product or educational matters relating solely to the specified Divestiture Product(s);
6. pursuant to which a Third Party manufactures the specified Divestiture Product on behalf of the Respondent;
7. pursuant to which a Third Party provides any part of the manufacturing process including, without limitation, the finish, fill, and/or packaging of the specified Divestiture Product on behalf of Respondent;
8. pursuant to which a Third Party provides the Product Manufacturing Technology related to the specified Divestiture Product to the Respondent;
9. pursuant to which a Third Party is licensed by the Respondent to use the Product Manufacturing Technology;
10. constituting confidentiality agreements involving the specified Divestiture Product;
11. involving any royalty, licensing, covenant not to sue, or similar arrangement involving the specified Divestiture Product;
12. pursuant to which a Third Party provides any specialized services necessary to the research, Development, manufacture or distribution of the specified Divestiture Product to the Respondent

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including, but not limited to, consultation arrangements; and/or

13. pursuant to which any Third Party collaborates with the Respondent in the performance of research, Development, marketing, distribution or selling of the specified Divestiture Product or the Business related to such Divestiture Product;

*provided, however,* that where any such contract or agreement also relates to a Retained Product(s), the Respondent shall assign the Acquirer all such rights under the contract or agreement as are related to the specified Divestiture Product, but concurrently may retain similar rights for the purposes of the Retained Product(s).

QQQ. “Product Copyrights” means rights to all original works of authorship of any kind directly related to a Divestiture Product and any registrations and applications for registrations thereof within the Geographic Territory, including, but not limited to, the following: all such rights with respect to all promotional materials for healthcare providers, all promotional materials for patients, and educational materials for the sales force; copyrights in all preclinical, clinical and process development data and reports relating to the research and Development of that Product or of any materials used in the research, Development, manufacture, marketing or sale of that Product, including all copyrights in raw data relating to Clinical Trials of that Product, all case report forms relating thereto and all statistical programs developed (or modified in a manner material to the use or function thereof (other than through user references)) to analyze clinical data, all market research data, market intelligence reports and statistical programs (if any) used for marketing and sales research; all copyrights in customer information, promotional and marketing materials, that Product’s sales forecasting models, medical education materials, sales training

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materials, and advertising and display materials; all records relating to employees of a Respondent who accept employment with an Acquirer (excluding any personnel records the transfer of which is prohibited by applicable Law); all copyrights in records, including customer lists, sales force call activity reports, vendor lists, sales data, reimbursement data, speaker lists, manufacturing records, manufacturing processes, and supplier lists; all copyrights in data contained in laboratory notebooks relating to that Product or relating to its biology; all copyrights in adverse experience reports and files related thereto (including source documentation) and all copyrights in periodic adverse experience reports and all data contained in electronic databases relating to adverse experience reports and periodic adverse experience reports; all copyrights in analytical and quality control data; and all correspondence with the FDA or any other Agency.

RRR. “Product Development Reports” means:

1. Pharmacokinetic study reports related to the specified Divestiture Product;
2. Bioavailability study reports (including reference listed drug information) related to the specified Divestiture Product;
3. Bioequivalence study reports (including reference listed drug information) related to the specified Divestiture Product;
4. all correspondence, submissions, notifications, communications, registrations or other filings made to, received from or otherwise conducted with the FDA relating to the Application(s) related to the specified Divestiture Product;
5. annual and periodic reports related to the above-described Application(s), including any safety update reports;



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6. FDA approved Product labeling related to the specified Divestiture Product;
7. currently used or planned product package inserts (including historical change of controls summaries) related to the specified Divestiture Product;
8. FDA approved patient circulars and information related to the specified Divestiture Product;
9. adverse event reports, adverse experience information, descriptions of material events and matters concerning safety or lack of efficacy related to the specified Divestiture Product;
10. summary of Product complaints from physicians related to the specified Divestiture Product;
11. summary of Product complaints from customers related to the specified Divestiture Product;
12. Product recall reports filed with the FDA related to the specified Divestiture Product, and all reports, studies and other documents related to such recalls;
13. investigation reports and other documents related to any out of specification results for any impurities found in the specified Divestiture Product;
14. reports related to the specified Divestiture Product from any consultant or outside contractor engaged to investigate or perform testing for the purposes of resolving any product or process issues, including without limitation, identification and sources of impurities;
15. reports of vendors of the active pharmaceutical ingredients, excipients, packaging components and detergents used to produce the specified

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Divestiture Product that relate to the specifications, degradation, chemical interactions, testing and historical trends of the production of the specified Divestiture Product;

16. analytical methods development records related to the specified Divestiture Product;
17. manufacturing batch records related to the specified Divestiture Product;
18. stability testing records related to the specified Divestiture Product;
19. change in control history related to the specified Divestiture Product; and
20. executed validation and qualification protocols and reports related to the specified Divestiture Product.

SSS. “Product Employee Information” means the following, for each Divestiture Product Core Employee, as and to the extent permitted by Law:

1. a complete and accurate list containing the name of each Divestiture Product Core Employee (including former employees who were employed by the specified Respondent within ninety (90) days of the execution date of any Remedial Agreement);
2. with respect to each such employee, the following information:
  - a. the date of hire and effective service date;
  - b. job title or position held;
  - c. a specific description of the employee’s responsibilities related to the relevant Divestiture Product; provided, however, in lieu of this description, the specified Respondent

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may provide the employee's most recent performance appraisal;

- d. the base salary or current wages;
  - e. the most recent bonus paid, aggregate annual compensation for the relevant Respondent's last fiscal year and current target or guaranteed bonus, if any;
  - f. employment status (i.e., active or on leave or disability; full-time or part-time);
  - g. and any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees;
3. at the Acquirer's option or the Proposed Acquirer's option (as applicable), copies of all employee benefit plans and summary plan descriptions (if any) applicable to the relevant employees.

TTT. "Product Intellectual Property" means all of the following related to a Divestiture Product (other than Product Licensed Intellectual Property):

1. Patents;
2. Product Copyrights;
3. Product Trademarks, Product Trade Dress, trade secrets, know-how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development and other information; and
4. rights to obtain and file for patents, trademarks, and copyrights and registrations thereof and to bring suit against a Third Party for the past, present

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or future infringement, misappropriation, dilution, misuse or other violations of any of the foregoing;

*provided, however*, “Product Intellectual Property” does not include the corporate names or corporate trade dress of “Mylan”, “Agila”, “Strides” or the related corporate logos thereof, or the corporate names or corporate trade dress of any other corporations or companies owned or controlled by the Respondent or the related corporate logos thereof, or general registered images or symbols by which Mylan, Agila or Strides can be identified or defined.

UUU. “Product Licensed Intellectual Property” means the following:

1. Patents that are related to a Divestiture Product that the Respondent can demonstrate have been routinely used, prior to the Acquisition Date, for Retained Product(s) that has been marketed or sold on an extensive basis by the Respondent within the two-year period immediately preceding the Acquisition;
2. trade secrets, know how, techniques, data, inventions, practices, methods, and other confidential or proprietary technical, business, research, Development, and other information, and all rights in the Geographic Territory to limit the use or disclosure thereof, that are related to a Divestiture Product and that the Respondent can demonstrate have been routinely used, prior to the Acquisition Date, for Retained Product(s) that has been marketed or sold on an extensive basis by the Respondent within the two-year period immediately preceding the Acquisition; and
3. all Right(s) of Reference or Use that is either owned or controlled by, or has been granted or licensed to the Respondent that is related to the Drug Master File of an NDA of a Product that is

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the therapeutic equivalent (as that term is defined by the FDA) of the specified Divestiture Product.

VVV. “Product Manufacturing Employees” means all salaried employees of a Respondent who have directly participated in the planning, design, implementation or operational management of the Product Manufacturing Technology of the specified Divestiture Product (irrespective of the portion of working time involved unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) within the eighteen (18) month period immediately prior to the Closing Date.

WWW. “Product Manufacturing Technology” means all of the following related to a Divestiture Product:

1. all technology, trade secrets, know-how, formulas, and proprietary information (whether patented, patentable or otherwise) related to the manufacture of that Product, including, but not limited to, the following: all product specifications, processes, analytical methods, product designs, plans, trade secrets, ideas, concepts, manufacturing, engineering, and other manuals and drawings, standard operating procedures, flow diagrams, chemical, safety, quality assurance, quality control, research records, clinical data, compositions, annual product reviews, regulatory communications, control history, current and historical information associated with the FDA Application(s) conformance and cGMP compliance, and labeling and all other information related to the manufacturing process, and supplier lists;
2. all ingredients, materials, or components used in the manufacture of any that Product including the active pharmaceutical ingredient, excipients or packaging materials; and,

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3. for those instances in which the manufacturing equipment is not readily available from a Third Party, at the Acquirer's option, all such equipment used to manufacture that Product.

XXX. "Product Marketing Materials" means all marketing materials used specifically in the marketing or sale of the specified Divestiture Product in the Geographic Territory as of the Closing Date, including, without limitation, all advertising materials, training materials, product data, mailing lists, sales materials (e.g., detailing reports, vendor lists, sales data), marketing information (e.g., competitor information, research data, market intelligence reports, statistical programs (if any) used for marketing and sales research), customer information (including customer net purchase information to be provided on the basis of either dollars and/or units for each month, quarter or year), sales forecasting models, educational materials, and advertising and display materials, speaker lists, promotional and marketing materials, Website content and advertising and display materials, artwork for the production of packaging components, television masters and other similar materials related to the specified Divestiture Product.

YYY. "Product Research and Development Employees" means all salaried employees of a Respondent who have directly participated in the research, Development, regulatory approval process, or clinical studies of the specified Divestiture Product (irrespective of the portion of working time involved, unless such participation consisted solely of oversight of legal, accounting, tax or financial compliance) with the eighteen (18) month period immediately prior to the Closing Date.

ZZZ. "Product Scientific and Regulatory Material" means all technological, scientific, chemical, biological, pharmacological, toxicological, regulatory and Clinical Trial materials and information.

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AAAA. “Product Trade Dress” means the current trade dress of a Product, including but not limited to, Product packaging, and the lettering of the Product trade name or brand name.

BBBB. “Product Trademark(s)” means all proprietary names or designations, trademarks, service marks, trade names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for a Product.

CCCC. “Proposed Acquirer” means a Person proposed by a Respondent (or a Divestiture Trustee) to the Commission and submitted for the approval of the Commission as the acquirer for particular assets or rights required to be assigned, granted, licensed, divested, transferred, delivered or otherwise conveyed pursuant to this Order.

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

1. any agreement between a Respondent(s) and an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission’s determination to make this Order final and effective;
2. any agreement between a Respondent(s) and a Third Party to effect the assignment of assets or

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rights of that Respondent(s) related to a Divestiture Product to the benefit of an Acquirer that is specifically referenced and attached to this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, that has been approved by the Commission to accomplish the requirements of the Order in connection with the Commission's determination to make this Order final and effective;

3. any agreement between a Respondent(s) and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the relevant assets or rights to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed, including without limitation, any agreement by that Respondent(s) to supply specified products or components thereof, and that has been approved by the Commission to accomplish the requirements of this Order; and/or
4. any agreement between a Respondent(s) and a Third Party to effect the assignment of assets or rights of that Respondent(s) related to a Divestiture Product to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.

EEEE. "Retained Product" means any Product(s) other than a Divestiture Product.

FFFF. "Right of Reference or Use" means the authority to rely upon, and otherwise use, an investigation for the purpose of obtaining approval of an Application or to defend an Application, including the ability to make



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available the underlying raw data from the investigation for FDA audit.

GGGG. “Sagent” means Sagent Pharmaceuticals, Inc. a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its headquarters address located at 1901 N. Roselle Road, Suite 700, Schaumburg, Illinois 60195.

HHHH. “Supply Cost” means a cost not to exceed the Respondent’s (as that Respondent is identified in the definition of the respective Divestiture Product) average direct per unit cost in United States dollars of manufacturing the specified Divestiture Product for the twelve (12) month period immediately preceding the Acquisition Date. “Supply Cost” shall expressly exclude any intracompany business transfer profit; provided, however, that in each instance where: (i) an agreement to Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, “Supply Cost” means the cost as specified in such Remedial Agreement for that Divestiture Product.

III. “Technology Transfer Standards” means requirements and standards sufficient to ensure that the information and assets required to be delivered to an Acquirer pursuant to this Order are delivered in an organized, comprehensive, complete, useful, timely (i.e., ensuring no unreasonable delays in transmission), and meaningful manner. Such standards and requirements shall include, inter alia,

1. designating employees of the Respondent(s) knowledgeable about the Product Manufacturing Technology (and all related intellectual property) related to each of the Divestiture Products who will be responsible for communicating directly with the Acquirer or its Manufacturing Designee, and the

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Interim Monitor (if one has been appointed), for the purpose of effecting such delivery;

2. preparing technology transfer protocols and transfer acceptance criteria for both the processes and analytical methods related to the specified Divestiture Product that are acceptable to the Acquirer;
3. preparing and implementing a detailed technological transfer plan that contains, inter alia, the transfer of all relevant information, all appropriate documentation, all other materials, and projected time lines for the delivery of all such Product Manufacturing Technology (including all related intellectual property) to the Acquirer or its Manufacturing Designee; and
4. providing, in a timely manner, assistance and advice to enable the Acquirer or its Manufacturing Designee to:
  - a. manufacture the specified Divestiture Product in the quality and quantities achieved by the specified Respondent (as that Respondent is identified in the definition of the specified Divestiture Product), or the manufacturer and/or developer of such Divestiture Product;
  - b. obtain any Product Approvals necessary for the Acquirer or its Manufacturing Designee, to manufacture, distribute, market, and sell the specified Divestiture Product in commercial quantities and to meet all Agency-approved specifications for such Divestiture Product; and
  - c. receive, integrate, and use all such Product Manufacturing Technology and all such intellectual property related to the specified Divestiture Product.

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JJJJ. “Third Party(ies)” means any non-governmental Person other than the following: the Respondents; or, the Acquirer of particular assets or rights pursuant to this Order.

KKKK. “Website” means the content of the Website(s) located at the Domain Names, the Domain Names, and all copyrights in such Website(s), to the extent owned by a Respondent; provided, however, “Website” shall not include the following: (1) content owned by Third Parties and other Product Intellectual Property not owned by a Respondent that are incorporated in such Website(s), such as stock photographs used in the Website(s), except to the extent that a Respondent can convey its rights, if any, therein; or (2) content unrelated to any of the Divestiture Products.

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

A. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondent Mylan shall divest the Group A Divestiture Product Assets and grant the related Divestiture Product License, absolutely and in good faith, to Intas pursuant to, and in accordance with, the Group A Divestiture Product Agreement(s) (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Intas or to reduce any obligations of Respondent Mylan under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Group A Divestiture Product Assets is incorporated by reference into this Order and made a part hereof;

*provided, however,* that if Respondent Mylan has divested the Group A Divestiture Product Assets to Intas prior to the Order Date, and if, at the time the

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Commission determines to make this Order final and effective, the Commission notifies Respondent Mylan that Intas is not an acceptable purchaser of the Group A Divestiture Product Assets, then Respondent Mylan shall immediately rescind the transaction with Intas, in whole or in part, as directed by the Commission, and shall divest the Group A Divestiture Product Assets within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

*provided further* that if Respondent Mylan has divested the Group A Divestiture Product Assets to Intas prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Mylan that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent Mylan, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Group A Divestiture Product Assets to Intas (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- B. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondent Mylan shall divest the Group B Divestiture Product Assets and grant the related Divestiture Product License, absolutely and in good faith, to JHP pursuant to, and in accordance with, the Group B Divestiture Product Agreement(s) (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of JHP or to reduce any obligations of Respondent Mylan under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Group

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B Divestiture Product Assets is incorporated by reference into this Order and made a part hereof;

*provided, however,* that if Respondent Mylan has divested the Group B Divestiture Product Assets and granted the related Divestiture Product License to JHP prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Mylan that JHP is not an acceptable purchaser of the Group B Divestiture Product Assets, then Respondent Mylan shall immediately rescind the transaction with JHP, in whole or in part, as directed by the Commission, and shall divest the Group B Divestiture Product Assets and grant the related Divestiture Product License within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

*provided further* that if Respondent Mylan has divested the Group B Divestiture Product Assets to JHP prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Mylan that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent Mylan, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Group B Divestiture Product Assets to JHP (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- C. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondent Mylan shall divest the Group C Divestiture Product Assets and grant the related Divestiture Product License, absolutely and in good

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faith, to Sagent pursuant to, and in accordance with, the Group C Divestiture Product Agreement(s) (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Sagent or to reduce any obligations of Respondent Mylan under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Group C Divestiture Product Assets is incorporated by reference into this Order and made a part hereof;

*provided, however,* that if Respondent Mylan has divested the Group C Divestiture Product Assets and granted the related Divestiture Product License to Sagent prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Mylan that Sagent is not an acceptable purchaser of the Group C Divestiture Product Assets, then Respondent Mylan shall immediately rescind the transaction with Sagent, in whole or in part, as directed by the Commission, and shall divest the Group C Divestiture Product Assets and grant the related Divestiture Product License within one hundred eighty (180) days from the Order Date, absolutely and in good faith, at no minimum price, to an Acquirer that receives the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission;

*provided further* that if Respondent Mylan has divested the Group C Divestiture Product Assets and granted the related Divestiture Product License to Sagent prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Mylan that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent Mylan, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Group C Divestiture Product Assets or grant of the related Divestiture Product License, as

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applicable, to Sagent (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- D. Not later than the earlier of: (i) ten (10) days after the Acquisition Date or (ii) ten (10) days after the Order Date, Respondent Mylan shall divest the Labetalol Product Assets (to the extent that such assets are not already owned, controlled or in the possession of Gland), absolutely and in good faith, to Gland pursuant to, and in accordance with, the Labetalol Product Divestiture Agreements (which agreements shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that this Order shall not be construed to reduce any rights or benefits of Gland or to reduce any obligations of Respondent Mylan under such agreements), and each such agreement, if it becomes a Remedial Agreement related to the Labetalol Product Assets is incorporated by reference into this Order and made a part hereof;

*provided, however,* that if Respondent Mylan has divested the Labetalol Divestiture Product Assets to Gland prior to the Order Date, and if, at the time the Commission determines to make this Order final and effective, the Commission notifies Respondent Mylan that the manner in which the divestiture was accomplished is not acceptable, the Commission may direct Respondent Mylan, or appoint a Divestiture Trustee, to effect such modifications to the manner of divestiture of the Labetalol Divestiture Product Assets to Gland (including, but not limited to, entering into additional agreements or arrangements) as the Commission may determine are necessary to satisfy the requirements of this Order.

- E. Prior to the Closing Date, Respondents shall secure all consents and waivers from all Third Parties that are necessary to permit Respondents to divest the assets

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required to be divested pursuant to this Order to an Acquirer, and to permit the relevant Acquirer to continue the Business of the Divestiture Product(s) being acquired by that Acquirer;

*provided, however,* Respondents may satisfy this requirement by certifying that the relevant Acquirer for the Divestiture Product has executed all such agreements directly with each of the relevant Third Parties.

- F. Respondents shall:
1. submit to each Acquirer, at Respondents' expense, all Confidential Business Information related to the Divestiture Products being acquired by that Acquirer;
  2. deliver all Confidential Business Information related to the Divestiture Products being acquired by that Acquirer to that Acquirer:
    - a. in good faith;
    - b. in a timely manner, i.e., as soon as practicable, avoiding any delays in transmission of the respective information; and
    - c. in a manner that ensures its completeness and accuracy and that fully preserves its usefulness;
  3. pending complete delivery of all such Confidential Business Information to the relevant Acquirer, provide that Acquirer and the Interim Monitor (if any has been appointed) with access to all such Confidential Business Information and employees who possess or are able to locate such information for the purposes of identifying the books, records, and files directly related to the relevant Divestiture Products that contain such Confidential Business Information and facilitating the delivery in a manner consistent with this Order;



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4. not use, directly or indirectly, any such Confidential Business Information related to the Business of the Divestiture Products other than as necessary to comply with the following:
    - a. the requirements of this Order;
    - b. Respondents' obligations to each respective Acquirer under the terms of any related Remedial Agreement; or
    - c. applicable Law;
  5. not disclose or convey any Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer of the particular Divestiture Products, (ii) other Persons specifically authorized by that Acquirer to receive such information, (iii) the Commission, or (iv) the Interim Monitor (if any has been appointed); and
  6. not provide, disclose or otherwise make available, directly or indirectly, any Confidential Business Information related to the marketing or sales of the Divestiture Products to the employees associated with the Business related to those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products.
- G. For each Acquirer of a Divestiture Product that is a Contract Manufacture Product, Respondents shall provide, or cause to be provided to that Acquirer in a manner consistent with the Technology Transfer Standards the following:
1. all Product Manufacturing Technology (including all related intellectual property) related to the Divestiture Product(s) being acquired by that Acquirer; and

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2. all rights to all Product Manufacturing Technology (including all related intellectual property) that is owned by a Third Party and licensed to any Respondent related to the Divestiture Products being acquired by that Acquirer.

Respondent Mylan shall obtain any consents from Third Parties required to comply with this provision. No Respondent shall enforce any agreement against a Third Party or an Acquirer to the extent that such agreement may limit or otherwise impair the ability of that Acquirer to use or to acquire from the Third Party the Product Manufacturing Technology (including all related intellectual property) related to the Divestiture Products acquired by that Acquirer. Such agreements include, but are not limited to, agreements with respect to the disclosure of Confidential Business Information related to such Product Manufacturing Technology. Not later than ten (10) days after the Closing Date, Respondents shall grant a release to each Third Party that is subject to such agreements that allows the Third Party to provide the relevant Product Manufacturing Technology to that Acquirer. Within five (5) days of the execution of each such release, Respondents shall provide a copy of the release to that Acquirer.

- H. For each Acquirer of a Divestiture Product that is a Contract Manufacture Product, Respondent Mylan shall:
  1. upon reasonable written notice and request from that Acquirer to Respondent Mylan, Contract Manufacture and deliver, or cause to be manufactured and delivered, to the requesting Acquirer, in a timely manner and under reasonable terms and conditions, a supply of each of the Contract Manufacture Products related to the Divestiture Products acquired by that Acquirer at Supply Cost, for a period of time sufficient to allow that Acquirer (or the Manufacturing Designee of the Acquirer) to obtain all of the

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relevant Product Approvals necessary to manufacture in commercial quantities, and in a manner consistent with cGMP, the finished drug product independently of Respondent Mylan, and to secure sources of supply of the active pharmaceutical ingredients, excipients, other ingredients, and necessary components listed in Application(s) of the relevant Respondent (as that Respondent is identified in the definition of the respective Divestiture Product) for the Divestiture Product(s) acquired by that Acquirer from Persons other than Respondents Mylan or Agila;

2. make representations and warranties to such Acquirer that the Contract Manufacture Product(s) supplied by a Respondent pursuant to a Remedial Agreement meet the relevant Agency-approved specifications. For the Contract Manufacture Product(s) to be marketed or sold in the Geographic Territory, the supplying Respondent shall agree to indemnify, defend and hold the Acquirer harmless from any and all suits, claims, actions, demands, liabilities, expenses or losses alleged to result from the failure of the Contract Manufacture Product(s) supplied to the Acquirer pursuant to a Remedial Agreement by that Respondent to meet cGMP. This obligation may be made contingent upon the Acquirer giving that Respondent prompt written notice of such claim and cooperating fully in the defense of such claim;

*provided, however,* that a Respondent may reserve the right to control the defense of any such claim, including the right to settle the claim, so long as such settlement is consistent with that Respondent's responsibilities to supply the Contract Manufacture Products in the manner required by this Order; *provided further, however,* that this obligation shall not require Respondents to be liable for any negligent act or omission of the Acquirer or for any representations and warranties,

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express or implied, made by the Acquirer that exceed the representations and warranties made by a Respondent to the Acquirer in an agreement to Contract Manufacture;

*provided further, however,* that in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order, and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on a Respondent's aggregate liability resulting from the failure of the Contract Manufacture Products supplied to the Acquirer pursuant to such Remedial Agreement to meet cGMP;

3. give priority to supplying a Contract Manufacture Product to the relevant Acquirer over manufacturing and supplying of Products for Respondents' own use or sale;
4. make representations and warranties to each Acquirer that Respondents shall hold harmless and indemnify the Acquirer for any liabilities or loss of profits resulting from the failure of the Contract Manufacture Products to be delivered in a timely manner as required by the Remedial Agreement(s) unless Respondents can demonstrate that the failure was beyond the control of Respondents and in no part the result of negligence or willful misconduct by Respondents;

*provided, however,* that in each instance where: (i) an agreement to divest relevant assets or Contract Manufacture is specifically referenced and attached to this Order and (ii) such agreement becomes a Remedial Agreement for a Divestiture Product, each such agreement may contain limits on a Respondent's aggregate liability for such a failure;

5. during the term of any agreement to Contract Manufacture, upon written request of that Acquirer

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or the Interim Monitor (if any has been appointed), make available to the Acquirer and the Interim Monitor (if any has been appointed) all records that relate to the manufacture of the relevant Contract Manufacture Products that are generated or created after the Closing Date;

6. during the term of any agreement to Contract, Respondent Mylan shall take all actions as are reasonably necessary to ensure an uninterrupted supply of the Contract Manufacture Product(s);
7. in the event Respondent Mylan becomes unable to supply or produce a Contract Manufacture Product from the facility or facilities originally contemplated under a Remedial Agreement with an Acquirer, then Respondent Mylan shall provide a therapeutically equivalent (as that term is defined by the FDA) Product from another of Respondent Mylan's facility or facilities in those instances where such facilities are being used or have previously been used, and are able to be used, by Respondents to manufacture such Product(s);
8. provide access to all information and facilities, and make such arrangements with Third Parties, as are necessary to allow the Interim Monitor to monitor compliance with the obligations to Contract Manufacture;
9. during the term of any agreement to Contract Manufacture, provide consultation with knowledgeable employees of the Respondents and training, at the written request of the Acquirer and at a facility chosen by the Acquirer, for the purposes of enabling that Acquirer (or the Manufacturing Designee of that Acquirer) to obtain all Product Approvals to manufacture the Contract Manufacture Products acquired by that Acquirer in the same quality achieved by, or on behalf of, the relevant Respondent (as that

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Respondent is identified in the definition of the respective Divestiture Product) and in commercial quantities, and in a manner consistent with cGMP, independently of Respondent Mylan and sufficient to satisfy management of the Acquirer that its personnel (or the Manufacturing Designee's personnel) are adequately trained in the manufacture of the Contract Manufacture Products;

The foregoing provisions, II.H.1. - 9., shall remain in effect with respect to each Contract Manufacture Product until the earliest of: (i) the date the Acquirer of that Contract Manufacture Product (or the Manufacturing Designee(s) of that Acquirer), respectively, is approved by the FDA to manufacture and sell such Contract Manufacture Product in the United States and able to manufacture such Contract Manufacture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent Mylan; (ii) the date the Acquirer of a particular Contract Manufacture Product notifies the Commission and Respondent Mylan of its intention to abandon its efforts to manufacture such Contract Manufacture Product; (iii) the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer of a particular Contract Manufacture Product has abandoned its efforts to manufacture such Contract Manufacture Product, or (iv) the date five (v) years from the Closing Date.

- I. Respondent Mylan shall require, as a condition of continued employment post-divestiture of the assets required to be divested pursuant to this Order, that each employee that has had responsibilities related to the marketing or sales of the Divestiture Products within the one (1) year period prior to the Closing Date and each employee that has responsibilities related to the marketing or sales of those Retained Products that are the therapeutic equivalent (as that term is defined by the FDA) of the Divestiture Products, in each case

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who have or may have had access to Confidential Business Information, and the direct supervisor(s) of any such employee sign a confidentiality agreement pursuant to which that employee shall be required to maintain all Confidential Business Information related to the Divestiture Products as strictly confidential, including the nondisclosure of that information to all other employees, executives or other personnel of Respondent Mylan (other than as necessary to comply with the requirements of this Order).

- J. Not later than thirty (30) days after the Closing Date, Respondent Mylan shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information related to the Divestiture Products by Respondent Mylan's personnel to all of their employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information. Respondent Mylan shall give the above-described notification by e mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Closing Date. Respondent Mylan shall provide a copy of the notification to the relevant Acquirer. Respondent Mylan shall maintain complete records of all such notifications at Respondent Mylan's registered office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. Respondent Mylan shall provide the relevant Acquirer with copies of all certifications, notifications and reminders sent to Respondent Mylan's personnel.
- K. For each Acquirer of a Divestiture Product that is a Contract Manufacture Product, Respondent Mylan shall:
1. for a period of six (6) months from the Closing Date or until the hiring of twenty (20) Divestiture

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Product Core Employees by that Acquirer or its Manufacturing Designee, whichever occurs earlier, provide that Acquirer with the opportunity to enter into employment contracts with the Divestiture Product Core Employees related to the Divestiture Products and assets acquired by that Acquirer. Each of these periods is hereinafter referred to as the “Divestiture Product Core Employee Access Period(s);”

2. not later than the earlier of the following dates: (i) ten (10) days after notice by staff of the Commission to Respondent Mylan to provide the Product Employee Information; or (ii) ten (10) days after written request by that Acquirer, provide that Acquirer or Proposed Acquirer(s) with the Product Employee Information related to the Divestiture Product Core Employees. Failure by Respondent Mylan to provide the Product Employee Information for any Divestiture Product Core Employee within the time provided herein shall extend the Divestiture Product Core Employee Access Period(s) with respect to that employee in an amount equal to the delay;
3. during the Divestiture Product Core Employee Access Period(s), not interfere with the hiring or employing by that Acquirer or its Manufacturing Designee of the Divestiture Product Core Employees, and remove any impediments within the control of Respondent Mylan that may deter these employees from accepting employment with that Acquirer or its Manufacturing Designee, including, but not limited to, any noncompete or nondisclosure provision of employment with respect to a Divestiture Product or other contracts with Respondents Mylan or Agila that would affect the ability or incentive of those individuals to be employed by that Acquirer or its Manufacturing Designee. In addition, Respondents Mylan or Agila shall not make any counteroffer to such a Divestiture Product Core Employee who has



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received a written offer of employment from that Acquirer or its Manufacturing Designee;

*provided, however,* that, subject to the conditions of continued employment prescribed in this Order, this Paragraph shall not prohibit Respondents from continuing to employ any Divestiture Product Core Employee under the terms of that employee's employment with Respondents prior to the date of the written offer of employment from the Acquirer or its Manufacturing Designee to that employee;

4. until the Closing Date, provide all Divestiture Product Core Employees with reasonable financial incentives to continue in their positions and to research, Develop, and manufacture the Divestiture Product consistent with past practices and/or as may be necessary to preserve the marketability, viability and competitiveness of the Divestiture Product and to ensure successful execution of the pre-Acquisition plans for that Divestiture Product. Such incentives shall include a continuation of all employee compensation and benefits offered by Respondents until the Closing Date(s) for the divestiture of the assets related to the Divestiture Product has occurred, including regularly scheduled raises, bonuses, and vesting of pension benefits (as permitted by Law);

*provided, however,* that this Paragraph does not require nor shall be construed to require Respondents to terminate the employment of any employee or to prevent Respondents from continuing to employ the Divestiture Product Core Employees in connection with the Acquisition; and

5. for a period of one (1) year from the Closing Date, not, directly or indirectly, solicit or otherwise attempt to induce any employee of the Acquirer or its Manufacturing Designee with any amount of responsibility related to a Divestiture Product

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(“Divestiture Product Employee”) to terminate his or her employment relationship with the Acquirer or its Manufacturing Designee; or hire any Divestiture Product Employee;

*provided, however,* Respondents may hire any former Divestiture Product Employee whose employment has been terminated by the Acquirer or its Manufacturing Designee or who independently applies for employment with a Respondent, as long as that employee was not solicited in violation of the nonsolicitation requirements contained herein;

*provided further, however,* that any Respondent may do the following: (i) advertise for employees in newspapers, trade publications or other media not targeted specifically at the Divestiture Product Employees; or (ii) hire a Divestiture Product Employee who contacts any Respondent on his or her own initiative without any direct or indirect solicitation or encouragement from any Respondent.

- L. Until Respondents complete the divestitures required by this Order and fully provide, or cause to be provided, the Product Manufacturing Technology related to a particular Divestiture Product to the relevant Acquirer,
  1. Respondents shall take actions as are necessary to:
    - a. maintain the full economic viability and marketability of the Businesses associated with that Divestiture Product;
    - b. minimize any risk of loss of competitive potential for that Business;
    - c. prevent the destruction, removal, wasting, deterioration, or impairment of any of the assets related to that Divestiture Product;

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- d. ensure the assets related to each Divestiture Product are provided to the relevant Acquirer in a manner without disruption, delay, or impairment of the regulatory approval processes related to the Business associated with each Divestiture Product;
  - e. ensure the completeness of the transfer and delivery of the Product Manufacturing Technology; and
2. Respondents shall not sell, transfer, encumber or otherwise impair the assets required to be divested (other than in the manner prescribed in this Order) nor take any action that lessens the full economic viability, marketability, or competitiveness of the Businesses associated with that Divestiture Product.
- M. Respondents shall not join, file, prosecute or maintain any suit, in law or equity, against an Acquirer or the Divestiture Product Releasee(s) of that Acquirer under the following:
1. any Patent owned by or licensed to a Respondent as of the day after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof;
  2. any Patent that was filed or in existence on or before the Acquisition Date that is acquired by or licensed to a Respondent at any time after the Acquisition Date that claims a method of making, using, or administering, or a composition of matter of a Product, or that claims a device relating to the use thereof;
- if such suit would have the potential directly to limit or interfere with that Acquirer's freedom to practice the

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following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer. Each Respondent shall also covenant to that Acquirer that as a condition of any assignment or license from that Respondent to a Third Party of the above-described Patents, the Third Party shall agree to provide a covenant whereby the Third Party covenants not to sue that Acquirer or the related Divestiture Product Releasee(s) under such Patents, if the suit would have the potential directly to limit or interfere with that Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer. The provisions of this Paragraph do not apply to any Patent owned by, acquired by or licensed to or from a Respondent that claims inventions conceived by and reduced to practice after the Acquisition Date.

- N. Upon reasonable written notice and request from an Acquirer to Respondent Mylan, Respondent Mylan shall provide, in a timely manner, at no greater than Direct Cost, assistance of knowledgeable employees of Respondent Mylan to assist that Acquirer to defend against, respond to, or otherwise participate in any litigation brought by a Third Party related to the Product Intellectual Property related to any of the Divestiture Product(s) acquired by that Acquirer, if such litigation would have the potential to interfere with that Acquirer's freedom to practice the following:

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- (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Product(s); or
- (ii) the use within, import into, export from, or the supply, distribution, or sale within, the United States of America of the Divestiture Product(s) acquired by that Acquirer.
- O. For any patent infringement suit filed prior to the Closing Date in which any Respondent is alleged to have infringed a Patent of a Third Party or any potential patent infringement suit from a Third Party that any Respondent has prepared or is preparing to defend against as of the Closing Date, and where such a suit would have the potential directly to limit or interfere with the relevant Acquirer's freedom to practice the following: (i) the research, Development, or manufacture anywhere in the World of the Divestiture Product(s) acquired by that Acquirer for the purposes of marketing, sale or offer for sale within the United States of America of such Divestiture Products; or (ii) the use within, import into, export from, or the supply, distribution, or sale or offer for sale within, the United States of America of such Divestiture Product(s), that Respondent shall:
1. cooperate with that Acquirer and provide any and all necessary technical and legal assistance, documentation and witnesses from that Respondent in connection with obtaining resolution of any pending patent litigation related to that Divestiture Product;
  2. waive conflicts of interest, if any, to allow that Respondent's outside legal counsel to represent that Acquirer in any ongoing patent litigation related to that Divestiture Product; and

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3. permit the transfer to that Acquirer of all of the litigation files and any related attorney work-product in the possession of that Respondent's outside counsel related to that Divestiture Product.
- P. The purpose of the divestiture of the Divestiture Product Assets and the provision of the related Product Manufacturing Technology and the related obligations imposed on the Respondents by this Order is:
1. to ensure the continued use of such assets for the purposes of the Business associated with each Divestiture Product within the Geographic Territory; and
  2. to create a viable and effective competitor that is independent of Respondent Mylan in the Business of each Divestiture Product within the Geographic Territory; and,
  3. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

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

- A. At any time after the Respondents sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that the Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by this Order, the Order to Maintain Assets and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondent Mylan has not opposed, in writing, including the reasons for opposing, the selection of a proposed

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Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Mylan of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent Mylan shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Order in a manner consistent with the purposes of the Order.
- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
1. The Interim Monitor shall have the power and authority to monitor Respondent's compliance with the divestiture and asset maintenance obligations and related requirements of the Order, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Order and in consultation with the Commission.
  2. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.
  3. The Interim Monitor shall serve until the date of completion by the Respondents of the divestiture of all Divestiture Product Assets and the transfer and delivery of the related Product Manufacturing Technology in a manner that fully satisfies the requirements of this Order and, with respect to each Divestiture Product that is a Contract Manufacture Product, until the earliest of:

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- a. the date the Acquirer of that Divestiture Product (or that Acquirer's Manufacturing Designee(s)) is approved by the FDA to manufacture and sell that Divestiture Product and able to manufacture the Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondent Mylan;
- b. the date the Acquirer of that Divestiture Product notifies the Commission and Respondent Mylan of its intention to abandon its efforts to manufacture that Divestiture Product; or
- c. the date of written notification from staff of the Commission that the Interim Monitor, in consultation with staff of the Commission, has determined that the Acquirer has abandoned its efforts to manufacture that Divestiture Product;

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

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

- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the ordinary course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with its obligations under the Orders, including, but not limited to, its obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and



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shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent Mylan, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent Mylan, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
- G. Respondents shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
- H. Respondents shall report to the Interim Monitor in accordance with the requirements of this Order and as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by Respondents, and any reports submitted by each Acquirer with respect to the performance of Respondents' obligations under the Order or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Order. provided, however, beginning ninety (90) days after Respondents

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have filed their final report pursuant to Paragraph VII.B., and ninety (90) days thereafter, the Interim Monitor shall report in writing to the Commission concerning progress by each Acquirer toward obtaining FDA approval to manufacture each Divestiture Product and obtaining the ability to manufacture each Divestiture Product in commercial quantities, in a manner consistent with cGMP, independently of Respondents.

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

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

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

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consented to the selection of the proposed Divestiture Trustee.

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

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

4. The Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer as required by this Order; provided, however, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondent from among those approved by the Commission; provided further, however, that Respondent shall select such Person within five (5) days after receiving notification of the Commission's approval.
5. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of 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,

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

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

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

**V.**

**IT IS FURTHER ORDERED** that, in addition to any other requirements and prohibitions relating to Confidential Business Information in this Order, each Respondent shall assure that its own counsel (including its own in-house counsel under

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appropriate confidentiality arrangements) shall not retain unredacted copies of documents or other materials provided to an Acquirer or access original documents provided to an Acquirer, except under circumstances where copies of documents are insufficient or otherwise unavailable, and for the following purposes:

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

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

*provided further, however,* that pursuant to this Paragraph V, the Respondent needing such access to original documents shall: (i) require those who view such unredacted documents or other materials to enter into confidentiality agreements with the relevant Acquirer (but shall not be deemed to have violated this requirement if that Acquirer withholds such agreement unreasonably); and (ii) use best efforts to obtain a protective order to protect the confidentiality of such information during any adjudication.

**VI.**

**IT IS FURTHER ORDERED** that:



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- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by a Respondent to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- C. Respondents shall include in each Remedial Agreement related to each of the Divestiture Products a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of each Respondent's obligation to the Acquirer pursuant to this Order.
- D. For each Divestiture Product that is a Contract Manufacture Product, Respondents shall include in the Remedial Agreement(s) related to that Divestiture Product a representation from the Acquirer that the Acquirer shall use commercially reasonable efforts to secure the FDA approval(s) necessary to manufacture, or to have manufactured by a Third Party, in commercial quantities, each such Divestiture Product, as applicable, and to have any such manufacture to be independent of the Respondents, all as soon as reasonably practicable.
- E. No Respondent shall seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Divestiture Products a decision the result of which would be inconsistent with the terms of this Order or the remedial purposes thereof.
- F. No Respondent shall modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission, except as otherwise provided in Rule 2.41(f)(5) of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41(f)(5). Notwithstanding any term of the Remedial Agreement(s), any modification or amendment of any

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Remedial Agreement made without the prior approval of the Commission, or as otherwise provided in Rule 2.41(f)(5), shall constitute a failure to comply with this Order.

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

- A. Within five (5) days of the Acquisition, Respondent Mylan shall submit to the Commission a letter certifying the date on which the Acquisition occurred.
- B. Within thirty (30) days after the Order Date, and every sixty (60) days thereafter until Respondent Mylan has fully complied with Paragraphs II.A , II.B., II.C., II.D., II.E., II.F.1. - II.F.3, II.G., II.H., II.I., II.J., II.K., and II.L., Respondent Mylan shall submit to the Commission a verified written report setting forth in detail the manner and form in which it intends to comply, is complying, and has complied with this Order. Respondent Mylan shall submit at the same time a copy of its report concerning compliance with this Order to the Interim Monitor, if any Interim Monitor has been appointed. Respondent Mylan shall include in its reports, among other things that are required from time to time, a full description of the efforts being made to comply with the relevant paragraphs of the Order, including:
  - 1. a detailed description of all substantive contacts, negotiations, or recommendations related to (i) the divestiture and transfer of all relevant assets and rights, (ii) transitional services being provided by the Respondents to the relevant Acquirer, and (iii) the agreement(s) to Contract Manufacture; and
  - 2. a detailed description of the timing for the completion of such obligations.
- C. One (1) year after the Order Date, annually for the next nine years on the anniversary of the Order Date, and at

## Decision and Order

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

**VIII.**

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

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

**IX.**

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

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

## Decision and Order

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

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

**X.**

**IT IS FURTHER ORDERED** that this Order shall terminate on December 12, 2023.

By the Commission.

## Analysis to Aid Public Comment

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

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Mylan Inc. (“Mylan”), Agila Specialties Global Pte. Limited and Agila Specialties Private Limited (collectively, “Agila”), and Strides Arcolab Limited (“Strides”) that is designed to remedy the anticompetitive effects that otherwise would have resulted in eleven generic injectable pharmaceutical markets from Mylan’s proposed acquisition of Agila. Under the terms of the proposed Consent Agreement, Mylan is required to divest either Mylan or Agila/Strides products as follows: (1) to Intas Pharmaceuticals Ltd. (“Intas”), Mylan’s fluorouracil injection and methotrexate sodium preservative-free injection; (2) to JHP Pharmaceuticals, LLC (“JHP”), Mylan’s etomidate injection, ganciclovir injection, meropenem injection, and mycophenolate mofetil injection and Agila/Strides’ amiodarone hydrochloride injection and fomepizole injection; and (3) to Sagent Pharmaceuticals, Inc. (“Sagent”), Agila/Strides’ acetylcysteine injection and mesna injection. In addition, Mylan is required to release all of its rights relating to labetalol hydrochloride injection to Gland Pharma Ltd. (“Gland”).

The proposed Consent Agreement has been placed on the public record for thirty days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again evaluate the proposed Consent Agreement, along with the comments received, in order to make a final decision as to whether it should withdraw from the proposed Consent Agreement, or make final the Decision and Order (“Order”).

Mylan proposes to acquire Agila for approximately \$1.85 billion pursuant to a Sale and Purchase Agreement dated February 27, 2013 (“Proposed Acquisition”). The Commission alleges in its Complaint that the Proposed Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15

## Analysis to Aid Public Comment

U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening current and future competition in eleven generic injectable pharmaceutical product markets in the United States. The eleven product markets are: (1) amiodarone hydrochloride injection; (2) etomidate injection; (3) fluorouracil injection; (4) labetalol hydrochloride injection; (5) mesna injection; (6) methotrexate sodium preservative-free injection; (7) acetylcysteine injection; (8) fomepizole injection; (9) ganciclovir injection; (10) meropenem injection; and (11) mycophenolate mofetil injection. The proposed Consent Agreement will remedy the alleged violations by replacing the competition that would otherwise be eliminated by the Proposed Acquisition.

**The Relevant Products and Structure of the Markets**

Mylan's proposed purchase of Agila will lessen current and future competition in each of the eleven generic injectable pharmaceutical product markets, in part, because the Proposed Acquisition will reduce the number of suppliers competing for customers in each market. Injectable drugs are administered intravenously, usually via a syringe or hollow needle. Generic versions of these drugs are usually launched after a branded product's patents expire, or a generic supplier successfully challenges such patents in court or reaches a legal settlement with the branded manufacturer. Once multiple generic suppliers enter a market, the branded drug manufacturer usually ceases to provide any competitive constraint on the prices for generic versions of the drug. Rather, the generic suppliers compete only against each other. Sometimes, however, a branded injectable drug manufacturer may choose to lower its price and compete against generic versions of the drug, in which case it would be a participant in the generic drug market.

The number of suppliers in generic pharmaceutical markets is critical because prices generally decrease as the number of competing generic suppliers increases. In addition, the injectable pharmaceutical industry generally, and the generic products at issue in this investigation in particular, are highly susceptible to supply disruptions caused by the inherent difficulties of producing sterile liquid drugs. Recent manufacturing problems have made it difficult for customers to obtain sufficient quantities of, and

## Analysis to Aid Public Comment

contributed to price increases of, several of the generic injectable products impacted by this transaction. By reducing the number of competitors in these markets, the Proposed Acquisition will likely create a direct and substantial anticompetitive effect on prices for each of the relevant products, absent the remedies required by the proposed Consent Agreement.

The Proposed Acquisition will reduce current (or imminent) competition in the markets for each of the following generic injectable products: (1) amiodarone hydrochloride injection; (2) etomidate injection; (3) fluorouracil injection; (4) labetalol hydrochloride injection; (5) mesna injection; and (6) methotrexate sodium preservative-free injection. The structure of these markets is as follows:

- Amiodarone hydrochloride injection is an anti-arrhythmic cardiac drug of last resort used to treat patients with frequently recurring ventricular fibrillation or unstable ventricular tachycardia. The market for amiodarone hydrochloride injection is highly concentrated with only three current suppliers for the drug – Mylan, Fresenius Kabi AG (“Fresenius”), and Hikma Pharmaceuticals PLC. Mylan has a 60% share of the market. Agila has an approved Abbreviated New Drug Application (“ANDA”) from the U.S. Food and Drug Administration (“FDA”) and is about to enter this market, as is one other firm. Thus, the Proposed Acquisition would reduce the number of suppliers of generic amiodarone hydrochloride injection from five to four.
- Etomidate injection is an anesthetic agent used to induce general anesthesia and sedation for surgical procedures. There are currently four significant suppliers in this highly concentrated market – Mylan, Agila (which distributes its product through Pfizer Inc. and Sagent), Hospira, Inc. (“Hospira”), and American Regent, Inc. Absent a remedy, the Proposed Acquisition would substantially increase concentration in this market, provide the combined firm a market share of 46%, and reduce the number of suppliers of generic etomidate injection from four to three.

## Analysis to Aid Public Comment

- Fluorouracil injection treats colon, rectal, breast, stomach, and pancreatic cancers. In this highly concentrated market, four firms have supplied fluorouracil injection in the recent past – Mylan, Fresenius, Teva Pharmaceutical Industries Ltd. (“Teva”), and Sandoz International GmbH. (“Sandoz”). A number of these suppliers, however, have experienced significant manufacturing issues. Agila is the only other company that currently holds an approved ANDA to sell generic fluorouracil in the United States. The Proposed Acquisition would reduce the number of firms capable of supplying generic fluorouracil injection from five to four.
- Labetalol hydrochloride injection treats severe hypertension. The market for labetalol hydrochloride injection is highly concentrated and only five firms are capable of supplying the drug today – Mylan, Agila, Hospira, Akorn, Inc., and Apotex Inc. Currently, Hospira and Akorn make most of the sales in this market, and Mylan, Agila, and Apotex are the only other firms with approved ANDAs and manufacturing facilities currently capable of producing this product. The Proposed Acquisition would reduce the number of firms capable of supplying generic labetalol hydrochloride injection from five to four.
- Mesna injection is a detoxifying agent used to prevent damage to the urinary tract caused by ifosfamide, a third-line chemotherapy drug used to treat germ cell testicular cancer. There are four current, significant suppliers of generic mesna injection – Mylan, Agila, Fresenius, and Baxter International Inc. The Proposed Acquisition would increase concentration in this market substantially, and reduce the number of current suppliers of generic mesna injection from four to three.
- Methotrexate sodium preservative-free injection treats several types of pediatric cancers, as well as certain autoimmune disorders such as rheumatoid arthritis and multiple sclerosis. Five firms currently supply the market for methotrexate sodium preservative-free injection – Mylan, Agila, Fresenius, Teva, and Hospira. The



## Analysis to Aid Public Comment

Proposed Acquisition would reduce the number of current suppliers of this drug from five to four.

In addition, the Proposed Acquisition will significantly reduce future competition in the markets for the following generic injectable products: (1) acetylcysteine injection; (2) fomepizole injection; (3) ganciclovir injection; and (4) meropenem injection. In each of these markets, either Mylan or Agila, or both, currently do not supply an existing generic product, but will likely do so in the near future, and entry by one or both of the parties will likely increase price competition in that market significantly absent the Proposed Acquisition. The structure of each of these markets is as follows:

- Acetylcysteine injection prevents or minimizes liver damage resulting from acetaminophen overdose. There are two generic acetylcysteine injection products currently on the market, and Mylan and Agila are two of only a limited number of firms that have generic products in development. Therefore, the Proposed Acquisition would significantly reduce the number of likely future suppliers of generic acetylcysteine injection.
- Injectable fomepizole treats accidental poisoning caused by ethylene glycol or methanol ingestion. Three firms currently supply the highly concentrated market for generic fomepizole injection – Mylan, X-Gen Pharmaceuticals, Inc., and Sandoz. Agila is developing its own generic fomepizole injection product and likely would be the next firm to enter the market. As a result, the Proposed Acquisition would significantly reduce the number of suppliers of generic fomepizole injection in the near future.
- Ganciclovir injection is an antiviral medication used to treat patients with weakened immune systems, such as patients with HIV-AIDS and transplant recipients, to slow the growth of cytomegalovirus, a form of herpes virus that can lead to blindness. Currently, Roche Palo Alto, LLC (“Roche”) sells a branded product, Cytovene. Fresenius sells the only generic version of this drug. Mylan and

## Analysis to Aid Public Comment

Agila are two of only a limited number of firms that have this drug in development. Therefore, the Proposed Acquisition would result in the reduction of likely future suppliers of generic ganciclovir injection.

- Meropenem injection is an ultra-broad spectrum antibiotic used as a last resort to treat serious bacterial infections in an intensive care setting. There are currently four suppliers of the drug – AstraZeneca PLC, Fresenius, Hospira, and Sandoz. All four of these companies, however, obtain their supplies of meropenem from two manufacturers. Mylan and Agila are two of only a limited number of firms that have a generic meropenem injection product in development. They are also the only likely entrants that will source their meropenem products from alternative manufacturing facilities. As a result, the Proposed Acquisition would significantly reduce the number of marketers, as well as the sources of manufacturing, of generic meropenem injection in the future.

Finally, the Proposed Acquisition will significantly reduce potential competition in one generic market that does not yet exist – the market for mycophenolate mofetil injections. This market would be highly concentrated when Mylan and Agila would likely enter it in the future. Mycophenolate mofetil injection is an immunosuppressant used in transplant medicine to subdue T-cell and B-cell production, reducing the risk of transplant rejection. Today, Roche sells its branded product, CellCept. When generic entry occurs, Mylan and Agila would likely be among a limited number of suppliers. Thus, the Proposed Acquisition would significantly reduce the number of likely future suppliers of this drug to the detriment of consumers.

**Entry**

Entry into each of these generic injectable product markets will not be timely, likely, or sufficient in magnitude, character, and scope to deter or counteract the likely anticompetitive effects of the Proposed Acquisition. The combination of drug development times and regulatory requirements, including FDA approval, takes well in excess of two years.

## Analysis to Aid Public Comment

**Competitive Effects**

Absent a remedy, the Proposed Acquisition would likely cause significant anticompetitive harm to consumers in the relevant generic injectable pharmaceutical markets, either by eliminating significant current or potential competition in concentrated existing markets, or by eliminating significant potential competition among a limited number of likely competitors in a future market. In each of these markets, Mylan and Agila are two of only a limited number of current or likely future suppliers of the drugs in the United States. The evidence shows that prices may continue to decrease even after a number of suppliers have entered a generic injectable drug market. Thus, although Mylan or Agila have not entered some of the markets at issue yet, both companies likely will compete in those markets in the future, and that competition is expected to reduce prices for consumers. The evidence also shows that the removal of an independent generic injectable drug supplier from the relevant markets in which Mylan and Agila currently compete would result in significantly higher prices post-acquisition. Therefore, by eliminating the significant current and future competition between the parties, the Proposed Acquisition will likely cause U.S. consumers to pay significantly higher prices for these generic injectable drugs, absent a remedy.

**The Consent Agreement**

The Consent Agreement effectively remedies the Proposed Acquisition's anticompetitive effects in each relevant market. Under the Consent Agreement, the parties are required to divest either Mylan's or Agila's rights and assets related to (1) amiodarone hydrochloride injection, (2) etomidate injection, (3) fluorouracil injection, (4) mesna injection, (5) methotrexate sodium preservative-free injection, (6) acetylcysteine injection, (7) fomepizole injection, (8) ganciclovir injection, (9) meropenem injection, and (10) mycophenolate mofetil injection. In addition, Mylan is required to release all of its rights and assets related to labetalol hydrochloride injection. The parties must accomplish these divestitures and relinquish their rights no later than ten days after the acquisition.

## Analysis to Aid Public Comment

The proposed Consent Agreement requires Mylan to terminate its contract with Gland and to release all rights related to labetalol hydrochloride injection. Gland, a global pharmaceutical company based in India, is Mylan's contract manufacturer for this drug. Given its experience with this drug, Gland is well positioned to replicate the competition that would otherwise have been lost as a result of the Proposed Acquisition. The proposed Consent Agreement also requires Mylan to divest assets related to fluorouracil injection and methotrexate sodium preservative-free injection to Intas and to divest assets related to etomidate injection, ganciclovir injection, meropenem injection, and mycophenolate mofetil injection to JHP. In addition, the proposed Consent Agreement requires Agila and Strides to divest assets related to acetylcysteine injection and mesna injection to Sagent and to divest assets related to amiodarone hydrochloride injection and fomepizole injection to JHP. Intas is a global pharmaceutical company based in India with approximately 79 prescription drugs approved for sale in the United States, as well as an active product development pipeline. JHP is a New Jersey based pharmaceutical company with approximately 22 approved ANDAs and an active product development pipeline. Finally, Sagent, a pharmaceutical company based in Illinois, has approximately 58 approved ANDAs and an active product development pipeline. With their experience in generic markets, Intas, JHP, and Sagent are expected to replicate fully the competition that would otherwise have been lost as a result of the Proposed Acquisition.

The Commission's goal in evaluating possible acquirers of divested assets is to maintain the competitive environment that existed prior to the acquisition. If the Commission determines that Intas, JHP, Sagent, or Gland are not acceptable acquirers, or that the manner of the divestitures or releases is not acceptable, the parties must unwind the sale or release of rights to Intas, JHP, Sagent, or Gland and divest the products to a Commission-approved acquirer within six months of the date the Order becomes final. In that circumstance, the Commission may appoint a trustee to divest the products if the parties fail to divest the products as required.

The proposed Consent Agreement contains several provisions to help ensure that the divestitures are successful. The Order

Analysis to Aid Public Comment

requires Mylan, Agila, and Strides to take all action to maintain the economic viability, marketability, and competitiveness of the products to be divested until such time that they are transferred to a Commission-approved acquirer. Mylan and Agila must transfer their respective manufacturing technologies for generic amiodarone hydrochloride injection, etomidate injection, and fomepizole injection to JHP and must supply JHP with these drugs during the transition period. Further, Agila and Strides must transfer the manufacturing technology for acetylcysteine injection and mesna injection to Sagent and must supply Sagent with the two drugs during the transition period.

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

INTERLOCUTORY, MODIFYING,  
VACATING, AND MISCELLANEOUS  
ORDERS

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HERTZ GLOBAL HOLDINGS, INC.

*Docket No. C-4376.      Order, July 11, 2013*

Commission letter approving an acquirer for the divestiture of certain assets in connection with the acquisition of Dollar Thrifty by Hertz Global Holdings.

LETTER ORDER APPROVING DIVESTITURE

Michael H. Knight, Esq.  
Jones Day

Dear Mr. Knight:

The Commission has issued its final Order in this matter, modified to incorporate changes that Hertz Global Holdings, Inc., Financial Services of North America, and Macquarie Capital have agreed to, and has added to Confidential Appendix H of the Order the amended agreements between The Hertz Corporation (“Hertz”) and Adreca Holdings Corp. (“Adreca”) for the divestiture of the DTAG Assets To Be Divested and the Additional Assets To Be Divested pursuant to Paragraphs II.A.2 and II.A.3 of the Decision and Order, all of which you submitted as a complete Confidential Appendix H on May 14, 2013.

The Commission has also approved the divestiture to Adreca of the Additional Assets To Be Divested pursuant to Paragraph II.A.3 of the Decision and Order, pursuant to the Divestiture Agreement, as amended. In according its approval, the Commission has relied upon the information submitted and representations made in connection with the proposed divestiture, and has assumed them to be accurate and complete.

By direction of the Commission, Commissioner Wright not participating.

Interlocutory Orders, Etc.

KINDER MORGAN, INC.

*Docket No. C-4355. Order, October 28, 2013*

Commission letter and order modifying the Commission's final order to permit respondent to extend a transition services agreement with the acquirer of the divested assets.

LETTER ORDER APPROVING TRANSITION SERVICES AGREEMENT

Laura A. Wilkinson, Esq.  
Weil, Gotshal & Manges LLP

Dear Ms. Wilkinson:

This letter responds to the Request for Prior Approval and to Reopen Proceedings and Modify the Decision and Order ("Request") filed by Kinder Morgan, Inc. ("Kinder Morgan"), on August 7, 2013. The Request was placed on the public record for comments until September 13, 2013, and no comments were received. In its Order Reopening and Modifying Order, issued on October 28, 2013, the Commission has determined to reopen the Decision and Order ("Order") in this matter and modify it as requested by Kinder Morgan.

Kinder Morgan has also requested that, pursuant to Section 2.41 of the Federal Trade Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.41 (2013), the Commission approve the modification to the Transitions Services Agreement ("TSA Modification") described in the Request. After consideration of the TSA Modification as set forth in the Request and supplemental documents, as well as other available information, and consistent with the Order as modified by the Order Reopening and Modifying Order, the Commission has determined to approve the TSA Modification. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Kinder Morgan's Request, and has assumed them to be accurate and complete.

By direction of the Commission, Chairwoman Ramirez not participating, and Commissioner Wright abstaining.

Interlocutory Orders, Etc.

## ORDER REOPENING AND MODIFYING ORDER

On August 7, 2013, Kinder Morgan, Inc. (“Kinder Morgan”) filed a petition pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), and Section 2.51 of the Commission’s Rules of Practice, 16 C.F.R. § 2.51, asking the Commission to reopen and modify the consent order in Docket No. C-4355 (“Order”) issued by the Commission on June 6, 2012.

The Order requires Kinder Morgan, in connection with the divestiture of certain natural gas pipeline and related assets, to provide transitional assistance to the acquirer of the assets for a period not to exceed nine months. Kinder Morgan divested the required assets to Tallgrass Energy Partners LP (“Tallgrass”) on November 21, 2012, and entered into an agreement to provide transitional assistance to Tallgrass. In its petition, Kinder Morgan, for itself and Tallgrass, asks that the Commission reopen the Order and extend the time period allowed for the transitional assistance from nine to fourteen months with an option by the acquirer to extend the period for five additional one-month periods (subject to approval by the Commission).

Kinder Morgan bases its petition on changed conditions of fact that it claims are sufficient to warrant reopening and modifying the Order. Kinder Morgan also claims that the proposed modification would be in the public interest. For the reasons stated below, the Commission has determined to grant the petition.

**Background**

On October 16, 2011, Kinder Morgan entered into an agreement to acquire El Paso Corporation (“El Paso”). Both Kinder Morgan and El Paso owned natural gas pipelines in the Rocky Mountain region of Wyoming and Colorado that raised competitive concerns for the Commission. To resolve its concerns, the Commission issued the Order on June 6, 2012, requiring Kinder Morgan to divest certain natural gas pipelines and related assets.

Paragraph II.D. of the Commission’s Order also requires Kinder Morgan to provide certain transition services to the



## Interlocutory Orders, Etc.

acquirer of the divested assets for a period “not to exceed nine (9) months” from the date of divestiture. Transitional assistance includes administrative and technical assistance relating to the operation of natural gas pipeline systems and pipeline business. Such assistance allows time for a purchaser to transfer highly automated systems that control pipelines and is common, even necessary, when pipeline assets are sold.

At the same time that Kinder Morgan completed the sale of the pipeline assets to Tallgrass, it also entered into a Transition Services Agreement (“TSA”) with Tallgrass that commenced on November 21, 2012, and terminated on August 13, 2013. Before termination of the agreement, however, at the request of Tallgrass, Kinder Morgan and Tallgrass agreed to extend the time period by five months with an option by Tallgrass to extend the time further for up to five successive one-month periods, for a potential total of a ten-month extension (subject to approval by the Commission).

The TSA obligates Kinder Morgan to provide services and software support to Tallgrass in twenty-two distinct categories, and as of the date of the petition, transitional services were no longer needed for approximately twelve of those categories. If Kinder Morgan is not allowed to extend the time period for providing the transitional assistance, Tallgrass will be unable to operate the assets and properly conduct its business. As a result, Tallgrass would be unable to effectively compete and so the requested extension would benefit consumers as well as Tallgrass.

**Standard to Reopen and Modify**

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) provides that the Commission shall reopen an order to consider whether it should be modified if the respondent “makes a satisfactory showing that changed conditions of law or fact” so require.<sup>1</sup> A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes either eliminate the

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<sup>1</sup> See *Supplementary Information, Amendment to 16 CFR 2.51(b)*, (“Amendment”), 65 Fed. Reg. 50636, August 21, 2000.

## Interlocutory Orders, Etc.

need for the order or make continued application of it inequitable or harmful to competition.<sup>2</sup>

Section 5(b) also provides that the Commission may reopen and modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.<sup>3</sup> In the case of “public interest” requests, FTC Rule of Practice 2.51(b) requires an initial “satisfactory showing” of how the modification would serve the public interest before the Commission determines whether to reopen an order.

A “satisfactory showing” requires, with respect to public interest requests, that the petitioner make a prima facie showing of a legitimate public interest reason or reasons justifying relief. A request to reopen and modify will not contain a “satisfactory showing” if it is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the reasons why the public interest would be served by the modification.<sup>4</sup> This showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order, that the order in whole or part is no longer needed, or that there is some other clear public interest that would be served if the Commission were to grant the requested relief. In addition, this showing must be supported by evidence that is credible and reliable.

If, after determining that the requester has made the required showing, the Commission decides to reopen the order, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen

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<sup>2</sup> S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) (“Hart Letter”). See also *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992).

<sup>3</sup> Hart Letter at 5; 16 C.F.R. § 2.51.

<sup>4</sup> 16 C.F.R. § 2.51.

## Interlocutory Orders, Etc.

an order oblige the Commission to modify it,<sup>5</sup> and the burden remains on the requester in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.<sup>6</sup> All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.<sup>7</sup>

**The Public Interest Warrants Reopening and Modifying the Order**

The Commission has determined that (i) the public interest requires that the Order be reopened and (ii) the Order should be modified to extend the time period allowed for Kinder Morgan to provide transitional assistance to the acquirer of the divested assets.<sup>8</sup> The purpose of the Order is to maintain competition in the market for transportation of natural gas in geographic markets located in Wyoming and Colorado. Without the continuing transitional assistance, Tallgrass will not be able to properly conduct the business acquired from Kinder Morgan and its ability to effectively compete in these markets will be materially diminished.

Providing an acquirer with necessary transitional assistance is an important component of the divestiture itself. In its orders, the Commission often requires respondents to provide transitional assistance to allow time for an acquirer to transfer or develop the assets necessary to operate the divested business. Because of concerns about "ongoing entanglements" among competitors, however, the Commission also seeks to limit the length of time

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<sup>5</sup> See *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

<sup>6</sup> See *Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

<sup>7</sup> 16 C.F.R. § 2.51(b).

<sup>8</sup> Kinder Morgan has asserted both changed conditions of fact and public interest grounds in support of its petition. Because the Commission has determined that Kinder Morgan has demonstrated the public interest supports the modification, the Commission need not consider whether conditions of fact have indeed changed since it issued the Order.

## Interlocutory Orders, Etc.

that transitional assistance is provided. In this instance, the Commission does not believe that extending the time period as requested by both Kinder Morgan and Tallgrass will raise a concern about ongoing entanglements or otherwise frustrate achieving the remedial purposes of the Order.

**Conclusion**

For the reasons explained above, the Commission has determined to reopen and modify Paragraph II.D. of the Order. Accordingly,

**IT IS ORDERED** that this matter be, and it hereby is, reopened; and

**IT IS FURTHER ORDERED** that Paragraph II.D. of the Order be revised to read:

At the request of the Acquirer, pursuant to an agreement that receives the prior approval of the Commission, Respondent shall, for a period not to exceed nineteen (19) months from the date Respondent divests the KM Pipeline Assets, or as otherwise approved by the Commission, provide Transitional Assistance to the Acquirer: . . .

By the Commission, Chairwoman Ramirez not participating, and Commissioner Wright abstaining.

Interlocutory Orders, Etc.

PINNACLE ENTERTAINMENT, INC.

*Docket No. D-9355. Order, November 20, 2013*

Order approving Pinnacle Entertainment, Inc.'s divestiture of all assets associated with Ameristar Casinos, Inc.'s casino and hotel project under construction in Lake Charles, Louisiana to GNLC Holdings, Inc.

LETTER ORDER APPROVING APPLICATION FOR APPROVAL OF  
DIVESTITURE OF THE AMERISTAR LOUISIANA ASSETS

Jonathan S. Gowdy, Esquire  
Morrison & Foerster LLP

Dear Mr. Gowdy:

This letter responds to the Application for Approval of Divestiture of the Ameristar Louisiana Assets ("Ameristar Louisiana Application") filed by Pinnacle Entertainment, Inc. on August 30, 2013. The Ameristar Louisiana Application requests that the Federal Trade Commission approve, pursuant to the Order in this matter, Pinnacle's proposed divestiture of the Ameristar Louisiana Assets to GNLC Holdings, Inc., the parent company of Landry's, Inc. The Application was placed on the public record for comments until November 12, 2013, and no comments were received.

After consideration of the proposed divestiture as set forth in Pinnacle's Ameristar Louisiana Application and supplemental documents, as well as other available information, the Commission has determined to approve the proposed divestiture. In according its approval, the Commission has relied upon the information submitted and representations made in connection with Pinnacle's Ameristar Louisiana Application and has assumed them to be accurate and complete.

By direction of the Commission.

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MCWANE, INC.

*Docket No. D-9351. Order, November 21, 2013*ORDER EXTENDING TIMETABLE FOR ISSUING  
FINAL DECISION AND ORDER

In order to ensure that it can give full consideration to the many issues presented by the cross-appeals in this matter, the Commission has determined, pursuant to Commission Rule 4.3(b), 16 C.F.R. § 4.3(b), to extend until January 24, 2014 the timetable for issuing a final decision and order.

**IT IS SO ORDERED.**

By the Commission.

AJM PACKAGING CORPORATION  
AND ABRAM EPSTEIN*Docket No. C-3508. Order, November 25, 2013*

Order vacating the prior consent order entered at 118 F.T.C. 56 (1994) and issuing a new order prohibiting respondent from making representations or causing anyone else to make representations regarding the degradability of respondents' products unless certain conditions are met, in accordance with the federal district court's ruling in a parallel proceeding.

ORDER TO SHOW CAUSE AND ORDER VACATING ORDER AS TO  
AJM PACKAGING CORPORATION AND ISSUING NEW ORDER AS TO  
AJM PACKAGING CORPORATION

The Federal Trade Commission ("FTC" or "Commission") issued a Decision and Order against AJM Packaging Corporation

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(“AJM”) and Abram Epstein in Docket C-3508 (“1994 Order”) on July 19, 1994.<sup>1</sup> On September 30, 2013, the Commission filed a complaint in federal district court alleging that AJM violated the 1994 Order by making false and unsubstantiated claims regarding certain paper products.

On October 1, 2013, Judge Beryl A. Howell in the District for the District of Columbia entered a Stipulated Order for Permanent Injunction and Civil Penalty Judgment (“Stipulated Order”) resolving the 2013 action. In Section III of the Stipulated Order, AJM consented: (1) to reopening this proceeding; (2) to waiving any rights it might otherwise have under the show cause procedures set forth in Commission Rule 3.72(b), 16 C.F.R. § 3.72(b); (3) to vacating the 1994 Order as to AJM; and (4) to issuing a new FTC order as to AJM as set forth below.

In view of the foregoing, the Commission has determined that it is in the public interest to reopen the proceeding in Docket No. C-3508 pursuant to Commission Rule 3.72(b), 16 C.F.R. § 3.72(b); to vacate the 1994 Order as to AJM; and to issue a new order as to AJM as set forth below. Accordingly,

**IT IS ORDERED** that this matter be, and it hereby is, reopened; and

**IT IS FURTHER ORDERED** that, AJM having consented to vacating the 1994 Order as to it and to issuing a new order as follows, the Commission hereby vacates the 1994 Order as to AJM and issues the attached Decision and Order, which shall become final upon delivery of this Order and the Decision and Order to AJM by any means specified in Commission Rule 4.4(a), 16 C.F.R. § 4.4(a):

### **DECISION AND ORDER**

The Federal Trade Commission having filed a complaint in Federal District Court on September 30, 2013, alleging that Respondent AJM Packaging Corporation (“AJM”) had violated

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<sup>1</sup> *In the Matter of AJM Packaging Corporation and Abram Epstein*, 118 F.T.C. 56 (1994).

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the Decision and Order in *In the Matter of AJM Packaging Corp., et al.*, 118 F.T.C. 56 (1994), by making false and unsubstantiated claims regarding certain paper products; and

AJM, its attorney, and counsel for the Commission having thereafter executed, and the District Court having thereafter entered, a Stipulated Order for Permanent Injunction and Civil Penalty Judgment in which AJM consented, inter alia, to vacating the 1994 Order as to AJM, and to issuing a new Commission Order as to AJM as set forth below;

Now in further conformity with the procedure prescribed in Commission Rule 3.72(b), 16 C.F.R. § 3.72(b), the Commission hereby issues a new Decision and Order as to AJM, as set forth below.

**DEFINITIONS**

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

1. “Clearly and prominently” means
  - A. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;
  - B. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the



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disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read and comprehend it; and

- C. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.
2. “Close proximity” means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.
  3. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
  4. “Competent and reliable scientific evidence” means tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true.
  5. “Customary disposal” means any disposal method whereby respondent’s products ultimately will be

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disposed of in a landfill, in an incinerator, or in a recycling facility.

6. “Degradable” includes biodegradable, oxo-biodegradable, oxo-degradable, or photodegradable, or any variation thereof.
7. “Landfill” means a municipal solid waste landfill that receives household waste. “Landfill” does not include landfills that are operated as bioreactors or those that are actively managed to enhance decomposition.
8. “Product or package” means any product or package, including but not limited to bags and plates, that is offered for sale, sold, or distributed to the public by respondent and any such product or package sold or distributed to the public by third parties that is manufactured by respondent.
9. Unless otherwise specified, “respondent” means AJM Packaging Corporation, its successors and assigns and its officers, agents, representatives, and employees.

**Part I.**

**IT IS ORDERED** that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any paper product or package in or affecting commerce, shall not represent, in any manner, expressly or by implication, that any such product or package is degradable, unless

- A. the entire item will completely decompose into elements found in nature within one year after customary disposal; or
- B. the representation is clearly and prominently and in close proximity qualified by: (1) the time to complete decomposition after customary disposal; or (2) the time to complete decomposition after non-customary disposal, the type of non-customary disposal facility or

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method, and the availability of such facility or method to consumers where the item is marketed or sold,

and such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation. Any technical protocol (or combination of protocols) must assure complete decomposition within one year or a stated time frame and must replicate, i.e., simulate, the physical conditions found in the type of disposal facility stated in the representation (e.g., in landfills, where most trash is disposed).

**Part II.**

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any paper product or package, in or affecting commerce, shall not represent in any manner, expressly or by implication, that any such product or package is compostable, unless

- A. all materials in the item will break down into, or become part of, usable compost (e.g., soil-conditioning material, mulch) in a safe and timely manner (i.e., in the same time as the materials with which it is composted)
  - 1. in a home composting pile or device;
  - 2. in a municipal or institutional composting facility that is available to a substantial majority of consumers or communities where the item is sold and respondent discloses clearly and prominently and in close proximity to the representation that the item is only compostable in such a facility; or
  - 3. in a municipal or institutional composting facility that is not available to a substantial majority of consumers or communities and respondent discloses clearly and prominently and in close

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proximity to the representation: (i) that the item is only compostable in such a facility and (ii) the limited availability of municipal or institutional composting facilities that compost the item, such as by disclosing the percentage of consumers or communities that have access to such facilities;

- B. and such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

**Part III.**

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any paper product or package, in or affecting commerce, shall not represent in any manner, expressly or by implication, that any such product or package is recyclable, unless

- A. the entire item can be collected, separated, or otherwise recovered from the waste stream through an established recycling program for reuse or use in manufacturing or assembling another item;
- B. recycling facilities that accept the item for recycling are available
  - 1. to a substantial majority (at least sixty percent) of consumers or communities where the item is sold; or
  - 2. to less than a substantial majority (at least sixty percent) of consumers or communities where the item is sold and respondent discloses clearly and prominently and in close proximity to the representation the limited availability of recycling for the item and the extent to which it is limited, such as by disclosing the percentage of consumers or communities that have access to facilities that recycle such item;

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and such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

**Part IV.**

**IT IS FURTHER ORDERED** that respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, labeling, offering for sale, sale, or distribution of any product or package, in or affecting commerce shall not represent, in any manner, expressly or by implication, that any such product or package offers any environmental benefit, unless, at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

**Part V.**

This Order will terminate on November 25, 2033, or twenty (20) years from the most recent date that the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the Order, whichever comes later; *provided, however*, that the filing of such a complaint will not affect the duration of:

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

*Provided, further*, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Order will terminate according to this Part as though the complaint had never been

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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.

# RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

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NATIONAL PROCESSING CO. AND VANTIV, INC.

*FTC File No. 132 3105. Order, September 6, 2013.*

OPINION AND ORDER DENYING PETITION TO QUASH CIVIL  
INVESTIGATIVE DEMANDS

By WRIGHT, Commissioner.

On August 15, 2013, Petitioners, National Processing Co. (“NPC”) and Vantiv, Inc. (collectively the “Vantiv Entities”) filed a timely Petition to Quash Commission Civil Investigative Demands (“CIDs”) dated July 24, 2013. For the reasons set forth below, the Commission denies the Petition to Quash (“Petition”) and orders the Vantiv Entities to comply with the CIDs on or before September 13, 2013.

## **I. BACKGROUND**

The Commission’s investigation of the Vantiv Entities concerns activities that are distinct from, but related to, the acts and practices that led to the Commission enforcement action, *FTC v. A+ Financial Center, LLC, et al.*, No. 12-CV-14373-DLG (S.D. Fla. filed Oct. 23, 2012), filed under the authority of 15 U.S.C. §53(b). The *A+ Financial* complaint alleges that the defendants violated Section 5(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §45(a), and the Commission’s Telemarketing Sales Rule (“TSR”), 16 C.F.R. Part 310, by deceptively marketing credit card interest rate reduction services to consumers struggling with high credit card debt, illegally collecting an advance fee for their purported services, and illegally using prerecorded calls to contact consumers. Neither NPC nor Vantiv is a defendant in the *A+ Financial* enforcement action. Nonetheless, from December 2009 through October 2012, NPC (a credit card processor) processed the majority of the allegedly illegal advance fees that consumers paid to the *A+ Financial* defendants. Vantiv acquired NPC as a wholly-owned subsidiary in November 2010.

## Responses to Petitions to Quash

On July 24, 2013, the Commission issued a separate CID to each of the Vantiv Entities as part of its investigation into the Vantiv Entities' role in, and knowledge of, the illegal acts and practices of the *A+ Financial* defendants. The documents sought in these CIDs (the "July 24, 2013 CIDs") will help the Commission evaluate whether the Vantiv Entities violated the FTC Act or the TSR. Each CID contains 14 identical document production specifications and a single interrogatory requesting an explanation for the spoliation, if any, of responsive documents.

On August 6, 2013, after it issued the CIDs, the Commission served the Vantiv Entities with subpoenas under Fed. R. Civ. P. 45. The subpoenas seek the same documents as the CIDs. Commission counsel issued these subpoenas, in part, because the presiding judge in the *A+ Financial* enforcement action had suggested that Commission counsel consider sharing any documents produced by the Vantiv Entities with the court-appointed receiver in that enforcement action. However, as a consequence of statutory and regulatory restrictions, Commission counsel could not readily share documents produced in response to a CID with the receiver.<sup>1</sup> The return date on the Rule 45 subpoenas was August 19, 2013. On that date, in a letter to Commission counsel, the Vantiv Entities objected to the subpoenas without producing any documents.

On August 15, 2013, the Vantiv Entities responded to the issuance of the Commission's CIDs by filing a Petition to Quash.<sup>2</sup> In their Petition to Quash, the Vantiv Entities argue that the Commission's authority to issue the CIDs terminated when Commission counsel issued Rule 45 subpoenas seeking the same information in the *A+ Financial* enforcement action.

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<sup>1</sup> Documents produced to the Commission in response to a CID are non-public, and their disclosure is subject to various statutory and regulatory restrictions. 15 U.S.C. §57b-2; 16 C.F.R. §4.10. Documents produced to the Commission in response to Rule 45 subpoenas are not subject to these restrictions.

<sup>2</sup> See 15 U.S.C. §57b-1(f) and 16 C.F.R. §2.10. This Petition stayed compliance with the CIDs' original August 19, 2013, return date. 16 C.F.R. §2.10(b).



## Responses to Petitions to Quash

**II. ANALYSIS**

The Commission has broad authority under 15 U.S.C. §57b-1 to issue CIDs to further any “Commission investigation”—*i.e.*, “any inquiry conducted by a Commission investigator for the purpose of ascertaining whether any person is or has been engaged in any unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. §57b-1(a)(2). The Commission may issue CIDs at any time before it starts an “adjudicative proceeding.” 15 U.S.C. § 57b-1(j)(1).

It is settled that, until the Commission names a person as a defendant or a respondent in a complaint, the Commission is not engaged in an adjudicative proceeding with regard to that person and remains solely in an investigative posture. *Genuine Parts Co. v. F.T.C.*, 445 F.2d 1382, 1388 (5<sup>th</sup> Cir. 1971); *United States v. Anaconda Co.*, 445 F. Supp. 486, 496-97 (D.D.C. 1977); *United States v. Associated Merch. Corp.*, 261 F. Supp. 553, 558 (S.D.N.Y. 1966). *See also In re: Subpoena Duces Tecum Addressed to Atlantic Richfield Co., et al.*, No. 741-0019, 1978 WL 434436, at \*6 (F.T.C. June 2, 1978) (discussing *In re: Horizon Corp.*, No. 9017, 88 F.T.C. 208, 1976 WL 180725, at \*1 (July 28, 1976), where the Commission properly issued investigative subpoenas to investigate third-party lenders who had financed the land development activities of respondents in an FTC administrative adjudicative proceeding).

Because the Commission did not name either of the Vantiv Entities as a defendant in the *A+ Financial* enforcement action, it necessarily follows that the Commission may issue CIDs to them. The cases cited by the Petitioners (Petition at 6-7) do not suggest otherwise. Indeed, they uniformly hold that the Commission may issue CIDs to anyone *at least* until the Commission commences an adjudicatory proceeding against that person.<sup>3</sup>

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<sup>3</sup> The Commission may also issue CIDs to a party already in adjudication with the Commission where the Commission is investigating whether that party committed violations beyond those alleged in the pending adjudication. *See Resolution Trust Corp. v. Grant Thornton*, 41 F.3d 1539, 1545-46 (D.C. Cir. 1994) (“[A]n agency’s investigative powers survive the commencement of litigation where the agency seeks to uncover *additional wrongdoing*.” (emphasis in original)); Commission Letter to Mr. Glynn, Counsel to Dr. William V. Judy, Denying Petition to Quash, F.T.C. File No. X000069 (Sept.

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Nor is there any inconsistency in the contemporaneous issuance of CIDs and Rule 45 subpoenas. The Commission has good reason to pursue this dual-track effort: the CIDs are justified by the Commission's ongoing investigation of the conduct of the Vantiv Entities for violations of the FTC Act and the TSR, and the Rule 45 subpoenas are justified by the Vantiv Entities' business relationship with the defendants. The issuance of the Rule 45 subpoenas does not somehow void otherwise valid CIDs. The July 24, 2013 CIDs and the Rule 45 subpoenas simply constitute alternative and appropriate routes to the same overriding Commission objective: prompt production of the documents the Commission needs.<sup>4</sup>

Finally, having denied the Petition to Quash, the Commission may now commence CID enforcement proceedings, pursuant to 15 U.S.C. §57b-1(e) and 16 C.F.R. §2.13(b), at any time after the new return date if the Vantiv Entities do not comply. We have full confidence that any proceedings to enforce the Rule 45 subpoenas and the July 24, 2013 CIDs will be managed in a manner that both expeditiously secures the necessary documents from the Vantiv Entities and promotes judicial economy.

### III. CONCLUSION

For all the foregoing reasons,

**IT IS HEREBY ORDERED THAT** the Petition of Vantiv, Inc. and National Processing Co. be, and hereby is, **DENIED**.

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10, 2002) ("It is axiomatic that the Commission's authority to investigate one product is not cut off by the filing of a federal lawsuit relating to another."); *see also United States v. Litton Indus., Inc.*, 462 F.2d 14, 16 (9<sup>th</sup> Cir. 1972); *FTC v. Waltham Watch Co.*, 169 F. Supp. 614, 619-20 (S.D.N.Y. 1959).

<sup>4</sup> On August 22, 2013, after the return date on the Rule 45 subpoenas had passed and the Vantiv Entities had produced no documents, the Commission moved to compel compliance with the subpoenas in the federal district courts for the Southern District of Ohio (as to Vantiv) and the Western District of Kentucky (as to NPC). The Vantiv Entities' responses are due on September 16, 2013.

## Responses to Petitions to Quash

**IT IS FURTHER ORDERED THAT** Petitioners Vantiv, Inc. and National Processing Co. shall comply in all respects with the July 24, 2013 CIDs on or before September 13, 2013.

By the Commission.

AEGIS MOBILE LLC

*FTC File No. 132 3247. Order, October 24, 2013.*

ORDER STAYING PETITION TO QUASH PROCEEDINGS

On September 24, 2013, Petitioner, Aegis Mobile, LLC (“Aegis”) filed a petition to quash a civil investigative demand (“CID”) issued by the Commission to Aegis in response to a request by the Competition Bureau Canada (“Competition Bureau”) for investigative assistance.<sup>1</sup> The CID requested materials needed by the Competition Bureau in connection with its enforcement litigation in Canada against Bell Canada, Rogers Communications Inc., Telus Corporation, and the Canadian Wireless Telecommunications Association (collectively, the “Canadian Companies”). In the Canadian proceeding, currently pending in Ontario Superior Court, the Competition Bureau alleges that the Canadian Companies engaged in the deceptive marketing of premium text messaging and digital content services. The FTC’s CID in aid of the Canadian proceedings sought materials from Aegis regarding the marketing of premium text messages and rich content in Canada, as well as Aegis’s work for and on behalf of the Canadian Companies.

The Commission issued the CID pursuant to its authority under Section 6(j) of the Federal Trade Commission Act (“FTC

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<sup>1</sup> Pursuant to Section 2.10(5)(b) of the Commission’s Rules of Practice, 16 C.F.R. § 2.10(5)(b), the timely filing of a petition to quash a CID stays the remaining period of time permitted for compliance.

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Act”), which was added to the FTC Act by the U.S. SAFE WEB Act of 2006.<sup>2</sup> Specifically, the statute authorizes the Commission to assist foreign law enforcement agencies in their investigations of, or enforcement proceedings against, “possible violations of laws prohibiting fraudulent or deceptive commercial practices, or other practices substantially similar to practices prohibited by any provision of the laws administered by the Commission.” 15 U.S.C. § 46(j). Section 6(j) gives the Commission two routes to provide such assistance. Under Section 6(j)(2)(A), the Commission may “conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance, using all investigative powers authorized by [the FTC Act]; . . .” 15 U.S.C. § 46(j)(2)(A). Under Section 6(j)(2)(B), the Commission may also – “when the request is from an agency acting to investigate or pursue the enforcement of civil laws” – “seek and accept appointment by a United States district court of Commission attorneys to provide assistance to foreign and international tribunals and to litigants before such tribunals on behalf of a foreign law enforcement agency pursuant to section 1782 of Title 28.” 15 U.S.C. § 46(j)(2)(B).

Due to the recent interruption in U.S. government operations, considerable time has elapsed since the Commission received the request for assistance in obtaining access to materials that are highly relevant to the Competition Bureau’s pending litigation in Canada. Accordingly, the Commission finds that greater expedition is warranted and, therefore, has determined to stay the instant petition to quash proceedings while it exercises its authority under Section 6(j)(2)(B) of the FTC Act, 15 U.S.C. § 46(j)(2)(B), to institute a proceeding under 28 U.S.C. § 1782. In that proceeding, the Commission will seek an appointment of Commission attorneys by the United States District Court for the District of Maryland to obtain information needed by the Competition Bureau for use in the Canadian enforcement proceedings.<sup>3</sup> In staying the instant proceedings, the Commission expresses no views on the substantive issues raised by Aegis’s petition to quash. Accordingly,

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<sup>2</sup> Pub. L. No. 109-455, 120 Stat. 3372 (2006).

<sup>3</sup> Aegis’s obligation to comply with the Commission’s CID shall remain stayed pending disposition of the petition to quash. *See supra* note 1.

## Responses to Petitions to Quash

**IT IS HEREBY ORDERED THAT** consideration of the Petition of Aegis Mobile, LLC is **STAYED** pending the federal courts' disposition of an application by the Commission pursuant to 28 U.S.C. § 1782.

By the Commission.

HEALTHYLIFE SCIENCES, LLC

*FTC File No. 122 3287. Order, December 20, 2013.*

OPINION AND ORDER DENYING PETITION  
TO LIMIT CIVIL INVESTIGATIVE DEMAND

By WRIGHT, Commissioner.

On November 22, 2013, petitioner HealthyLife Sciences, LLC ("HLS") filed a petition to limit a Civil Investigative Demand ("CID") issued by the Commission in connection with its investigation of certain HLS products and policies. For the reasons stated below, the Commission denies the petition.

**I. BACKGROUND**

Through a variety of advertising and marketing platforms, HLS claims that its "Healthe Trim" brand dietary supplements help users lose weight. In response to these claims and other marketing practices, the Commission's Division of Advertising Practices opened an investigation to determine whether HLS may have violated Sections 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 52.

On October 30, 2013, as part of this investigation, the Commission issued a CID seeking materials relating to Healthe Trim products ("Specified Products"), including Healthe Trim

## Responses to Petitions to Quash

Original Formula (“Original Formula”) and three derivative products.<sup>1</sup> The CID seeks information and materials relating to HLS and its products, including copies of advertisements and HLS’s substantiation for its weight-loss claims. The CID also seeks copies of any documents reflecting relevant communications between HLS and regulatory authorities or consumer protection entities, including the Food and Drug Administration, the U.S. Postal Service, the Better Business Bureau, and the National Advertising Division (“NAD”), which is one of four self-regulatory advertising programs administered by the Council of Better Business Bureaus. The CID directed HLS to produce the responsive materials and information by November 25, 2013.

On November 21, 2013, counsel for HLS sent a letter to FTC staff regarding Original Formula’s inclusion in the CID’s definition of “Specified Products.” HLS sought to exclude Original Formula from the scope of the CID because HLS had already produced some responsive documents to the NAD in response to that organization’s own review of HLS’s substantiation for the weight-loss claims for Original Formula.<sup>2</sup> HLS argued that requiring it to produce these documents to the FTC as well would impose an undue burden. FTC staff and HLS counsel were unable to resolve the dispute. The following day, HLS filed this Petition to Limit Civil Investigative Demand

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<sup>1</sup> Instruction O defines “Specified Products” as “all Healthe Trim dietary supplements promoted for weight loss, including but not limited to Healthe Trim Original Formula, Healthe Trim powered by Raspberry Ketone, Healthe Trim powered by Green Coffee Bean, and Healthe Trim powered by Garcinia Cambogia.”

<sup>2</sup> That review had begun in July 2012, after the NAD received a letter from the Council for Responsible Nutrition challenging thirteen claims appearing in HLS’s advertising. Participation in an NAD inquiry is voluntary, and advertisers may decide whether they wish to comply with the NAD’s recommendations to discontinue advertising claims. If an advertiser refuses to participate in the NAD process (*i.e.*, if it does not respond to the NAD’s request to produce substantiation for advertising claims), or declines to follow the recommendations of the NAD, the advertiser may be referred to the appropriate government agency (generally the FTC) for consideration of further action. *See* Policies and Procedures by the Advertising Self-Regulatory Council (as amended Sept. 24, 2012) ¶¶ 2.10(B) and 4.1(B), *available at* <http://www.ascreviews.org/wp-content/uploads/2012/10/NAD-CARU-NARB-Procedures-Updated-10-9-12.pdf>.

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(“Petition”), asking the Commission to exclude Original Formula from that definition. (Pet. at 1).

## II. ANALYSIS

HLS principally contends that compliance with the CID would be unduly burdensome because HLS previously submitted some of the materials regarding Original Formula to the NAD in connection with NAD’s ongoing inquiry. (Pet. at 3-5). That assertion lacks merit.

As a preliminary matter, HLS has not met its evidentiary burden in seeking to limit the CID because it has not provided any affidavits or other evidence that would establish that producing these materials would unduly disrupt or seriously hinder its normal operations. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992); *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). Indeed, one would expect that producing materials that HLS has already largely compiled for the NAD proceedings would involve minimal additional effort.

In addition, HLS’s petition rests on a false premise: that an NAD investigation into deceptive advertising somehow obviates the need for an FTC investigation. In fact, an FTC investigation is typically broader in its substantive scope. For example, FTC staff will consider a marketer’s entire advertising campaign in multiple media channels over a long period, whereas the NAD usually examines only selected components of a marketer’s advertising. Moreover, as shown by the CID’s specifications, FTC staff is examining a wide variety of issues that NAD did not fully study, such as HLS’s continuity programs, its “free” trial offers, and its material connections with endorsers. Also, the CID seeks information and materials relating to a broader set of remedies, such as consumer redress, that FTC staff may want to consider after completing its review of HLS’s practices.

In any event, even were the NAD and FTC investigations identical in scope, an advertiser’s participation in a parallel self-regulatory program cannot limit an FTC inquiry. To be sure, the NAD is an important partner in protecting American consumers from deceptive advertising. As the Commission has noted, it

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“will not necessarily defer, however, to a finding by a self-regulation group,” and instead must discharge its responsibilities by “mak[ing] its judgment independently, evaluating each case on its merits.” *Policy Statement Regarding Advertising Substantiation* (appended to *Thompson Med. Co.*, 104 F.T.C. 648, 839 (1984), *aff’d*, 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987)).<sup>3</sup>

**III. CONCLUSION AND ORDER**

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** the Petition to Limit Civil Investigative Demand filed by HealthyLife Sciences, LLC be, and it hereby is, **DENIED**; and

**IT IS FURTHER ORDERED THAT** all responses to the specifications in the Civil Investigative Demand to HealthyLife Sciences, LLC, must be produced on or before January 17, 2014.

By the Commission.

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<sup>3</sup> Available at <http://www.ftc.gov/ftc-policy-statement-regarding-advertising-substantiation>. HLS contends that compliance with the CID, to the extent it overlaps with the NAD’s inquiry, would “significantly reduce[] the motivation and incentive for companies to participate in the NAD self-regulatory process in the first place.” (Pet. at 5). We disagree. The risk of public exposure and referral to authorities should provide ample incentive for advertisers to cooperate with the NAD.



# TABLE OF COMMODITIES

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